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LOUISIANA

ANNUAL REPORTS.

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF LOUISIANA.

VOL. 50—FOR THE YEAR 1898.

WALTER H. ROGERS, REPORTER.

NEW ORLEANS:
F. F. HANSELL & BRO., LTD., PUBLISHERS,
1899.

Rec. July. 8. 1899.

JUSTICES OF THE SUPREME COURT.

DURING THE TERM OF THESE REPORTS.

CHIEF JUSTICE:

FRANCIS T. NICHOLLS.

ASSOCIATE JUSTICES:

LYNN B. WATKINS,

JOSEPH A. BREAUX,

HENRY C. MILLER,

NEWTON C. BLANCHARD.

ATTORNEY GENERAL:

M. J. CUNNINGHAM.

CLERK OF THE COURT:

T. McC. HYMAN, New Orleans.

IN MEMORIAM.

NEW ORLEANS, SATURDAY, January 15, 1898.

The Court was duly opened, pursuant to adjournment.
Present, their Honors:

HON. FRANCIS T. NICHOLLS, *Chief Justice.*
HON. LYNN B. WATKINS.
HON. JOSEPH A. BREAUX,
HON. HENRY C. MILLER,
HON. NEWTON C. BLANCHARD. } *Associate Justices.*

JAMES MCCONNELL, ESQ., now addressed the court as follows:

"I take pleasure in presenting this portrait of the late Judge Lea, formerly an Associate Justice of this court, whose memory is deservedly cherished, as one of its most distinguished members.

"I make this presentation at the request of Mrs. Grace Lea Hunt, Mrs. Helen Shoemaker and Mr. Walter Lea, his children, and the court will accept it from them as a graceful and loving tribute to their father's memory: And in benalf of the Bar of New Orleans, of which he was an honored member and a talented leader, let me ask, that it be placed and preserved among the portraits of these eminent jurists, both of the Bench and of the Bar, looking upon us from these walls, all great men, who in the past, have by their talents shed lustre upon a noble profession, and by their learning and force of character, have imbedded in the soldid masonry of the jurisprudence of Louisiana, the great principles of honor, justice and truth.

"Judge JAMES NEILSON LEA, LL. D., was horn in Baton Rouge, in the State of Louisiana, November 26, 1815. He received his education at Yale College, where he graduated in 1834. Returning from college, he studied law with his uncle, Judge Samuel Harper, who at that time, was Judge of the United States District Court in Louisiana. Entering upon the practice of his profession as a lawyer, he soon became distinguished, not only for learning and ability, but for that purity and integrity which characterized his life, and was particularly noticeable in his judicial career. In 1849 he was appointed Judge of the Second District Court of New Orleans, and his adminis-

tration on that important office then charged with exclusive probate jurisdiction, won the public confidence, and the esteem of a bar distinguished at that time especially, by practitioners of great learning.

"In 1855 his merits as a jurist met deserved appreciation, in his judicial advancement, and he became an Associate Justice in this court, succeeding Mr. Justice Ogden, whose term expired two years later. Unfortunately for the public interests the office at that period, was elective, and it is well known, that the temporary triumph of a political faction, then known as the "Know Nothing" party, prevented his re-election. The failure of re-election of this accomplished jurist, who was in every way competent, and enjoyed the confidence and support of the bar, will ever remain as a remarkable illustration and proof of the wisdom of maintaining the principle of appointment, and not election, in determining who shall become members of judicial tribunals of last resort.

"But while the State suffered the loss of his valuable services, as one of the members of this court, JUDGE LEA was pecuniarily benefitted by his return to the practice of his profession, which soon became lucrative, as he was shortly after invited to partnership in a legal firm, which, in many respects, was the most distinguished and successful in the history of the profession in this State. His professional labors were rewarded with a competency that enabled him to retire from active practice, and he settled with his family in Lexington, Virginia. The University of Washington and Lee conferred upon him the honorary degree of Doctor of Laws, and tendered him the Chair of Professor of Civil Law in that institution, which he accepted, and discharged its duties until his death in October, 1884. The members of the New Orleans bar paid their tribute of respect to his memory, expressed in appropriate resolutions, which were received by this court, and recorded upon its minutes, but by some inadvertence, these proceedings in honor of his memory, remain as yet not published in the reports.

"Those of us who enjoyed personal as well as professional intercourse with JUDGE LEA, his character presents for consideration very many admirable traits, but there is one feature of it, which, above others, should be emphasized as that, which pre-eminently gave him distinction and value, and that was his irreproachable integrity and high sense of personal honor, which conspicuously illustrated his public as well as his private life. He was a Christian gentleman, an honorable lawyer, and a judge, whose unsullied purity was universally recognized and acclaimed.

"He was a lawyer of the old school, a school of an era, when the sentiment of noble and aspiring manhood had not yielded to the spirit of utilitarianism, and when professional talent was not purchasable by fees to obtain judicial enforcement of unfounded demands, or of causes tainted with immorality.

"JUDGE LEA'S professional life, in this respect, would have challenged the admiration of the eminent jurist of New York, who recently, in a published criticism of the modern bar, condemned it, as having ceased to be a profession, and as having become a trade, practiced in aid of business enterprises and even speculations.

"I have already adverted to the fact that on his retirement from the bench, JUDGE LEA became a member of a distingnished legal firm. It was a firm, which numbered in its membership at different periods, such eminent jurists as Benjamin, Bradford, Lea, Finney and Miller, all now passed from our midst, except one, who, to-day, in his judicial capacity, enjoys the rare privilege as an associate justice of this court, of uniting with its members, in honoring the memory of his professional partner, and cherished friend of his earlier manhood.

Replying on behalf of the court, MR. JUSTICE MILLER said:

"Those of us who recall JUDGE LEA, and those who know him only from the reports of his decisions, fully concur in the eloquent tribute to his memory from the bar. By some it is supposed there is a triteness in the commendation, usual to these occasions of departed jurists, that detracts from the significance of the tribute. But when sincere and free from that exaggeration that supposes an enlogium appropriate of one, is equally applicable of another, the attestation by the living to departed worth carries deserved significance. In this instance the remarks from the bar have truthfully depicted the character and career of the deceased, and have done but the justice due to his eminent services on the bench and his reputation at the bar. The appreciation of the lawyer or the judge by those of the period in which he lives is often neither just nor adequate. The lawyer's functions are of a public nature, and necessarily attracted the attention of the community. Unless he is prudent to a point beyond consistency with duty, while he may be so fortunate as to win the approbation of a client, the lawyer is apt to excite resentments, which necessarily tinge for the moment the public estimate of his worth. The judge brings to the discharge of his functions all his ability and learning, and that conscientiousness

indispensable to the faithful performance of the judicial function. But the decision is to be subjected to the criticism always to be expected and not to be deprecated, except in the rare instances when the motives of the judge are impugned, or criticism exceeds the bounds of propriety. If the decision relates to a public or party question it will undergo review, often not calculated to enhance the reputation of the judge. A decision of that character must be counter to one or other of the phases of existing public or party opinion. The press naturally has its view of the subject, and the decision is apt to be canvassed on lines foreign to the inflexible guides that control judicial action. But the judge has no voice or opportunity to correct the misconception of the decision; he is confined to that utterance that comes from his seat on the bench. The American people hold in reverence the memory of that great jurist who filled the highest judicial position. Yet on how frail a basis would the reputation of CHIEF JUSTICE MARSHALL rest if measured by that animadversion provoked at the time of his decision that Aaron Burr should go free on the charge of treason? Or if MARSHALL'S repute with the American lawyers was to be gathered from the comment on the decision, at a later period, in favor of the constitutionality of the United States Bank, the then great issue between the political parties of the day; and the decision not only divided opinion as to its merits, but utterly failed to settle the bank question, manifested conspicuously by the refusal, notwithstanding the decision of the recharter of the bank by the Congress of the Unite dStates. ROGER B. TANER in life stood on the summit of judicial eminence. Yet his memory would be but of diminished proportions if his judicial worth were to be tested by the angry feeling of one section, aroused by the Dred Scott decision, that perhaps contributed in no small decree to the strife between the States, if, indeed, that conflict had not already become inevitable. This line of thought must reach the conclusion not at all favorable to contemporaneous appreciation of the labor of the judge or the work of the lawyer. But the judgment of the bar and public opinion after the death of the jurist or lawyer, and when time has effaced the resentments, prejudices and passions that militated against the proper appreciation of the decisions of the one and professional attainments of the other, carries deserved value. In this view is to be regarded that tribute in which the bench and bar to-day unite to the memory of JAMES NEILSON LEA.

"He belonged to an era of distinguished lawyers. Intellectual gifts are distributed variously. Nature is affluent in bestowing on one the capacities withheld from another, but the apparent inequality is compensated in giving to that other intellectual qualities of another kind. In my retrospect on this occasion GRIMES, BENJAMIN, RANDELL HUNT, ROSELIUS, BRADFORD and others no less distinguished lawyers occur. All were remarkable, but none alike in intellectual powers. LEA deserves his place with these distinguished men and without undertaking to analyze the qualities of his mind I can say, within the bounds of accuracy, I think that admirably equipped for the prominence he attained at thebar and on this bench he was ranked as the valued colleague or the formidable adversary with the other eminent members of this bar. He first served on the District Court bench. He presided in the court then of exclusive probate jurisdiction—a jurisdiction, it is computed in every decade, controls the disposition of the great bulk of the property of the community. No magistrate on that bench ever achieved more reputation. That jurisdiction is exerted largely by *ex-parte* orders. It was the comment of the bar at that time that his pen never traced his signature to any order until thoroughly satisfied it was warranted by the law. I recall an occasion when, in a case of great importance, the ardor of counsel for a quick decision suggested that all required of LEA was his decision, that the cause might be speeded through this court. That method of perfunctory performance of judicial duty did not consist with LEA'S ideas of judicial office. He stated that he would decide after due examination and according to his view of the law. He gave an elaborate opinion sustained on appeal. With the entire concurrence of the profession he took his seat on this bench, and his decisions, beginning in the tenth Annual, for the series of years he occupied the bench speak for themselves and command the respect of the profession. His career at the bar after he left the bench was of great efficiency and distinction. The filial affection that we understand prompts the presentation of the portrait of LEA to this court is impressive, and in the array of the faces of the great jurists that look down upon us that portrait well deserves a place, and it remains to say in this utterance of the thoughts of the moment I am fully sensible of the imperfect attempt to delineate the worth of the deceased."

The court thereupon requested Mr. McConnell to convey to Mrs. Hunt, Mrs. Shoemaker and Mr. Lea their high appreciation of their

gift, and directed the clerk to have the portrait of JUDGE LEA hung on the walls of the court room in its proper place.

It was further ordered that these proceedings be spread on the minutes of the court, and that a copy of them be sent to Mrs. Hunt.

NEW ORLEANS, TUESDAY, April 19, 1898.

The court was duly opened, pursuant to adjournment.

Present, their Honors:

HON. FRANCIS T. NICHOLLS, *Chief Justice.*
LYNN B. B. WATKINS,
JOSEPH A. BREAUX,
HENRY C. MILLER,
NEWTON C. BLANCHARD. } *Associate Justices*

THE COURT appreciates the gift by Miss Sarah D. Strawbridge of the *portrait* of her father, GEORGE STRAWBRIDGE, a distinguished jurist of the past, and an *Associate Justice* of this court 1839, and the court directs that the portrait be placed in the portrait gallery of the court room, and the clerk convey to Miss Strawbridge this action of the court.

ADDITIONAL RULES OF THE SUPREME COURT

ADDITION TO RULE XII.

FIRST.—When the Judges of the Courts of Appeal find it requisite to certify to this Court any question or proposition of law arising in any case pending before them in which they desire instruction they shall also certify the findings of fact on which the said questions of law arise, and thereupon this Court will give the instruction requested; or this Court, if it deems it necessary, will direct the entire record to be transmitted and render such decree as is requisite; such instruction or decree to be binding on the Courts of Appeal, and the mandate of this Court will issue accordingly to said Courts of Appeal.

SECOND.—When application is made to this Court by one of the parties to a suit in one of the Courts of Appeal for the writ of *certiorari* to review its judgment in such suit, if this Court deems the showing sufficient, the *certiorari* will issue directing the Court of Appeal to certify the questions of law in the case determined by the judgment, and the findings of fact on which the legal questions arise, and on such return this Court will render the decree it deems necessary; or, if deemed requisite, this Court will direct the entire record to be transmitted and render such decree as it may deem required; whether rendered on the return or the record the decree of this Court shall be binding on the Court of Appeal, and the mandate of this Court will issue accordingly; before any application to this Court is made under this rule the applicant shall file in the office of the clerk of the Court of Appeal a notification addressed to the parties to the suit of the purpose to apply to this Court for the *certiorari*, and the affidavit of such filing shall accompany the application.

THIRD.—The clerk of this Court, upon filing of a petition of this nature, is authorized to require the litigant who presents it to advance twenty dollars to cover costs, and where instructions are applied for by the Court of Appeal he shall be entitled to the same fee collectible from the party finally cast in the litigation.

ADOPTED JUNE 30, 1898.

ADDITION TO RULE XIV.

The following preamble and resolutions adopted by the New Orleans Law Association and accompanying *memorandum* of rule were this day presented to the court by Mr. James McConnell, Jr.:

WHEREAS, Art. 85 of the Constitution of 1898 confers upon the Supreme Court of Louisiana exclusive original jurisdiction in all matters touching professional misconduct of the members of the bar with power to disbar under such rules as may be adopted by the court; and

WHEREAS, the New Orleans Law Association has appointed a committee to consider rules needed in such cases, and

WHEREAS, it is the sense of this association that the rules hereinafter suggested should be submitted to the Supreme Court as the recommendations of this association in the premises:

Therefore, Be it resolved, that the accompanying *memorandum* of a rule be submitted to the Honorable the Supreme Court of the State of Louisiana as the recommendation of the New Orleans Law Association in the premises.

"That a commission of five lawyers shall be appointed to serve five years, the terms of the first committee to expire one in one, one in two, one in three, one in four and one in five years after appointment, whose duty it shall be to examine all applicants for members of the bar, and report in writing thereon to this court, and in addition to those duties said commission shall be charged with the special duty of investigating any complaints made against members of the bar touching professional misconduct, and if said commission shall be of the opinion that a probable cause of disbarment exists against said member of the bar, the said commission shall certify the facts to the Attorney General of the State, and it shall thereupon be his duty to file in this court a suit to disbar the offending attorney, and said bar commission shall designate one or two of its members to associate with and assist said Attorney General in the said prosecution. All of said proceedings shall be in the name of the State of Louisiana at the costs of the defendant if condemned, otherwise without costs."

The rule was adopted by the court as paragraph 11 of Rule XIV, but limited to the city of New Orleans.

Adopted June 30, 1898.

Under the requirements of the foregoing rule the following members of the Bar of the city of New Orleans were appointed on the

COMMITTEE OF EXAMINERS:

HENRY P. DART, Chairman, for five years.
BERNARD MCCLOSKEY, for four years.
CHARLES J. THEARD, for three years.
FRANK L. RICHARDSON, for two years.
EDWIN T. MERRICK, for one year.

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Yick Wo. vs. Hopkins, 118 U. S., 371 1194
Zacharie vs. Buckman, 8 L., 308 1125
Zeigler vs. Creditors, 49 An. 175 ..... 910, 911
Zimmerman vs. Langles, 36 An. 68 89

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT NEW ORLEANS, 1898.

JUDGES OF THE COURT:

HON. FRANCIS T. NICHOLLS, *Chief Justice.*

HON. LYNN B. WATKINS,
HON. JOSEPH A. BREAUX,
HON. HENRY C. MILLER,
HON. NEWTON C. BLANCHARD. } *Associate Justices.*

No. 12,716.

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STATE EX REL. LAWRENCE L. LEWIS VS. LOUIS ARNAULD, RECORDER.

A party can not be arrested and kept in prison five days merely on an affivavit that he is dangerous and suspicious, or that he has violated an ordinance embracing numerous offences with no specification of the offence intended to be charged. Horr & Bemiss Municipal Ordinances, Secs. 165, 172, 173.

This court, by its writs of *certiorari* and prohibition directed to the committing magistrate, has the power to order the release of the party from such imprisonment. Const., Art. 90.

ON APPLICATION for writs of *Mandamus*, Prohibition and *Certiorari*.

John C. Wickliffe for Relator.

Submitted on briefs January 3, 1898.

Opinion handed down January 4, 1898.

The opinion of the court was delivered by

MILLER, J. The relator seeks the writs of *certiorari* and prohibition to arrest further proceedings in the prosecution against him in the Sixth Recorder's Court for an alleged violation of the Ordinance No. 5046, Administration Series, of the Common Council of this city.

The affidavit charges the relator with the violation of the Ordinance 5046, relative to dangerous and suspicious characters. The ordinance referred to in the affidavit, it is conceded, is grouped in paragraphs 3054, 3055 and 3056, Flynn's Digest. These paragraphs specify various offences—living without working, though able to maintain himself, and other forms of vagrancy; loitering in front of churches during services therein, remaining in front of theatres or other places of public amusement; loitering on the public streets; habitual drunkenness, and other transgressions of public order or decency.

While the proceedings before the recorders' courts are not subjected to the rules in respect to the structure of indictments or informations for crime, still, it is essential that the affidavit before the committing magistrate should be reasonably certain as to the offence intended to be charged. "Neither the strictness of the common law requirements or the technical accuracy of indictments need be observed. Still, a complete statement of the offence must be made, and is not satisfied by the simple allegation that defendant has violated a certain ordinance." Horr & Bemiss Municipal Ordinances dealing with the procedure generally for violations of municipal ordinances, Secs. 165, 172, 173.

In this case the relator has been arrested and imprisoned for over a week on an affidavit which simply charges a violation of "Ordinance No. 5046 relative to dangerous and suspicious characters," giving no indication whatever which of the numerous offences embraced in the ordinance is intended to be charged. "Dangerous and suspicious" used by the affiant does not occur in the ordinance, and the conclusion of the officer making the arrest that the party is "dangerous and suspicious," is not the equivalent of the statement of any offence known to the law. We can not reveiw the question of the refusal of the recorder to accept the bail offered by the relator, but on the other ground that the relator has been imprisoned for over a week merely on an affidavit that he is "dangerous and suspi-

cious," it seems to us, the imprisonment is beyond the jurisdiction of the recorder.

It is therefore ordered, adjudged and decreed that the Sixth Recorder's Court be and it is hereby prohibited from any further proceedings on the affidavit against the relator, and that he be released from custody on said charge.

No. 12,685.

G. W. SENTELL & CO. VS. J. E. HEWITT ET ALS.

There was not a partnership liability of stockholders even if, as contended by plaintiffs, the corporation of which the defendants were stockholders was a defective and illegal corporation, for the reason that the plaintiffs had notice of the stipulation to secure limited liability of the stockholders and contracted their debt with reference to the limited liability of three of the defendant stockholders.

Plaintiffs carried defendants' policitation into effect and received actual benefits therefrom.

The law points out no special form of acceptance of a policitation. Performance of the condition upon which the offer is made and benefits derived from the transaction are acceptance enough, and concludes the one accepting from recovering more than the limited liability proposed when the proposal was made, and to which no objection was ever made by plaintiffs while it was being carried out.

APPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

J. D. Wilkinson and *Wm. Goss* for Plaintiffs, Appellants.

Elam & Egan and *Lee & Liverman* for Defendants, Appellees.

Argued and submitted December 17, 1897.
Opinion handed down January 10, 1898.

The opinion of the court was delivered by

BREAUX, J. Plaintiffs sued the defendants for balance of an account for goods sold to the late firm of J. E. Hewitt & Co.

Plaintiffs alleged that the firm had not been legally incorporated and that in conseqnence the members of the firm were *in solido* indebted for the firm's debts, and that thèy were not as they claimed indebted as a corporation.

The defendants interposed the pleas of misjoinder, of estoppel and of prescription.

The pleas of prescription and misjoinder were overruled, and the plea of estoppel was referred to the merits. In their answer three of the defendants severed from J. E. Hewitt, their co-defendant. They alleged in their answer that there was an agreement entered into between Hewitt and plaintiffs giving consent to a limited liability in so far as they were concerned, as expressed in the charter of their company, which had been submitted to them by Hewitt in order to secure the limited liability.

Defendants' plea of misjoinder was based on an asserted valid incorporation of defendants' firm. In that case it followed (they pleaded) that the company limited alone was to be sued, and not the shareholders of the company personally.

The plea of estoppel was grounded upon the alleged assistance and participation of plaintiffs in the organization of the J. E. Hewitt & Co., Limited.

The defendants averred their dealings with the company; and their (plaintiffs') profits resulting from their common business. The act of incorporation of the J. E. Hewitt & Co., Limited, now assailed by plaintiffs, sets forth properly the name of the corporation, also its domicile; the period for which organized, and during which it was to have and enjoy succession.

The object in forming the company was stated. It was authorized to have a corporate seal; to contract, sue and be sued, to hold real estate, to mortgage and accept mortgage, and do all other needful acts.

In the charter it was recited that the capital stock was not to exceed twenty thousand dollars, and the amount of the shares was fixed at five hundred dollars each; the election of a general manager was left to the stockholders, upon whom citations or other legal processes were to be served. This charter was duly made public and it was duly inscribed in the clerk's office. The objection to the charter is that no subscription list of shareholders was ever made or, at any rate, that none was ever recorded.

In support of their pleas defendants introduced several letters in evidence, and among them one written in the latter part of 1888 to plaintiffs by J. E. Hewitt, enclosing a copy of the charter and informing the plaintiffs that he had seven thousand dollars paid in, and that he was investing that amount for the corporation in paper secured by mortgage which he would forward and deposit with plaintiffs under their agreement.

In another letter also in evidence, written a few days after the one just noted, the writer, J. E. Hewitt, requested the plaintiffs to open an account with J. E. Hewitt & Co., Limited. They complied. He also in this letter to them represented that in transforming the firm of J. E. Hewitt & Co. into a corporation limited, he did not intend to avoid personal responsibility and he expressly waived all limitation of responsibility and wrote that he would hold himself bound for all debts of the corporation limited. He added in the letter, "Of course this does not apply to my associates, or to any other creditors except yourselves. By limiting their liability to what they put in, I am able to handle considerable of my friends' money at a low rate of interest, and while I will secure you from loss with it by investing it in small but safe loans I will build up an almost invincible support and enable me to control the trade for the Farmers' Supply Company and the cotton for you.

"The supply company is doing a rattling business and small stock as yet, but I think its trade will be immense. It sells for cash and turns the cash over to me every Saturday night. I am determined to make the supply company and allow shipments a complete success and profitable to you and all parties concerned."

Judgment was rendered against J. E. Hewitt for the amount claimed. The demand against the other defendants was rejected. Plaintiffs' appeal from the judgment rejecting their demand against the defendants other than Hewitt.

We gather from the evidence that the firm of J. E. Hewitt & Co. secured from the plaintiff money with which the latter in a manner pursued a banking business. In accepting pledges for money and supplies advanced on crops, the borrower expressly agreed to ship the cotton pledged to plaintiff. As we interpret the facts, the firm of Hewitt & Co., Limited, was bound, as a matter of good faith, to ship all the cotton it purchased with funds advanced by plaintiff and all the cotton it controlled to plaintiffs. The result was that many thousand bales of

cotton were shipped through the management of J. E. Hewitt & Co. to Sentell & Co. At the beginning of the discussion we will take it for granted that no one will deny that both the plaintiffs and the firm of J. E. Hewitt & Co., Limited, were free agents and capable of contracting.

The extent the defendants, if they were partners, could limit their liability is one of the questions before us for determination.

A creditor of a partnership, it will not be denied, may release one of the members of a partnership with the consent of the others, and without thereby discharging the latter.

That proposition being settled, we have not succeeded in discovering a good reason why a partner may not, as in this case, offer to hold himself bound to creditors accepting for the whole of the liability of the partnership to be incurred for loans or advances, with the understanding that the liability of his partner shall be taken as limited. The current of authorities sustains the view that it is possible to thus contract.

There is here no question of private stipulation between the partners. The plaintiffs had more than a distinct notice of a limit of liability. It was a stipulation. The promoter of the corporation or partnership, as the case may have been, made application directly to plaintiff for the wherewith to carry out his plan, and stated that part of the amount he needed, could only be obtained on the condition of limited liability contained in the charter, which he, however, waived to the extent that he was personally concerned. The condition was a possible condition and the waiver a possible waiver. There was nothing in the stipulation in violation of a prohibitory law or repugnant to public policy or morals.

"There is certainly nothing illegal in a creditor agreeing to such a limited responsibility as a qualification or limitation of his contract." Story on Partnership, par. 165.

The civilians of old affirmed that members of partnership may limit their responsibility. Cooper's Justinian.

Such stipulations have always been looked upon as possible. 3d Kent, par. 26.

As relates to questions of usurping and attempting to exercise the proper functions of a corporation, which the Legislature or government alone is competent to establish or the wanton disregard of the forms pointed out by law (Story on Partnership, par. ——), while

it is claimed that there was failure to organize properly under the law we do not understand that plaintiffs question the good faith of Hewitt & Co., Limited, in their attempt to effect a legal organization.

Again, limited liability clauses such as that here can have no effect as relates to the interest of strangers.

But in the case before us for determination, not only plaintiffs had notice of the stipulation entered into with the view of limiting personal responsibility, but they in addition, as we gather from the facts, carried defendants' policitation into effect, and during several years continuously derived therefrom income and profit.

From this point the question resolves itself into one of acceptance on the part of plaintiffs.

With reference to acceptance *vel non* the law points out no particular form of acceptance. Laurent, upon that subject, gives effect to the maxim: *Eadem vis est tacite atque expressi concensus.* Vol. 15, par. 482.

The views of Baudry-Lacantinerie are similar, par. 798, Vol. 2.

A decision of this court, in our judgment, bears upon the point.

"A policitation becomes often the basis of a contract. It requires, in order to be ripened into a perfect contract, the acceptance of the party to whom it is made. The offer, it was held, had been accepted, the one accepting having actually assumed to do the work offered upon stated conditions. Seal vs. Erwin, 2 Martin, N. S. 246.

Here plaintiffs did not accept the terms offered, by doing work offered to them to be done, but by advancing money, the representative of work or *quid pro quo* for work. Moreover, they received actual benefits from the effects of which, it does appear to us, they can now be released without its being contrary to the plainest principles of reason and justice. We are well aware that stipulations of the kind here discussed are not looked upon favorably, and that to sustain them they require that the creditor shall have more than ordinary notice. We are of the opinion, after having given our most attentive consideration to the question, that the case here comes strictly within the plain intent, terms and meaning of the exception, for the reason that policitation had been in effect accepted and acted upon by all parties concerned.

The counsel for plaintiff, in their brief, have made clear and fair abbreviations of the following decisions:

Lynch vs. Portlewaite, 7 M. 70; Lambert vs. Voliter, 6 R. 128;

Cooley vs. Broad, 29 An. 345, in which, as we appreciate those decisions, it was held that mere notice to the creditors was not sufficient to sustain a claim of limited liability of partners.

In the case before us for decision, we have found that there was considerably more than mere notice, and in consequence, in our view, decisions regarding the effect of notice have not the bearing claimed by counsel.

The conclusion at which we have arrived regarding plaintiff's acceptance of the defendant's business, with attending conditions, renders it unnecessary for us to pass upon the other points raised in the case.

It is therefore ordered and adjudged that the judgment appealed from is affirmed.

No. 12,623.

STATE OF LOUISIANA VS. GUSTAVE MOREAU ET ALS.

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This court, not informed of the evidence adduced on behalf of the defense must necessarily rely upon the statement of the trial judge that testimony for the State offered in rebuttal is of that character.

Not the province of this court to reverse juries in criminal causes on questions of fact.

APPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Dupré, J.*

M. J. Cunningham, Attorney General, *R. Lee Garland*, District Attorney, for Plaintiff, Appellee.

John N. Ogden for Defendants, Appellants.

Submitted on briefs December 18, 1897.
Opinion handed down December 28, 1897.
Rehearing refused January 24, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The accused, Gustave Moreau and Cleophas Moreau, were indicted jointly for the larceny of a cow, convicted

and sentenced to penal servitude for twelve and eighteen months respectively.

A witness for the State, called to the stand in rebuttal, was asked: "Can you make the brand with which the cow was branded?"

Objection was raised that this was not evidence in rebuttal.

The District Judge, in overruling the objection, states the answer sought to be elicited by the inquiry was in rebuttal. This court, not informed of the evidence adduced on behalf of the defense, must necessarily rely upon the declaration of the trial judge that testimony of the State offered in rebuttal was of that character.

However, considering the statement in the bill of exceptions, we are of opinion that the answer sought by the question was clearly in rebuttal, and that it was not amenable to the further objection, urged by the defense, that it was not the best evidence of the fact sought to be established.

Nor can we disturb the verdict on the grounds set up in the bill of exceptions reserved to the ruling of the court below, denying the motion for new trial. These grounds were that the verdict was contrary to the law and the evidence. The trial judge was familiar with the facts of the case; he had seen and heard thewitnesses.

As has been repeatedly held, this court will not interfere with such rulings, unless manifestly erroneous. We repeat this with some emphasis. The facts and circumstances set up in the lengthy motion for new trial were urged as defense, and were all before the jury, who, after weighing the same, brought in a verdict of guilty.

It is not our province to reverse juries, in criminal causes, on questions of fact, and no question of law appears in regard to which there was error on the trial below.

Judgment affirmed.

No. 12,624.

STATE OF LOUISIANA VS. MACK LEE.

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Act 84 of 1894 is constitutional and valid to the extent that it provides that the State may coerce the trial of the cause by making the admission that if the witness named in the affidavit for a continuance were present he would testify to the truth of the statement contained therein.

APPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Dupré, J.*

M. J. Cunningham, Attorney General, and *R. Lee Garland*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

Chas. W. DuRoy for Defendant, Appellant.

Submitted on briefs December 4, 1897.
Opinion handed down December 28, 1897.
Rehearing refused January 10, 1898.

The opinion of the court was delivered by

WATKINS, J. The defendant was indicted for the crime of shooting with intent to commit murder, found guilty of shooting with intent to kill, and sentenced to imprisonment in the penitentiary for a term of two years, and from that judgment he prosecutes this appeal.

The only ground on which he seeks relief is the alleged unconstitutionality of Act 84 of 1894.

The record discloses that the defendant's counsel applied for a continuance on account of the absence of a material witness, and that the trial judge refussd to grant the application "because the State offered to admit that if said witness were present she would testify as stated in the affidavit for continuance, agreeably to the provision of Act 84 of 1894."

The contention of defendant's counsel is that he has been deprived of a constitutional right by being forced to trial without the personal presence of his material witness.

It is conceded on the other side that the defendant used due diligence to obtain the attendance of said witness and that his testimony was competent and material to his defence.

The proposition insisted upon by defendant's counsel is that the Constitution guarantees the right to an accused to have the *personal presence* of his witnesses and that the State must admit the *truth* of the statement made by the accused in his application for a continuance in order to compel him to go to trial without his witnesses being present.

Inasmuch as Act 84 of 1894 provides that in such case it shall only be necessary for the State to admit that the witness if present would testify to the facts which are set forth in the affidavit for contin-

uance, counsel for accused assign the unconstitutionality of said act as being in contravention of Arts. eight (8) and nine (9) of the Constitution.

The provisions of the statute are plain and unambiguous and must control decisions of this court, unless same are found to be in conflict with the precepts of the Constitution.

And the unconstitutionality of the statute being the ground assigned for the defendants' relief, our decision must be restricted to it alone, and consequently no useful purpose will be subserved by the citation of authority from text-books or that of adjudicated cases, with repect to the general principles of the criminal law—the provision of our statute controlling the principles of the common law.

Article 8 of the Constitution provides as follows, viz.:

"In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor, and to defend himself and to have the assistance of counsel, and to have the right to challenge jurors peremptorily, the number of challenges to be fixed by statute (Our italics.)

That provision of the Constitution guarantees to an accused person the right "to be confronted with the witnesses *against* him;" but similar provision guaranteeing the presence of witnesses to be heard in his favor seems to have been omitted *ex industria*.

Inasmuch as the unconstitutionality of the aforesaid statute rests upon its supposed incompatibility with the article cited, the contention is manifestly groundless.

A similar question arose in State vs. Pruett, 49 An. 283, and thereupon the court speaking through CHIEF JUSTICE NICHOLLS, after citing the authorities, said:

"We are unwilling to pass upon the constitutionality of a statute unless imperatively required to do so. No such necessity exists in the present case. We content ourselves with saying, for the present, that the law is at least in derogation of common right, and that recourse to it should be avoided, if possible."

But the contingency has arisen in this case rendering a decision of the question of the unconstitutionality of that statute necessary.

It is squarely presented. It was presented to the trial judge, and he maintained the constitutionality of the statute; and the accused

retained a bill of exceptions to his ruling, and upon that bill he rests his claim to relief, exclusively.

Applying the statute to the constitutional test, we have reached the conclusion that it is valid in so far at least as the objection which the counsel of the accused has urged against it; and that is sufficient for us to decide in this case.

Judgment affirmed.

No. 12,676.

CLARA YOUNG ET ALS. VS. C. T. CADE, SHERIFF, ET ALS.

When parties to a litigation have agreed among themselves as well as by order of court that the credit portions of the purchase price should be represented by notes of the purchaser secured by special mortgage and vendor's privilege on the property sold, the purchaser although one of the heirs in a partition suit can not refuse to comply with that portion of the bid.

Granting that an heir in a partition suit who becomes a purchaser at the partition sale could not be called upon to pay the cash price of the bid, that fact would not justify such purchaser in asking a title to the property purchased unless such purchaser executed simultaneously the notes called for by the conditions of the sale.

APPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

E. Simon and *Foster & Broussard* for Plaintiffs, Appellants.

W. J. Burke & Bro. for Defendant, Appellee.

Submitted on briefs December 27, 1897.
Opinion handed down January 10, 1898.

Plaintiff alleged that the sheriff of the parish of Iberia, in the suit entitled Jasper Gall *et al.* vs. Amelia Gall *et al.*, on the docket of the District Court for Iberia parish, in execution of a judgment rendered in said suit of partition adjudicated to her at public sale on November 7, 1896, certain property, which she described, being a

portion of that ordered to be sold for partition; that out of the proceeds of said sale made that day of the entire property disposed of to divers parties, an amount of —— dollars was to be paid over to petitioner, one of the parties to said suit, as her share thereof.

That said sheriff held said proceeds in his hands to be distributed among the parties to said suit by said sheriff by virtue of said judgment and a written agreement between said parties to said suit, which provided that said fund should not be turned over to the notary public appointed by the court in said judgment; that said sheriff had sufficient funds in his hands to be applied to the payment of the money due on her bid for said property, and that at divers times the sheriff was called upon and positively requested by petitioner to make out and deliver to her a title deed, which he was bound to execute and deliver to her under the circumstances above mentioned; that he had constantly refused and continued to refuse to do so without any lawful excuse for so doing; that she caused to be tendered the amount, and offered to comply with the terms of the purchase price.

That she was, therefore, compelled to pray to have issued by the court a rule to be served on the sheriff to show cause why he should not execute in favor of petitioner a title deed of the property adjudicated to her, and that she prayed accordingly.

The sheriff answered, pleading first the general issue. He then averred that in the suit referred to in plaintiff's petition the judgment therein ordered the sale of the property to be partitioned to be made by a public auctioneer, but that subsequently and inexecution thereof the parties to this suit entered into a written agreement whereby the sheriff was authorized to sell the said property at public sale, acting as agent of all parties in interest—observing in other respects save as he would thereafter mention the terms of the judgment rendered in the suit. That to that extent he was made their private agent for the sale of their lands under the terms and conditions as set forth in the advertisement under which the sale took place; that the agreement referred to was a record in the clerk's office, but that it had been lost or mislaid. That the property referred to in the rule was adjudicated by him to Mrs. Clara Young, but that she failed to comply with her bid, nor had she ever made a legal tender of the amount due by her.

He averred that whatever proceeds he received from the sale

of the property on that day he transferred according to the terms of the judgment (which he was under the power of attorney given him directed to observe) to the notary who was directed by the court to make such partition as was to be made between the parties in interest, and that he had no right to make a partition between those parties, and had no fund wherewith to pay the amount due by Mrs. Clara Young; that the suit in which he was appointed an agent to make sale was one of partition between Jasper Gall, the surviving husband in community, and the heirs of his deceased wife; that said Jasper Gall was insolvent, and that many oppositions were filed claiming to be paid out of the proceeds of the sale the share coming to him for a variety of claims far in excess of any amount which may have come to him through these sales, and that plaintiff did not offer to pay defendant the proportion of the amount of her bid, or indeed any other amount to respondent.

That subsequent to the sale, under a writ of *fieri facias*, the suit entitled John Bussey vs. Jasper Gall *et al.*, on the docket of the Iberia court, respondent had, under order of that court, seized and sold this property to Frank B. Williams and William Kyle, who, having complied with the terms of their bid at said sale, had had a deed of sale given to them, and that respondent was without right or authority in any manner to comply with the demand of the plaintiff in rule. That plaintiff had repeatedly recognized that Dulaney, notary public, was the party appointed by the court in the partition proceedings under which she claimed title to conduct the partition proceedings between the heirs, and that she had recognized his custody of all the funds which she alleged in her rule to be in respondent's hands, and that she was estopped in the proceedings, as would appear on trial.

The District Court discharged the rule, reserving plaintiff's right to be exercised hereafter as best she might.

The court stated that the property for which plaintiff sought to have the sheriff execute to her a deed had been adjudicated and delivered *to one Williams* on the 17th of April, 1897 (after the date of the partition sale), who held it under a recorded title; that any decree that the court would render ordering the sheriff to execute a deed to plaintiff would in nowise affect the title of Williams to that property, inasmuch as the sheriff colud not place her in possession without ousting Williams; that to give a deed to

the plaintiff would be vain and leave matters as undecided as ever; that there would still be a clashing of proprietary rights between Mrs. Young and Williams—a question of title to an immovable not to be finally adjudicated upon by rule, but by an ordinary action. That the adjudication of the sheriff at a judicial sale was in itself title and the act of sale added nothing to its force, and being merely intended to offer proof of it (C. P. 695). That there was no question that one heir purchasing property at a succession or partition sale was not obliged to pay the purchase price until a liquidation be had to ascertain the share coming to him (C. C. 1343, 2625), but that the court expressed no opinion as to the obligation of the heir to furnish her notes for the purchase price, which are subsequently extinguished *pro tanto* by the share coming to the purchaser when ascertained by the final liquidation. That no steps had been taken by the plaintiff to compel the sheriff either to correct his *proces verbal* of sale of November 6, 1896, or to complete his adjudication with a deed or act of sale immediately after that sale. That no legal proceedings were instituted by her to prevent the sale of that property to Williams by the sheriff on the 17th of April, 1897, after the same property now claimed had been seized anew and sold by order of court in execution of a judgment of Bussey vs. Jasper Gall, the only step taken by plaintiff being to protest against the sale on the 17th of April, on which day the property was transferred and delivered to Williams.

Plaintiff appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. The evidence showed that in a partition suit between J. Gall and the heirs of his deceased wife certain property was ordered by the District Court for Iberia parish on the second day of October, 1896, to be sold for the purpose of effecting a settlement between them.

The property went to sale on the 7th of November, 1896, under an advertisement, which declared the terms and conditions to be "the interest of *J. Gall* in each tract would be sold for cash—the interest of *Sylvanus Gall* in each tract would be sold for cash. The interests of the other heirs would be sold one-third cash and the balance in one and two years; the credits represented by notes, bearing eight per cent. interest, secured by special mortgage and vendor's lien on

the property sold, with ten per cent. attorney's fees in case of suit."

The sheriff upon a day not stated therein made out a *proces verbal* of the sale of the properties, which was recorded in the Conveyance Book of the parish of Iberia, from which it appears that the property advertised was adjudicated to *Williams and Kyle*, Jacob Davies, J. E. Leitmeyer and Mrs. Clara Young, plaintiff, and that the three former complied with their bid by paying cash and furnishing notes with mortgage as required by the terms and conditions, and that in consequence the sheriff transferred to these purchasers the title to the properties bought by them.

The *proces verbal* recites the fact that the two properties, a title to which plaintiff claims in these proceedings, had been adjudicated to the plaintiff, but this recital is accompanied by the statement that "Lots *15 and 18*, adjudicated to *Mrs. Clara Young*, are not included herein, as she has failed to pay the amount bid by her."

The adjudication to "*Leitmeyer*" is referred to as *lot No. 14*, and in reference to the same it is recited that "*lot No. 14*, adjudicated to J. E. Leitmeyer, was not included in the transfer, he having enjoined the payment of its purchase price, pending action of the District Court, on his third opposition."

At the foot of the *proces verbal* is found a *P. S.* to the following effect:

"It is agreed and accepted by all parties concerned, that the purchasers pay the entire amount of the purchase price, and in accordance with said agreement, F. B. Williams and William Kyle, paid the sum of ten thousand and seventy dollars, and J. Davis paid eleven hundred and fifty dollars by check on the New Iberia National Bank at sight, signed F. J. Mestayer, *Deputy* Sheriff."

Prior to the sale of the 7th of November, 1893, a large number of persons intervened in the partition proceedings by third opposition, praying that the court direct the sheriff to hold in his hands the amounts of their respective claims—these oppositions were principally directed against the interests of Jasper Gall and Sylvanus Gall, but one was directed against the interest of Mrs. Young, plaintiff.

The opposition of Leitmeyer claimed a priority of payment to the extent of his demand ever all parties in interest.

It was under these circumstances that the sheriff declined in his *proces verbal* to transfer to Mrs. Young the properties adjudicated to her as he had those adjudicated to Williams and Kyle.

On the 17th of April, 1897, the interests of Jasper Gall and Sylvanus Gall in the two lots which were adjudicated to Mrs. Young, under the circumstances stated, were sold to F. B. Williams under a seizure made thereof in the suit of Bussey vs. Gall *et al.;* Williams complied with his bid and a title was made to him under the adjudication to him.

On the trial of the rule the husband of the plaintiff was placed upon the stand as a witness for her. In his testimony he stated that he had as her agent bid upon the property claimed by her the sum of two thousand and thirty dollars; that it was adjudicated to his wife; that after the sale he had requested the sheriff several times to make a title to his wife, which he refused to do. That he finally demanded it of him; that when he made such demand he told the sheriff he was ready to pay him the balance of the price after crediting the purchaser with the amount of money in his hands for Mrs. Young; that he told him he was ready to settle with him in presence of Mr. Cammack when he called for that purpose. That the sheriff told him he would let him know later; that later he declined to give the title without assigning any reason; that when he made the demand he told the sheriff that under an agreement signed by all parties he had been given full power to make the sale, make title and settle with each heir their respective portions.

On cross-examination he stated that he did not make any offer to pay the sheriff any specific sum of money; that he did not do so from the fact that he did not know the amount the property would get credit for; that he wanted the sheriff to credit the property with the amount he had in his hands and that then he was ready to pay him the balance; that that was what he told him; that he took to him no sum of money whatever and made no tender of any. He did not do so from the fact that he did not know what particular amount it would be; that he knew about what it would be, and after the sheriff would have told witness what it was, he was ready to pay the balance.

The only question we have to deal with is whether plaintiff had the legal right to exact of the sheriff, who made the sales of the 7th of November, 1896, a title deed to the property adjudicated to her under the circumstances of this particular case.

We do not find the sheriff to have been either charged with the duty of making a partition between Jasper Gall and the heirs of his

wife or authorized to do so. If the husband of the plaintiff, one of the parties in interest, did not know what amount his wife was called upon to pay in order to obtain a title (granting that under the circumstances of this case the sheriff could have claimed anything less of her than a compliance with her bid)—he certainly could not expect the sheriff to be informed upon that subject. We are not called on to discuss generally the extent of the rights which can be exercised by heirs under the privilege granted them under Arts. 1343 and 2625 of the Civil Code. The parties to this litigation had by express agreement among themselves as well as by order of court declared that the credit portions of the purchase price should be represented by notes of the purchaser secured by special mortgage and vendor's privilege on the property purchased. We see no ground upon which plaintiff's wife could have refused to have complied with that portion, at least, of the bid. The heirs respectively had the right to protect themselves from litigation which might possibly arise from having a title acquired by any one of the heirs through the sale, spread upon the records without the act of sale declaring on its face that the price was secured by special mortgage and vendor's privilege and the sheriff as an officer could not waive the rights of any of these parties.

Plaintiff was not forced to an immediate payment of her bid. Through these notes she would have obtained the full time which the parties agreed purchasers should have. Granting it to be true that plaintiff as an heir was not called upon to pay the cash portion of her bid, that fact would not justify her in asking a title unless she should simultaneously execute the notes called for by the conditions of sale.

We have so far considered the situation as one purely between the heirs themselves; that is independently of the fact that numerous third oppositions were filed in this proceeding requiring the sheriff to hold in his hands the amounts named. The legal complications which would arise from sustaining pretensions such as are advanced by the plaintiff in this case, and the danger which the sheriff would run by departing from orders of court which he was bound to obey, so manifestly show the correctness of that officer's refusal to make to the plaintiff the title she claims under the circumstances shown, that we do not think it necessary to discuss the subject at length.

It is possible that the situation may be such as that plaintiff will

ultimately obtain the benefit of her bid upon the property in controversy under her bid, but that is a matter not before us as matters stand and with the parties before us.

The judgment of the District Court is affirmed.

No. 12,601.

STATE EX REL. BENOIT ROZIER VS. HON. FRED. D. KING, JUDGE OF DIVISION B, CIVIL DISTRICT COURT.

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The proceedings were regular on the face of the papers, and within the jurisdiction of the court.

Prohibition or *certiorari* is not a proper remedy where relief can be reached through appeal. 47 An. 1602.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

Theo. Cotonio for Relator.

Dinkelspiel & Hart for Respondent.

Submitted on briefs November 2, 1897.

Opinion handed down November 15, 1897.

Rehearing refused January 10, 1898.

The opinion of the court was delivered by

BREAUX, J. The record sets forth and the respondent states, in his return, that in answer to a rule filed by the syndic of the insolvent estate of Walter G. Salaun and wife for an order of sale to sell the right which was afterward bought by the relator, all the matters alleged by the relator for writs of *certiorari* and prohibition were alleged by him and were passed upon by the court, after having heard the evidence in open court, and that judgment was rendered in open court; that it was signed after all the delays had expired and while respondent was in the city and at the court house. The respondent adds that, had such not been the case, the judgment

having been rendered upon an interlocutory proceeding, it required no signature; that no objection was made at the time to the judge of Division C, acting for respondent.

Further, the respondent states that the sale of the right was a conservatory act established by the evidence which was introduced on the trial, and that the purchaser has no interest in contesting the validity of the order of sale; that the relator is in actual possession of "the right of possession" which was adjudicated to him.

In the brief for respondent it was urged that the judgment was appealable, and that relator's remedy was by appeal, and not by writs of *certiorari* and prohibition.

The relator avers that the judgment in question was not legally signed; that the judge of Division C was on the 14th of September, 1897, acting in the place of the judge of Division B.

Why it was that the judge of the latter court was acting in place of the former is not definitely shown of record, but it appears that the respondent judge, after hearing the parties, made the rule absolute and signed the judgment; no one has appealed from the judgment.

The relator argues that he could not appeal until the judgment had been legally signed.

The judgment was actually signed by the respondent judge, who had heard the case (*i. e.*, by the judge of Division B.)

A judgment was rendered in the court below, which was appealable, as it was regular, at least on the face of the papers. On appeal this court could have passed upon all questions regarding the merits of the case, and now urged on this application for writs of prohibition and *certiorari*, and all questions of validity or invalidity of the signature of the judge. This court has repeatedly declined to entertain an appeal from an unsigned judgment, but here, legally or illegally, the judgment has been signed and any existing nullity growing out of an illegal signing is reviewable on appeal.

"Prohibition is not a proper remedy where relief can be reached through appeal or injunction." State *ex rel.* Shaw vs. Ellis, Judge, 47 An. 1602.

But granted for an instant that the judgment had not been signed as stated by the relator, there was no necessity for the signature. If it caused irreparable injury, it was appealable.

This court has decided that a judgment of the court making the

rule absolute, as was made in this case, is not required to be signed (Fox vs. Executor, 1 An. 334), and that the signature of the judge is required only to final judgments. Kraeutler vs. Bank, 40 Robinson, 160; Van Winckle vs. Flecheaux, 12 La. 148.

It does not appear of record that the court was without jurisdiction. Moreover, the irregularities, if there were any irregularities, are not reviewable in these proceedings.

The proceedings being regular are within the jurisdiction of the court; the writs applied for can not, under our jurisprudence, be granted. State *ex rel.* Scallen vs. Judge, 45 An. 241.

It is ordered and adjudged that our previous order is set aside, and the writ is denied.

No. 12,600.

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STATE OF LOUISIANA VS. ELI BAZILE.

Act No. 59 of 1896 held not to violate the constitutional provision which requires every law enacted to embrace but one object and to express the same in its title.

The rule of criminal evidence requires the prosecution to establish the guilt of the accused by legal and sufficient evidence to the satisfaction of the jury beyond a reasonable doubt. It does not go further and require a *preponderance of* testimony

The jury being exclusive judges of the facts in a criminal prosecution may, as their judgment indicates, give effect to the testimony of certain of the witnesses and disregard that of others.

APPEAL from the Tenth Judicial District Court for the Parish of Avoyelles. *Cullom, Jr,. J.*

M. J. Cunningham, Attorney General, and *Phanor Breazeale*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

J. H. Overton and *Alphonse V. Coco* for Defendant, Appellant.

Submitted on briefs December 31, 1897.
Opinion handed down January 10, 1898.
Rehearing refused January 24, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The accused was indicted for assault with intent to rape, convicted and sentenced to five years at hard labor.

He appeals and presents as error the refusal of the trial judge to charge the jury on two special instructions asked for on his behalf.

The first was: "In a criminal trial the State must establish its case, not only by a preponderance of evidence, but by such proof as establishes the guilt of the accused to the satisfaction of the jury beyond a reasonable doubt."

The judge having already charged fully the law of "reasonable doubt," declined to give the special charge as worded, on the ground stated in the bill of exceptions, as follows: "Preponderance of evidence does not figure; it requires on part of the State proof of guilt by legal and sufficient evidence to establish the crime to the satisfaction of the jury and beyond a reasonable doubt."

There was no error in this. The rule of criminal evidence requires the State to establish the guilt of an accused person by legal and sufficient evidence to the satisfaction of the jury beyond a reasonable doubt. It does not go further and require *a preponderance of testimony*. It is for the jury to weigh the testimony of each witness called on behalf of the prosecution and defense and to give such effect to the same as in their judgment, under the sanction of their oaths, it may be entitled, always bearing in mind that unless they are satisfied, *from the whole evidence adduced*, of the guilt of the accused beyond a reasonable doubt they must acquit.

The second special instruction asked was: "Where two witnesses for the State contradict each other upon some material fact, it is the duty of the jury to disregard the testimony of both, especially if their testimony can not be reconciled."

The trial judge refused this on the ground that "the jury were sole and exclusive judges of the facts, and were authorized to regard or disregard the evidence or testimony of any witness, or witnesses, either in whole or in part, as in their judgment the testimony of said witness, or witnesses, was worthy of credit or not"—as he had already charged them.

There was no error here. The law is accurately stated by the judge.

A third ground urged for reversal of the verdict and sentence is that the law under which defendant was tried and convicted (Act

No. 59 of 1896) is unconstitutional, because its object is not clearly set forth in its title.

Act 59 of 1896 amends and re-enacts Sec. 792 of the Revised Statutes. It changes that section only in the term of punishment. The earlier law fixes the pnnishment for the offence denounced at "not exceeding two years;" the later law at "not more than twenty years."

The provision of the Constitution which the re-enacting law is claimed to have violated is Art. 29, which declares: "Every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in the title."

The title cf Act No. 59 is: "An act to amend and re-enact Sec. 792 of the Revised Statutes of 1870."

The point here raised is no longer an open question. It has been settled by adjudications of this court against the contention of the defendant. State *ex rel.* Mouton vs. Read, Judge *ad hoc*, 49 La. An.; State *ex rel.* Farrar vs. Garrett. 29 An. 637; State *ex rel.* Rills vs. Barrow, 30 An. 657.

Judgment affirmed.

No. 12,596.

STATE OF LOUISIANA VS. WILLIE GIBSON AND WILL DILLON.

Where a party proceeded against by information filed in open court has pleaded to the said information and gone to trial and is convicted, and on his appeal the verdict of the jury and judgment are set aside and the case remanded for further proceedings, it is too late for him to urge for the first time in arrest of judgment ofter a second conviction, that the information had been filed without the consent of the court first obtained.

The defendant by pleading to an information waives the objection that the said information was filed without leave of court first obtained.

APPEAL from the Fourteenth Judicial District Court for the Parish of West Baton Rouge. *Talbot, J.*

M. J. Cunningham, Attorney General, and *Alex. Hébert*, District Attorney, (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellant.

Clarence S. Hébert for Defendant, Appellee.

Submitted on briefs November 20, 1897.
Opinion handed down November 29, 1897.
Rehearing refused January 10, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The following entry appears on the minutes of the District Court for the parish of Iberville, under the date of the 14th September, 1896:

"STATE OF LOUISIANA
VS.
"WILLIE GIBSON AND WILL DILLON.

"Information filed for 'larceny.'"

"Will Dillon, being present in court, was regularly arraigned, plead not guilty and asked for trial by jury and case assigned."

The defendant Dillon was subsequently tried and convicted. On appeal to the Supreme Court the verdict and judgment were set aside and the case remanded for a new trial (State vs. Dillon, 48 An. 1365).

On the return of the case to the District Court defendant filed (so the minutes state) a "demurrer," which was overruled and the defendant was sent to trial. On the second trial he was again convicted, but the court having sustained a motion in arrest of judgment, the State appealed.

In the brief filed in behalf of appellee it is stated:

"Before going to trial accused, by his counsel, filed a demurrer to the proceedings, based on the fact that the information, though filed in open court, had not been filed with the consent of the court first obtained as required by the statute. This demurrer was overruled and the accused was sent to trial. No reason was assigned by the trial judge and no bill was reserved by the defence. Dillon was found guilty. A motion for a new trial was made and overruled, and a motion in arrest was presented by the defendant on the ground that the information against him had not been filed with the consent of the court first obtained.

The motion was sustained, and the State having reserved a bill of exceptions to the ruling of the court, annulling and setting aside the verdict, prosecutes this appeal.

Appellee calls our attention to Sec. 977 of the Revised Statutes, which declares that prosecutions for offences not capital may be

by information with the leave of the court first obtained, and contends that the law makes a consent of the court prior to the filing of the same a condition precedent to a prosecution under an information, and that evidence of such prior consent must appear on the face of the record.

The Attorney General contends that it is not necessary that the minutes of the court should show affirmatively that the leave of court was first obtained to file an information, and that the court ordered it filed, when the minutes show affirmatively that said information was offered to be filed in open court and was filed.

He also directs the court to Act No. 35 of 1880, entitled an act to provide for the trial of offences where the penalty is not necessarily imprisonment or hard labor, or death, by the second section of which act it is provided that "District Attorneys may file information in the office of the clerk of the District Court, which said filing shall be as valid as if made in open court," and to the fact that the penalty for larceny is not necessarily imprisonment at hard labor or death.

Appellee's reply is that, though under this act the District Attorney may file the information in the clerk's office, out of open court, he none the less must have had prior consent of the court to filing of the information.

The information in this case was filed in open court, the accused was arraigned upon it, pleaded not guilty and asked for trial by jury. He was tried and convicted. He appealed, and succeeded on appeal in having the verdict and judgment set aside and the case remanded for further proceedings.

It was only upon the return of the cause to the District Court that he urged for the first time that the information had been filed without the consent of the court first obtained, and upon the overruling of that complaint he acquiesced therein and reserved no bill of exception. He was tried a second time and convicted, and thereafter was successful in causing the proceedings to be arrested on a motion in arrest of judgment. We are of the opinion that the court erred. Every affirmative act in the cause from the filing of the information down to the return of the cause to the District Court evidenced the concurrent knowledge and assent of the court, the State and the accused to the regularity and legality of the proceeding against the present appellee. The administration of criminal justice

would be thrown into disrepute were an accused party to be able to hold such an objection in reserve to be utilized only after his case had been remanded to the District Court for a new trial. It was held by this court in State vs. McCord, 23 An. 326, that "in a criminal case the objection that there was no order of court authorizing the filing of the information comes too late if only made for the first time in the Supreme Court." We are of the opinion that defendant by pleading to the information waived the objection he now urges.

For the reasons herein assigned: It is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and appellee's motion in arrest is hereby overruled and denied, and the cause reinstated on the docket of the District Court.

It is further ordered that the District Court do enter judgment in the cause under the verdict therein according to law, the cause being remanded to the District Court for that purpose. 21 An. 348; 38 An. 145.

No. 12,582.

STATE OF LOUISIANA EX REL. HIBERNIA NATIONAL BANK VS. THE JUDGES OF THE COURT OF APPEALS FIRST CIRCUIT.

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ON APPLICATION FOR A WRIT OF CERTIORARI.

Judgment was rendered on appeal by the Court of Appeals. No question of jurisdiction in the pleading or in argument was raised. Want of jurisdiction was suggested the first time on application for rehearing, which was overruled.

Under *certiorari* or prohibition this court can correct proceedings in progress, but after the proceedings are ended writs go to the execution of the judgments. C. P. 847, 853; 5 R. 27.

ON APPLICATION for Writ of *Certiorari*.

John A. Richardson for Relator.

Respondent Judges for themselves.

Submitted on briefs November 29, 1897.
Opinion handed down December 13, 1897.
Rehearing refused January 24, 1898.

The opinion of the court was delivered by

BREAUX, J. This is an application for a writ of *certiorari* to annul and have declared void a judgment of the Court of Appeals on the ground that the court was without jurisdiction *ratione materiæ*.

The facts are that a suit was brought in the District Court for the parish of Claiborne by a judgment creditor of T. J. Caldwell for a decree annulling a mortgage for seven thousand dollars on the ground of simulation and fraud. There was, it appears, a note for the amount identified with the act of mortgage.

The transferees and holders of the mortgage, about the time that suit was brought for its annulment, proceeded to foreclose the mortgage.

The suit in the District Court terminated in favor of the holders of the note and mortgage.

On appeal to the Court of Appeals the judgment was annulled and avoided and the court decreed that the mortgage and the note identified with it, as above stated, were null and void.

It appears that the relator here and the appellee in the Court of Appeals pleaded his cause in the Court of Appeals, yet made no suggestion of want of jurisdiction of that court at any time prior to judgment.

On application for rehearing only; the appellee, whose judgment had been reversed, suggested the want of jurisdiction of the court to decide the case. The application for a rehearing was overruled. The appellee then applied to this court for writ of *certiorari*, alleging that the Court of Appeals have declared a contract amounting to seven thousand dollars, simulated.

Respondents set forth in their answer to relator's petition for the writ as follows:

"A consideration of the pleadings and the record will disclose the fact that both plaintiff and defendant, as well as respondents, treated and considered the case as a revocatory action."

Be this as it may, the fact remains that no motion to dismiss the

appeal for want of jurisdiction, and no suggestion to that end prior to the judgment of the Court of Appeals was made.

Unquestionably, the Circuit Court of Appeals had jurisdiction to annul the mortgage for seven thousand dollars, so far as it affected the complaining creditor, whose demand was for less than two thousand dollars.

In a revocatory action the test of jurisdiction is the amount claimed, save in case which does not here apply. Ex rel. Newman vs. Judge, recently decided.

In an action *de simulation* the value of the property involved is the test. Katz & Barnett vs. Gill, 43 An. 1041; C. C. 1977, Livingstone vs. Hardie Bros., 41 An. 312; Loeb & Bloom vs. Arent, 33 An. 1086; State *ex rel.* Zuberbier & Behan vs. Judge, 34 An. 1215.

Manifestly the Court of Appeals had no jurisdiction to annul the transfer of the note of seven thousand dollars by the holders (Flower, Putnam & King) to the bank. The transfer might well be good, although the mortgage is not one that can be executed.

The nullity of the transfer of the note was not an incident to annulling the mortgage.

Despite the situation of affairs in the course of this litigation, we are not authorized under our laws to reverse the action of the Circuit Court of Appeals and annul the judgment—that is, write another judgment.

The writ will not issue to the end of reviewing matters which might have been, but were not, raised in the court below.

Under the writs of *certiorari* or prohibition we can correct proceedings for lack of jurisdiction while the proceedings are in progress, and we can correct execution of void judgment. But after the judicial proceedings are ended our writs go only to the execution of the judgment. C. P. 847, 853; Clark vs. Rosenda, 5 Rob. 27.

The nullity invoked by relator is that the court had no jurisdiction to decree that the mortgage was void. If that be so, then the relator at this stage of affairs must seek other modes of relief for protection against the judgment void for want of jurisdiction.

It is ordered and adjudged that the preliminary writ be set aside and that the relief prayed for by relator be refused at their costs.

MILLER, J., recused on account of relationship.

No. 12,531.

L. H. GOLDMAN VS. SIMON GOLDMAN.

Amicable compounders are judicial appointees who are selected by the parties to a litigation over partnership and like matters; but once they have been appointed and qualified, and one or more of them resign and others are appointed in their stead, it will be assumed that such appointments were authorized unless the contrary clearly appears.

APPEAL from the First Judicial District Court for the Parish of Ouachita. *Potts, J.*

Boatner, Potts & Hudson for Plaintiff, Appellant.

A. A. Gunby and *E. T. Lamkin* for Defendant, Appellee.

Argued and submitted June 3, 1897.
Opinion handed down June 22, 1897.
Rehearing refused January 24, 1898.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. The grounds of the motion are (1) that the judgment appealed from is based on an award of amicable compounders and is not reviewable on appeal; (2) there is no evidence or statement of facts in the record from which this court can review the judgment appealed from.

The theory on which the plaintiff prosecutes this appeal is, that when the report of the alleged amicable compounders was filed, and the defendant's counsel ruled him to show cause why same should not be homologated, his counsel submitted an extended opposition thereto, which was, on motion of defendant's counsel, stricken from the record; and consequently he was not permitted to introduce any evidence in support of his opposition. And it is further to the effect that there were no amicable compounders selected by the parties and appointed by the court conformably to law, and, for that reason, the judgment based upon the report which was submitted, is necessarily illegal, and therefore appealable.

In our opinion the appellant is entitled to a hearing on these ques-

tions of law, and his right to an appeal must be recognized and sustained.

The motion to dismiss is denied.

ON THE MERITS.

This suit is one for the settlement of a commercial partnership which once existed between the plaintiff and defendant, the domicile of which was in the city of Monroe; and it was conducted under the firm name and style of L. H. Goldman & Brother, from 1887 until the end of the year 1890, when it was dissolved by mutual consent—the defendant retiring and the plaintiff being left in possession of the books and assets of the partnership for the purposes of liquidation and making a final settlement of the partnership business and affairs.

The plaintiff avers that the business of said copartnership has been fully liquidated, and that there is due him, on a fair settlement of same, by the defendant as his copartner, the sum of five hundred dollars; and that he is desirous of having a full, fair and final settlement thereof.

The answer of the defendant is a general denial, coupled with an averment that instead of being indebted to the plaintiff "on a fair, just and legal settlement (plaintiff) owes him (defendant) three hundred dollars;" and his prayer is that plaintiff's demand be rejected, and for general relief.

As appears from the statement of the case, as it is presented upon the appellee's motion to dismiss the appeal, there was a submission made of the partnership books and accounts to persons appointed by the judge *a quo*, for the purpose of making an examination thereof, and a report of their findings therefrom to the court; and the record discloses that the court based its opinion exclusively upon the report of the experts or auditors, and rendered a judgment in favor of the defendant for the sum of three thousand four hundred and sixty-seven dollars and nineteen cents, and all costs of suit, including the fees of the amicable compounders.

It is from that judgment that the plaintiff prosecutes this appeal.

A better understanding of the course of proceedings in the lower court can be had by a brief historical statement of them as they occur in the record, chronologically, and which are substantially as follows, viz.:

On the 17th of November, 1896, the plaintiff filed a petition to the effect "that a true settlement of the partnership and an exact showing of the items of debits and credits between the partners to said business can best be made by auditors appointed by the court, which is necessary in order to facilitate the trial of the case."

Thereupon he prayed "that the court appoint two auditors, one at the suggestion of the plaintiff, and the other at the suggestion of the defendant, who shall be duly summoned and sworn, and to whom shall be (submitted) the books, papers and accounts of the mercantile firm of L. H. Goldman & Bro. for their examination, investigation, and report to the court a true settlement between plaintiff and defendant," etc. * * * "That in the event of a disagreement between said auditors in their reports, the (judge) shall appoint a third (person) as arbitrator, to be *summarily* sworn," etc.

On the same date, and in the same order, the judge *a quo* appointed R. L. Prophet and H. D. King auditors, and W. R. Hudson as umpire, to examine the books and papers, and report as provided for in the foregoing petition; and upon the following day said parties took an oath, in which it was declared that they "having been appointed as experts to examine the books, papers and accounts of the late firm of L. H. Goldman & Bro." would "examine said books, papers and accounts, and report as ordered by the court," etc.

On the 3d of December, 1896, said committee made a report of their investigation to the court, the substance of which is contained in this statement, viz.:

"We would also represent that said partnership, as we are informed by both parties, was dissolved on the 31st of January, 1891, and that on that day, as appears from the face of the ledger proper, the balance due to Simon Goldman, the retiring partner, was five thousand five hundred and sixty-five dollars and forty-four cents, as is evidenced by the business statement herewith presented," etc.

Thereupon the auditors pray that they be discharged.

Their report is accompanied by a memorandum to the effect that "the above figures do not include the petty ledger accounts, of which there is no record in the general ledger, and nothing to show that they were included in the settlement, or how (same were) disposed of."

On the 7th of December, 1896, the defendant's counsel filed

a motion, in which he invites attention to the fact that the auditors, in making their examination and report, had failed and omitted to take into account the petty ledger and other papers and memoranda, and that he had been injured thereby, and requested the court to recommit their said report to them with instructions to examine same, and make an additional report; and upon the 9th of December, 1896, the court *a qua* made an order to that effect upon the agreement of the parties—it being therein recited that the persons so appointed "are to act as judicial arbitrators and amicable compounders in this case with authority to hear evidence upon all differences between both sides as to accounts and to report to the court on Monday, 11th of December, 1896," etc.

On the following day, December 10, the aforesaid persons took and subscribed an additional oath as judicial arbitrators and amicable compounders.

On the 16th of December, 1896, R. L. Prophet resigned his trust or appointment, assigning as his excuse the alleged personal insults and abuse of W. R. Hudson, a member of the committee appointed by the court; and said resignation was received by the court and he was discharged from further service.

On the 21st of December, 1896, W. R. Hudson and H. D. King, the two remaining members of the committee, made a report to the court, in which they state that upon taking up and continuing their previous report of the 30th of November, 1896, they find "that the plaintiff, L. H. Goldman, is justly indebted and due to Simon Goldman three thousand and sixty-one dollars and nineteen cents"—an amount less then that awarded in said previous report by two thousand five hundred and four dollars and twenty-five cents.

On the 22d of December, 1896, the defendant's counsel filed a motion in which they prayed for the homologation of said award, and that same be made executory and a judgment be entered up against the plaintiff, and in his favor, in accordance therewith; and thereupon the plaintiff's counsel filed an opposition thereto on the grounds (1) that the report is misleading and erroneous, and does not present a true showing of the rights of the partners in said commercial business; (2) that said report was not participated in by the entire committee appointed by the court, but that same was the result of the labors of but two of them; and (3) that H. D. King, a member of said committee, was violently prejudiced against him, and that the

only member whom he was permitted to select had been compelled to resign.

On considering said objections, the judge *a quo* appointed H. B. Newhall to fill the vacancy occasioned by the resignation of R. L. Prophet, and recommitted the matter to the full committee as thus composed; and to this ruling the plaintiff by counsel objected and reserved a bill of exceptions to any further submission to this committee for the following reasons, viz.:

"For the reason that H. D. King, one of said compounders, was not fair and impartial, as (it was) contemplated by law he should be, but is violently prejudiced against plaintiff, and had publicly and repeatedly announced that he represented on that committee the interests of the defendant, and proposed to look especially after the same, and that he would not believe the plaintiff on his oath in any manner."

On the following day the judge, considering the grounds of plaintiff's complaint against H. D. King, revoked his appointment and selected and appointed J. J. Jordan in his place and stead, and as thus constituted the judge *a quo* again committed the partnership affairs to the three amicable compounders for examination and report, to which plaintiff's counsel objected, and excepted in general terms without assigning any additional reasons therefor.

On the next day, December 24, 1896, the plaintiff's counsel filed a motion to revoke the order referring this case to amicable compounders for the following reasons, viz.: (1) that R. L. Prophet had resigned and the court appointed another person to fill the vacancy thus occasioned without his consent—said appointment was without the sanction or authority of law; (2) that the appointment of H. D. King and W. R. Hudson should be set aside and revoked because they "are not fair and impartial, but are violently prejudiced against the plaintiff."

The judge declined to remove W. R. Hudson, and having removed H. D. King and appointed J. J. Jordan in his place, the motion to revoke was refused; and upon the 12th of January, 1897, the three amicable compounders took and subscribed the necessary oath, the plaintiff's counsel retaining no bill of exceptions to the ruling of the court.

On January 19, 1897, the three arbitrators presented their report to the court, showing that L. H. Goldman is indebted to the defend-

ant in the sum of three thousand four hundred and sixty-seven dollars and nineteen cents, for which they gave judgment in the defendant's favor; but the report explains why they increased the previous award by the amount of three hundred and ninety-six dollars.

The report contains this important statement, viz.:

"We beg to state that we have not been furnished with all the books showing assets of the firm. Both their petty ledger and another small ledger, which doubtless show assets, can not be or are not produced by the plaintiff in this case, although he has been repeatedly asked to produce the same. We are, therefore, convinced that many of the assets in his charge are not accounted for, which, if placed in the hands of your committee, would result in a much larger judgment against the said L. H. Goldman, plaintiff in this case."

On the 20th of January, 1897, the defendant's counsel filed a motion to homologate said award, and to have a judgment rendered pronouncing it executory; and after due service of said motion and order, the plaintiff's counsel filed an extended opposition, in which are set out with detail, and particularly all the grounds heretofore recited, and many others unnecessary to be mentioned.

This was followed by a motion on the part of the defendant to strike out the averments of the opposition, principally upon the grounds which have been assigned by the judge *a quo* in the rulings he had made; and said motion having been sustained, the opposition was stricken accordingly, but the plaintiff's counsel retained no bill of exceptions to the ruling.

Thereupon the judge rendered a decree homologating and approving the award of the amicable compounders and giving a judgment against the plaintiff for the sum of three thousand four hundred and sixty-seven dollars and nineteen cents in favor of the defendant; and it is from that judgment the plaintiff has appealed.

From the foregoing statement two propositions are clearly established, viz.: (1) that the plaintiff is indebted to the defendant on a fair, final settlement of the partnership accounts in the full amount of the award, if not more; and (2) that all the defences and objections that were interposed in behalf of the plaintiff are merely technical, and under the circumstances related, can not be favorably entertained.

In the first place the amicable compounders were selected and

appointed by the court upon the joint motion of plaintiff's and defendant's counsel, and the committee reported that the plaintiff was indebted to the defendant in the snm of five thousand five hundred and sixty-five dollars and forty-four cents.

In the next place the matter was recommitted on the application of defendant's counsel, and two out of the three arbitrators reported that the plaintiff was indebted to the defendant in the sum of three thousand and sixty-one dollars and nineteen cents, the third member of the committee having resigned his trust.

Upon the defendant's counsel moving for the homologation of said award, plaintiff's counsel opposed same upon the ground that it was participated in by only two members of the committee, and that another was violently opposed to him; and this opposition having resulted in the appointment of a successor of the one resigned, the plaintiff's objection was removed.

The plaintiff's counsel then urged objection to H. D. King, the third member, on the ground that he was biased and prejudiced against him, but the judge *a quo* at once removed King and appointed Jordan, thus again completing the complement of three arbitrators. To this appointment plaintiff's counsel excepted, but assigned no reason for his objection.

After the completion of the board and the three amicable compounders had subscribed their oaths, the plaintiff's counsel filed a motion to annul and revoke the order referring the case to amicable compounders; but upon the declination of the judge so to do the counsel reserved no bill of exceptions.

And when the arbitrators presented their final report and award to the court it was opposed on various grounds; but when upon the motion of the defendant's counsel the opposition was stricken from the record, the counsel of plaintiff retained no bill of exceptions.

It is undoubtedly true and conceded that amicable compounders are judicial appointees who are selected by the parties to a pending litigation over complicated accounts of partnership, though appointed by the judge of first instance and are, upon their oaths, to examine all the affairs of the partnership and make a report upon which the judgment of the court is to be predicated; but once they are appointed and qualified and have made a report, and thereafter one or more of them withdraw, or are removed at the instance of one of the litigants, and one or more are appointed in their stead, it will be

assumed that such appointments have been made with the knowledge or acquiescence of the parties, in the absence of any specific objection having been made seasonably to their appointment *on the ground that the judge had not the authority to make the appointment and a bill of exceptions retained to his ruling.*

If this were not so, parties litigant would have the opportunity of testing the strength of demands of parties who are opposed to them, by means of the award of arbitrators, to whose capacity they could object subsequently, in case the report were unfavorable to their interest, or in which they could acquiesce in case the award was favorable thereto.

This situation of affairs is clearly shown in this case.

For it was upon the petition of the plaintiff as the member of the copartnership who retained the assets and was entrusted with the liquidation of its affairs that this suit was brought. It was upon his petition that amicable compounders were selected. And it was upon his motion that the first award against him was set aside because there were but two of the arbitrators participating therein—the third member who was appointed at his suggestion having resigned. And it was also upon his motion that another member, H. D. King, was removed on the ground of alleged prejudice against him and J. J. Jordan appointed in his place, notwithstanding King had been chosen by the defendant.

The learned judge of the lower court was evidently disposed to do his utmost to secure the most competent and unbiased persons possible for the discharge of the delicate and responsible duties which the law has imposed upon amicable compounders, and in so doing his rulings were nearly altogether in favor of plaintiff.

Our examination of the record has fully satisfied our minds that he has done substantial justice between the parties.

Judgment affirmed.

The Chief Justice takes no part in this case.

No. 12,482.

MRS. MARGARET RUSSELL VS. JOHN H. LANG.

The law of 1874 decreeing the prescription of three years against actions to invalidate tax titles held to be in force and applicable to facts of this case.

Purpose of this statute is to obviate necessity on part of purchasers at tax sales, after lapse of three years, of substantiating validity of the tax titles under which they hold

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108	18
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Russell vs. Lang.

Where the purchaser has actual and open possession, this fact puts original owner under notice of necessity of bringing his action within the time fixed, in default of which the bar of the statute applies.

Defendant has the right to stand on his possession. Plaintiffs can not force him, in defence, to assume the attitude of plaintiff in a petitory action.

Instant case distinguished from Remick vs. Lang, 47 An. 922; Blood vs. Negrotto, 47 An. 1132; Johnson vs. Martinez, 48 An. 52; Hoyle vs. Athletic Club, 48 An. 879; Breaux vs. Negrotto, 43 An. 428.

The law relative to the assessment of property for taxation, its description, proper use of name of owner, how to be listed when held in indivision, etc., stated.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Wall & Watt for Plaintiff and Intervenors, Appellees.

J. Zach. Spearing for Defendant, Appellant.

Argued and submitted June 14, 1897.
Opinion handed down January 24, 1898.

The opinion of the Court was delivered by

BLANCHARD, J. The plaintiffs and certain parties who appear as intervenors claim the ownership and possession of certain real estate in the parish of Orleans.

The title under which this claim is made is set up, and it is averred that the defendant is wrongfully in possession of the property, without valid title to support the ownership which he asserts.

Defendant answers that he is in possession as owner under good and valid title. He sets forth this title, and from it we gather that the property was sold at tax sale in 1885 under the provisions of Act No. 82 of 1884, for State taxes due thereon for the years from 1871 to 1878, both inclusive, and was bought by Orloff Lake, who, subsequently, sold to Lallance, and he, in 1891, to defendant.

On his behalf it is further averred that the property had been adjudicated to the State in 1885 for the unpaid State taxes due thereon for the years from 1880 to 1883, inclusive, and that defendant, having redeemed the same by paying the amount due the State, had become subrogated to the rights acquired by the State under the adjudication aforesaid.

From a judgment sustaining the demands of the plaintiff and intervenors and decreeing them owners of the property in controversy, defendant prosecutes this appeal.

In this court he files the plea of prescription of three and five years, and especially does he insist that this action is barred by the prescription of three years. This latter prescription is bottomed upon Sec. 5 of Act No. 105 of 1874, which is as follows: * * * "Any action to invalidate the titles to any property purchased at tax sale under or by virtue of any law of this State, shall be prescribed by a lapse of three years from the date of such sale."

It is shown that the tax sale in question was made in 1885, whereas the present suit was not filed until 1894.

The law of 1874, quoted above, is still in force. It has survived the adoption of the Constitution of 1879 and all tax enactments of the General Assembly since then. Barrow vs. Wilson, 39 An. 403; McDougall vs. Monlezun, 39 An. 1010; Smith vs. City, 43 An. 733; Michel vs. Stream, 48 An. 341.

It is distinctly a statute decreeing the prescription of an action. It does not purport to cure defects, nor does it concern itself with the rights of parties. Its simple declaration is that whatever rights parties may have they must assert them within three years, or forever thereafter "hold their peace." It creates a positive bar against "any action to invalidate" a tax title after the lapse of three years. Barrow vs. Wilson, 39 An. 406.

It is a statute of repose, sanctioned alike by reason, sound policy and authority. Blackwell, Tax Titles, p. 643; Cooley on Taxation, p. 376; McElmoyle vs. Cohen, 13 Peters, 312.

Defendant and the authors of his title hold under a deed from the State Tax Collector, which sets forth that the property was sold for the non-payment of taxes. They went into possession under this purchase of the identical property claimed by plaintiffs, and this possession has been adverse to plaintiffs for nearly nine years. This is a sufficient showing upon which to predicate the plea in bar of the action. Breaux vs. Negrotto, 43 An. 426; Barrow vs. Wilson, 39 An. 409.

In order to invoke the plea it is not required defendant should show that all the requisitions of the law had been complied with in order to make the tax deed a valid and indefeasible conveyance of the title. If such proof were essential before defendant could have

the benefit of the law, it would, in effect, be requiring him to shew that he had no need of the protection of the statute before he could avail himself of its provisions. Such a construction would deprive the statute of the effect it was clearly intended to have, viz.: obviating the necessity, on part of purchasers at tax sales, after the lapse of three years, of substantiating the validity of tax titles under which they hold. Pillow vs. Roberts, 13 How. 472.

A similar statute in Wisconsin was held by the Supreme Court of that State to be of such binding force that if the tax purchaser's possession had been actual and open, and the suit to annul his title was not brought within the three years, the statute would protect him even if the tax deed was void on its face. Lindsay vs. Fay, 25 Wis. 460.

The action under consideration is not one of jactitation or slander of title. Plaintiff and intervenors are not in possession of the property; defendant is, and is so alleged to be in plaintiff's petition.

Defendant has the right to stand on his possession. Plaintiffs can not force him, in defence, to assume the attitude of plaintiff in a petitory action. Michel vs. Stream, 48 An. 348.

Plaintiffs found defendant in possession under a title deriving its source from a tax sale. Their suit, under some disguise, is virtually an attack on his title and on the tax sale. This is shown by the circumstance that they make the State of Louisiana a party through the Attorney General, who is asked to be cited in order that the State may assert title to the property, "if she have any."

The State could have no title or interest except that she had acquired it at tax adjudication and stood remotely in the character of warrantor to those to whom she had subsequently conveyed the property.

We think plaintiffs have thus directed their attack against defendant in such way as enables him to invoke the plea of prescription of three years against the action. Michel vs. Stream, 48 An. 348.

This court observed truly, in a case already cited, that the statute awarding this prescription does not concern itself with the strength of one title or the weakness of the other.

Plaintiffs asserted a right. This required an action at law to enforce it.

They were out of possession and must necessarily sue to acquire it. In order to acquire it they must show a better title than the

one defendant has. They knew that defendant was in possession as owner under a title having its origin in a tax sale. The deed evidencing this title accurately describes the property and is otherwise sufficient in terms to transfer its title. Plaintiffs' suit must be viewed as one intended to test the validity of this title. Defendant's title must prevail over that of plaintiffs unless the latter can get rid of it by showing that as a tax title it is void for inherent defects such as want of fulfilment of the requirements of law in the matter of the assessment of the property for taxation, or in the proceedings taken for its sale for non-payment of taxes.

When plaintiffs attempt to make this showing they run up against the barrier of the prescription of three years. They are told by the law that even if inherent defects in defendant's tax title exist, they have no right of action to inquire into the same after the lapse of three years from the date of the tax sale.

It is impossible to view plaintiffs' action in any other light than one to dispossess defendant by assaulting and overthrowing the tax title which is the basis of his possession.

The road over which plaintiffs must travel to deliver this assault is barricaded by the prescription invoked. The court can not do otherwise than enforce the limitation and deny the action.

It was held in Barrow vs. Wilson, *supra*, that where a purchaser at tax sale has actual and open possession of the property so purchased, this fact puts the original owner under notice of the necessity of bringing his action within three years, and if he fails to do so the bar of the statute applies.

The instant case is distinguishable from Remick vs. Lang, 47 An. 922. In that case the defendant was not in possession of the property under his tax title. Plaintiff being in possession, his action was one of jactitation or slander of title, and he sought also to enjoin the defendant from asserting title based on the tax deed, and to have the deed annulled.

The property had been adjudicated to the State for taxes prior to 1880, and in 1885 had been sold by the State to Lake, who in turn sold to Perkins and the latter to the defendant. But Lake and his vendees failed to pay the taxes that had accrued after 1879. Whereupon, in 1893, plaintiff (original owner) paid all taxes accruing since 1879 and took formal redemption and subrogation from the State for same, continuing on in possession of the property. Because of fail-

ure to pay the taxes assessed on the property subsequent to 1879, and which were due when the defendant purchased from the State and which he assumed to pay, it was held that no title whatever passed to the defendant—reaffirming the doctrine announced in State *ex rel.* Martinez vs. Tax Collector, 42 An. 677, and State *ex rel.* Powers vs. Recorder, 45 An. 56.

Under these circumstances the defendant, being neither in possession of the property, and no title from the State having passed to him, was not in a position to invoke the prescription of three years in bar of the action brought against him. Whereas, in the instant case, defendant *is* in possession of the property, and he, not plaintiff, has paid the taxes accruing on the property since 1879, receiving in his own name, before this suit was filed, the State's redemption, relinquishment and subrogation for and on account of said taxes.

Under these different circumstances, the present defendant is in position to invoke the prescription denied in the other case.

For the same reasons the case at bar is distinguishable from that of Blood vs. Negrotto, 47 An. 1132, another of the cases relied on by plaintiff's counsel.

So, too, the cases of Johnson vs. Martinez, 48 An. 52; Hoyle vs. Athletic Club, 48 An. 879; and Breaux vs. Negrotto, 43 An. 428, are to be differentiated from the present one.

In each of those cases defendant claimed under an adjudication to the State for taxes accrued *since* 1880, followed by a sale by the State to the author of defendant's title, and it was held that sales for taxes accruing since the Constitution of 1879 must be preceded by notice to the owner, or no title passes, and in the first named case it was said that neither the prescription of three or five years cured the want of this notice required by the organic law.

In the instant case defendant holds under an adjudication to the State for taxes which had accrued for the years 1871 to 1878, or *before* the Constitution of 1879, followed by a sale by the State to the author of his title. The "notice" prescribed by Art. 210 of the Constitution refers only to taxes accruing subsequent to 1879.

Defendant shows payment by Lake (one of the authors of his title) of the purchase price of the property at tax sale from the State. This extinguished all the taxes due prior to 1879. He shows payment of taxes due the State from 1880 to 1887 inclusive, and produces a redemption certificate from the State in his favor. As to the taxes

due the city of New Orleans from 1880 to 1885 inclusive, which were assumed as part of the purchase price, it appears that neither defendant nor the author of his title have paid the same. Because of this plaintiffs contend that no title has passed to defendant, and such was the doctrine announced in West vs. Negrotto, 48 An. 922, and other cases.

But it appears that immediately after Lake acquired the property from the State he sold to Lallance, and the latter then filed suit in the District Court against the city of New Orleans to be relieved of payment of city taxes. The city contested the action, but there was judgment decreeing, in effect, that the property in question owed no city taxes for the years from 1880 to 1885, inclusive. This judgment, rendered in 1886, seems not to have been appealed from, and however erroneous it may have been, it is now final and conclusive against the city and forms *res judicata* as to the city taxes, for the non-payment of which plaintiffs assert no title passed to Lake and his vendees. Reed vs. His Creditors, 39 An. 120, 125.

After this judgment, which was acquiesced in by the parties having an interest to contest the same, it was not to be expected that the State's vendees would pay the city taxes, especially since they were in possession of the property under the State's title and held the State's redemption certificate for the State taxes since 1879.

The property in this case was so described as to be susceptible of easy identification. 34 An. 255.

The description of urban property for assessment purposes may be made by reference to the plan of the city, town, or village where situated. Sec. 20, p. 139, Acts 1877; Sec. 7, p. 122, Acts 1882; Act 140 of Acts of 1890.

In the instant case the number of the square was given, by what streets bounded, and the numbers by which the lots were designated in the squares were stated. That sufficed for identification. 15 An. 15; 41 An. 765.

The property was assessed in the name of J. R. Russell for the years 1880 to 1885, inclusive, and described as one half of square No. 35, Greenville, Lots 11 to 20—Oliver, Wall, Lowerline and Pine streets. This description was not inadequate, and the assessment in the name of Russell was the assessment in the name of one of the owners in indivision. This assessment can not be held an absolute nullity. It was sufficient as to the interest of Russell in the property which

was an undivided half, and if the taxes due by his interest were not paid, that interest (an undivided half) could be legally sold under an assessment which placed the whole property in the name of Russell. An assessment of the entire property, correctly described, in his name, while error as to the whole, was not error as to his half, on the principle that the greater includes the less.

It is true Russell died in August, 1881, and notwithstanding his death his name was continued in use in the assessment of the property. If it was illegal to so assess the property, or his interest in it, after his death, this objection falls as to the assessment for the years 1880 and 1881. He was alive when the assessment was made in those years, which are years for the non-payment of whose taxes the property was adjudicated to the State. It has been held that if the assessment of property and proceedings had leading up to a sale for taxes were sufficient and legal in any one of the years for whose taxes the property was sold, the tax title will be maintained.

The lots were evidently vacant and unoccupied and plaintiffs had no agent to represent them in New Orleans. They resided out of the State and there was no one in possession of the property holding under plaintiffs.

When Lake bought from the State he and his vendees took possession, no writ of possession being necessary for the purpose.

Besides, it appears that from 1871 to 1885, when the State sold to Lake—a period of fourteen or fifteen years—no taxes, city or State, were paid on the property by plaintiffs, or by those from whom they derive title. They did not return the property for assessment, nor to be listed for taxation, nor did they seek in any way to meet their tax obligations to the city and State.

Under these circumstances there would seem to be little or no equity in the demand of plaintiffs, and the observations of this court on a somewhat similar state of circumstances in Webre vs. Lutcher & Moore, 45 An. 579, apply with much force here.

We are referred to Hayes, Administrator, vs. Viator, 33 An. 1162, as holding that "lands held in indivision by several parties must be assessed as a whole in the name of all the joint owners."

This quotation is taken from plaintiff's brief. It is the *syllabus* of the case merely, and the *syllabus* is erroneous. A reading of the body of the opinion shows that no such proposition was sustained and it is not true in law.

There are two ways of legally assessing real property held by two or more parties in indivision. One, and the better way, is to assess to each his undivided interest; the other, to assess the property as belonging jointly to the parties, giving the name of each individual owner, followed by the description of the property. Or, if a firm, or business company, corporation or association owns the property, it may be legally assessed in the name of such firm, company, corporation or association. And in placing the names of taxpayers on the assessment rolls, while it is better to give the Christian or baptismal names, it suffices to use the initials, followed by the family or surname—thus, "J. R. Russell."

This designation of the name of the owner, followed by a correct description of the property, fulfils the requirements of the law. Douglas vs. Dakin, 46 Cal. 51.

And if there be two joint owners, and the name of one only is used, followed by an accurate description of the property, this suffices to bind the interest of the one whose name is used, for his share of the taxes, but, of course, can not bind the other individual owner whose name is not used, nor his interest in the property. The cases of Thibodeaux vs. Kellar, 29 An. 509, and Hayes vs. Viator, 33 An. 1164, cited in opposition to this view, do not sustain the pretension.

Plaintiffs' contention that the adjudication to the State for taxes due subsequent to 1879, is void because not preceded by the notice required by Art. 210 of the Constitution can not be sustained. There is nothing in the record to rebut the presumption that this notice was properly given to Russell, at least for the taxes for the years he was alive, 1880 and 1881. The deeds to the State for the taxes of those years so state, and the Constitution, Art. 210, declares that all deeds of sale by collectors of taxes shall be received by courts in evidence as *prima facie* valid sales, and Sec. 3 of Act No. 82 of 1884 distinctly declares that duly certified copies of such deeds shall be full proof of the recitals thereof. See Saunders on Taxation, p. 313; Acts of 1880, p. 99, Secs. 34, 35, 36.

Defendant's deed, then, was proof of notice unless overthrown by stronger proof that no notice was given, which was not the case. There is no proof to contradict the recital of the proper giving of the notice. 43 An. 433, 434; 33 An. 438; 35 An. 893; Stroebel vs. Seeger, 49 An. 36. See Del Castillo, plaintiff in error, vs. McConnico *et al.*, decided by the Supreme Court of the United States at October term 1897.

Besides, the facts of this case bring it within the rule laid down in Webre vs. Lutcher & Moore, 45 An. 574, as to unknown owners, relative to whom notice by publication is sufficient, and the tax collector's deed to the State declares that the notice required in case of unknown ownres was given.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that the demand of plaintiff and intervenors be rejected at their costs in both courts.

MR. JUSTICE BREAUX: I concur in the decree.

MR. JUSTICE MILLER: I concur in the decree.

No. 12,584.

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STATE OF LOUISIANA EX REL. J. M. COURREGE VS. JOHN FISHER, MAYOR OF THE TOWN OF NEW IBERIA.

Application for writs of *certiorari* and prohibition. Relief asked from sentence of fine and imprisonment by mayor's court, based upon allegations of illegality and nullity in reference to both form and matter.

Regularity and legality of trial reviewed; writs denied in part and granted in part.

Course of procedure before mayor's court is summary. Proceedings for the punishment of offenders against municipal ordinances enacted in virtue of implied or incidental powers of corporations, or in the exercise of legitimate police authority for the preservation of peace, good order, etc., and which relate to minor acts and matters, are not usually or properly regarded as criminal.

The object and purpose of the amendment of the town charter, authorizing the mayor to commit to prison any person refusing to pay a fine imposed for violation of a municipal ordinance, is to coerce the payment of the fine, and not to inflict double punishment.

APPLICATION for Writs of *Certiorari* and Prohibition.

L. O. Hacker, *Weeks & Weeks* and *Foster & Broussard* for Relator.

A. J. Cammack and *Walter J. Burke & Bro.* for Respondent.

Submitted on briefs September 6, 1897.

Opinion handed down January 10, 1898.

Decree amended as to costs and rehearing refused February 7, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The relator complains of an order for his incarceration in prison issued by the mayor of the town of New Iberia.

This order is based upon a trial and conviction had before the mayor's court for a violation of a municipal ordinance.

The ordinance in question is as follows:

"That it shall be unlawful for the owner, manager or clerk of any saloon or coffee-house within the limits of the town of New Iberia * * * to invite, admit or permit to remain therein any lewd woman or prostitute, for the purpose of drinking, carousing or any other lewd or immoral purpose, or any purpose whatever, and any proprietor of such place, or his clerk or agent, violating the foregoing provisions, shall be liable to a fine not exceeding twenty-five dollars, or imprisonment not to exceed five days, or both, at the discretion of the mayor."

The facts are that two lewd negro women at night entered the saloon in the rear of relator's store; one of them bought an intoxicating drink and divided it with her companion, both drinking the liquor in the saloon. A policeman of the town witnessed this violation of the ordinance and reported it to the mayor. The next morning the relator was summoned before the mayor's court to answer to the complaint. He was tried, found guilty and sentenced to pay a fine of twenty-five dollars.

After a short interval, the accused, having said nothing and intimated no purpose of paying the fine, was asked by the mayor what he intended doing about it. He replied that he would not pay the fine.

The mayor then ordered him committed to the town prison for ten days.

Thereupon the accused, finding he was about to be imprisoned, declared his willingness to pay the fine of twenty-five dollars "under protest." But the mayor declined to so receive it and directed the order of imprisonment to be carried into effect.

The relator then applied to this court for its remedial writs of *certiorari* and prohibition, praying that the validity of the proceedings of the mayor's court be inquired into and passed upon, and for judgment avoiding the same and releasing him from incarceration thereunder.

This prayer is based upon allegations of illegality and nullity in reference to both form and matter.

Summarized, certain of them are as follows:

1. Want of affidavit charging violation of the ordinance.

2. No warrant issued for his arrest.

3. No opportunity given to summon witnesses, nor to prepare his defence, nor to be heard through counsel.

The writs applied for can not be maintained on any of these grounds. Two of the propositions are erroneous in law; the third without foundation in fact.

The mayor's court had jurisdiction. The charter of the town shows his authority to impose the fine. There was an ordinance forbidding the act of which relator was guilty. There can be no question of the validity of this ordinance. It was within the police power of the town. There was warrant in the charter for it. A trial usual before mayor's courts was had. The result of that trial was the imposition of a fine authorized by the ordinance.

The course of procedure before a mayor's court is summary. Proceedings for the punishment of offenders against municipal ordinances enacted in virtue of implied or incidental powers of corporations, or in the exercise of legitimate police authority for the preservation of peace, good order, safety and health, and which relate to minor acts and matters, are not usually or properly regarded as criminal. A. and E. Ency. of Law, Vol. 24, 504; State vs. Gutierrez, 15 An. 192; Natal vs. Louisiana, 139 U. S. 621; Mayor and City Council vs. Meuer, 35 An. 1193.

In this view, it is not essential that an affidavit should precede an arrest for the violation of a municipal ordinance, or that a formal warrant for arrest should issue.

The purpose of both is to bring the party accused to the bar of the court to answer to the charge made.

In the instant case the accused appeared in response to the summons to do so and submitted to the trial. Thereafter it did not lie in his mouth to complain that his appearance there was not preceded by an affidavit and warrant. Bishop's Crim. Proc., Vol. 1, Sec. 235; State *ex rel.* Zuberbier vs. Judge, 33 An. 16.

It is not shown that the relator asked for time to summon witnesses and was refused it; nor to prepare for his defence and was denied it; nor to be heard by counsel and was forbidden it.

The fine imposed by the mayor was within the authority of the ordinance. He might have imprisoned him for five days without imposing the fine, or he might have inflicted both the fine and imprisonment. He imposed only the fine.

Thus far he was acting under the ordinance relating to lewd women hereinbefore quoted. But when the relator refused to pay the fine thus imposed, it is claimed on behalf of the mayor that he violated the sixteenth amendment of the town charter, and that, thereupon, arose the authority of the mayor, under the terms of that amendment, to deal further with him.

We quote as follows from the charter amendment aforesaid: "In all cases wherein the mayor shall, in the exercise of the powers herein granted him, and in accordance with the laws and ordinances of the corporation, impose any fine, penalty or forfeiture on any person for the breach thereof, and such person shall not comply with and perform the judgment imposing the same, he shall be committed to the town prison until discharged by law for a time not to exceed thirty days, for any one offence, the time to be determined by the mayor trying the offence."

Under the authority here conferred the mayor had the power to sentence the relator, for refusing to pay his fine, to prison for any number of days not exceeding thirty. He did sentence him to ten days. But immediately, in order to obviate the sentence of imprisonment, the relator offered to pay the fine.

This the mayor refused to receive and directed his imprisonment.

In this the mayor erred. The purpose and object of the sixteenth amendment to the town charter, heretofore quoted, is to coerce the payment of fines imposed and not to inflict double punishment. It follows that when relator offered to pay the fine it should have been received and the accused discharged.

To this extent he is entitled to relief at our hands.

It is, therefore, ordered and decreed that the sentence of twenty-five dollars fine, imposed upon relator by the respondent mayor for violation of the municipal ordinance relating to lewd women, be recognized as legal and valid, and in so far as this fine is concerned the peremptory writs applied for are refused, and it is ordered that relator stand committed under the judgment and sentence of imprisonment until the fine is paid.

It is further ordered and decreed that upon payment of the fine imposed relator be discharged from custody, and to this extent the alternative writs herein issued be made peremptory.

ON APPLICATION FOR REHEARING.

It is called to the attention of the court that the decree herein fails to direct upon whom the costs of this proceeding should fall.

Correcting this, it is now ordered that defendant pay the costs.

Rehearing refused.

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No. 12,622.

STATE OF LOUISIANA VS. MARIUS AUCOIN.

On an indictment against three the grand jury's action "not found" as to two and "a true bill" as to the other may be endorsed on the back of the bill, and neither that endorsement nor the title "The State vs. M. C. *et als*," placed on the back of the bill by the prosecuting officer when he preferred it, affords any cause of complaint to the accused.

APPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Dupré, J.*

M. J. Cunningham, Attorney General, and *Chas. W. Du Roy*, District Attorney, *ad hoc* (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

John N. Ogden for Defendant, Appellant.

Submitted on briefs December 18, 1897.

Opinion handed down January 24, 1898.

The opinion of the court was delivered by

MILLER, J. The accused appeals from the sentence of petty larceny.

The motion in arrest of judgment is on the ground that the indictment on which he was tried, preferred against him and two others, is endorsed, the action of the grand jury "not found" as to the two,

and "a true bill" as to the accused, and this is claimed to be a variance between the indictment and the finding, and hence there is no valid indictment.

It is argued that the failure to find a true bill, or "an *ignoramus*" can not be "blended in the same instrument," and is an irregularity fatal to the sentence. We believe it to be the common, if not the universal practice to exhibit the action of the grand jury by the endorsement of their foreman on the back of the bill. The endorsement has all the certainty of the finding or the failure to find stated in separate papers. In Blackstone the law is stated if on hearing the evidence the grand jury think the accusation groundless, they formerly endorsed *ignoramus*, but now they assert, as the commentator states, in better style "not found," and "not a true bill," is equivalent to "not found." 4th Blackstone, S., p. 306. As it is the province of the grand jury to determine whether the evidence submitted to them is sufficient to put the parties indicted on trial, the action of the jury "not found" as to two, and a true bill as to the defendant was properly endorsed on the bill.

It is urged that the title put by the prosecuting officer on the indictment, "The State vs. Marius Aucoin *et als.*," was an irregularity and misleading, and in this connection our attention is directed to the greater number of challenges to which the accused is entitled when tried jointly with others. We can perceive in this no cause for surprise to the accused, nor can we appreciate he could sustain any injury, unless injury is to be predicated on the theory it was his right to have the bill found as to all the parties indicted. When called on to plead that accused was fully apprised he alone was to stand his trial, and the law fixed the number of peremptory challenges. We think the motion in arrest was properly denied.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed.

No. 12,654.

SUCCESSION OF THOMAS J. LYONS.

Items of different accounts were taken to form a total in the final account.

They are not separate and distinct from the total acknowledged in the final account, and could not be allowed without charging the same item twice.

The last total was correct.

Succession of Lyons.

The husband or his heirs, who claim an amount, which went to the purchase of community property, must establish satisfactorily that the price was paid out by his separate fund.

An amount received by the husband, a few days prior to his death, not shown to have been retained (as charged) by the widow, was not deducted, as due by her, or by the community.

The claim had been rejected on opposition to a provisional account.

APPEAL from the Twelfth Judicial District Court for the Parish of Calcasieu. *Read, J.*

R. L. Belden for Succession and Mary Meyland, Plaintiffs, Appellees.

Pujo & Moss and *G. R. Fournet* for Opponents, Appellants.

Submitted on briefs December 16, 1897
Opinion handed down December 28, 1897.
Rehearing refused February 7, 1898.

The opinion of the court was delivered by

BREAUX, J. This was an action brought by the asserted purchaser, Mary Newland, of rights and claims.

The vendor of these rights and claims was Mrs. Adela Lyons, widow of Thos. J. Lyons. It was alleged that prior to the sale she, the executrix, Adela Lyons, had presented a final account of administration of the succession of Thos. J. Lyons, of which she was the executrix. The purchasers, opponents here, asked to have it homologated.

We find as a fact, that inventory was made in 1885, and the property was appraised at six thousand two hundred and thirty-eight dollars and six cents, and that at the sale this property brought four thousand one hundred and seventy-seven dollars and fifty-five cents.

In 1896, the forced heir, Mrs. Tabitha Lyons, filed a petition for the removal of the executrix, which was granted, the executrix was destituted from her office, and ordered to deliver the property to the petitioner.

The executrix filed several accounts during her administration and one after she had been ousted.

In the judgment dismissing her from office, the opposition to the provisional tableau and account of administration filed August 30, 1886, is sustained to some extent.

In 1890, Mrs. Tabitha Lyons, alleging that the executrix, Mrs. Adela Lyons, had failed to deliver the property as directed in the judgment destituting her; and had failed to file an account, moved the court to compel her to file a full and complete account of her administration. In compliance with the court's order she filed a final account and tableau of administration.

This account, Mary Newland, owner of all the rights and claims of Adela Lyons, desired to have homologated.

The legal heir, Mrs. Tabitha Lyons, opposed its homologation on the ground that there was no community or no gains during the second marriage of the late Thos. J. Lyons; that the executor should have been charged on the account with an item of one thousand eight hundred and twenty-five dollars, for which she was responsible, and that the petitioner held from the forced heir under a simulated title and had no standing in court.

A judgment was rendered in favor of Mary Newland, vendee of Adela Lyons. From the judgment the heirs of Tabitha Lyons, opponents, have appealed.

The appellants in the brief restated the account and claimed that she, the destituted executrix, had in her possession and retained as owner, as appears from the different provisional account, filed prior to the final account, a large amount that should be added to the amount for which judgment has been rendered, from which opponents appeal. This sum, the appellants assert, is fixed by the judicial admission of the executrix in her account and they claim that her liability for it is beyond question.

The position is correct if the accounts are taken and passed upon each, without reference to other accounts.

It was, manifestly, not the intention of the accountant to thus present them to the court. In the final account we find the first item made up of money collected from various claims, which had been previously carried in provisional accounts. This first item was one of the items which entered into the total active of the succession. The amounts admitted by the executrix were added to amounts afterward admitted as due by her in the final account.

Succession of Lyons.

If we were to add the.....$807 08
152 92
846 00
$1806 00

to the amount of the judgment as due by the executrix, the indebtedness would find no support by reference to the total of claims due the succession, as set forth in the inventory, nor by reference to the testimony of any of the witnesses.

In fine as we take the different accounts the sum of two thousand three hundred and twenty-four dollars and seventy-one cents, the first item before mentioned, includes the amount just stated.

In the second place, appellants argue, that the estate of the late Thomas J. Lyons should be distributed in the proportion of one-third to the surviving widow or her vendee, and the remaining two-thirds to Tabitha Lyons, the forced heir, because the deceased brought all the property, and there was really no community.

The principle is well settled, that conclusive evidence of the receipt by the husband of amounts during the existence of the community in payment of his individual property will not of itself be sufficient to hold the community indebted for the amount where there is no evidence that it was used in buying property which fell to the community.

We desire to adhere to a principle well settled in our jurisprudence. The property in the community at its dissolution presumably is owned by the community. It is equally as well settled that the husband or his heirs who seeks an amount furnished by him and which he claims to have been used in the purchase of community property must prove that the price was paid out of his separate funds. The evidence to sustain the claim for the price handed by the husband, out of his separate fund, to his vendor, must be as ample and satisfactory as if a third person were concerned.

With reference to a fund received during the community, claimed as having been used by the community, this court, in Succession of Forman, 38 An. 702, said: "But neither of these witnesses disclosed, if they knew, what disposition was made of any part of this property."

The case here is similar; the witnesses did not disclose what disposition was made of the funds.

Again, like "any other debt, its origin, character and amount must be shown." Denègre vs. Denègre, 30 An. 277.

The question was passed upon in a number of cases, notably, Belair vs. Dominguez, 26 An. 605; Succession of Glover, 2 An. 4; Succession of Viaud, 11 An. 297; Courtney vs. Andrews, 6 R. 508; Stewart vs. Pickard, 10 R. 18; Succession of Daigle, 15 An. 587.

Here the positions taken at different times are conflicting. The evidence shows that (ten years after a provisional account had been approved by a judgment rendered in due form) the surviving heir, Mrs. Tabitha Lyons, seeks to recover an amount she claims was used in buying property for the community.

While in her opposition to the provisional account filed years ago, which was rejected, she claimed a comparatively large amount as having been improperly retained by the surviving widow.

In other words, the heir claimed in opposition to her step-mother's account as executrix an amount of paraphernal funds as having been secretly appropriated by the widow—her step-mother—immediately after her husband's death—that is, the death of Thos. J. Lyons, father of opponents; subsequently, in another opposition, she claimed the same amount of paraphernal funds as having been used by her father in buying property for the community.

As relates to the ability of Adela Lyons, widow, to buy property since the community was dissolved, or during the existence of the community, there is no evidence before the court, save that one of the witnesses testified that she prior to her marriage always said that she was destitute.

It remains as a fact that there is not sufficient evidence to show that the fund of the separate estate was used in buying the property during the existence of the community.

The legal representatives of the children of the forced heir, the mother being dead, as before stated, claim, in addition, that Mrs. Lyons, widow, owes to the succession the sum of one thousand eight hundred and twenty-five dollars, which had been paid in cash to the deceased, while he was sick, confined to his bed, a few days prior to his death.

There is no evidence that the widow or the community ever received this amount. We would not be justified in inferring that one or the other must have received it, because it was handed by the debtor of Thomas J. Lyons to him, Lyons, a few days before he died. He may have used it as a separate fund. At any rate we will not

assume that it was wrongfully retained by widow and concealed from the heir, as alleged by her.

It is therefore ordered and adjudged that the judgment appealed from is affirmed.

No. 12,702.

STATE EX REL. ATKINS & WIDEMAN, IN LIQUIDATION, VS. ALLEN BARKSDALE, JUDGE, ET ALS.

This court on application for a writ of *certiorari* does not try the merits, but confines itself to inquiring whether or not the inferior tribunal kept within its jurisdiction and proceeded regularly.

In the order the respondent court returns the exceptions and the answers were filed in the justice of the peace court; the respondent court properly held that the relator had waived jurisdiction *ratione personæ* in the magistrate's court Matters not regularly appearing of record were not before the court, and could not therefore traverse the return made.

ON Application for Writs of *Certiorari* and Prohibition.

J. C. Theus for Relators.

Respondent Judge *pro se*.

B. A. Rennolds for the Other Respondents.

Submitted on briefs January 3, 1898.

Opinion handed down January 10, 1898.

ON APPLICATION FOR WRITS OF CERTIORARI AND PROHIBITION.

The opinion of the court was delivered by

BREAUX, J. This was an application under the supervisory jurisdiction of this court to have a judgment declared null; it was rendered by the respondent judge of the District Court for Claiborne parish, and it affirmed a judgment of the justice court of ward six, parish of Claiborne.

The complaint was that the relator firm, was a resident of the parish of Bienville, and not a resident of the parish of Claiborne, in which the magistrate rendered the judgment relator seeks to assail.

The facts are that the relator interposed several exceptions as defendant before the magistrate's court.

They were referred to be tried with the merits. There was no objection urged to the reference as made. An answer was filed by the defendant firm. The case was heard upon the merits and was decided against the defendant firm, who is the relator here. The defendant firm took an appeal to the District Court. There the case was tried upon the merits and a judgment affirming the judgment of the justice court was rendered as before stated.

The respondent judge represents, in his return, that he was vested with jurisdiction, and that he correctly passed upon the questions presented on relator's appeal to his court; that he was convinced that the justice of the peace had jurisdiction *ratione personæ*, and that if he had no jurisdiction originally, that relator had waived the want of jurisdiction *ratione personæ*.

Before the court of the respondent judge it, as relates to a waiver of jurisdiction, was made to appear that the relator, defendant in suit below, first filed exceptions to plaintiff's action, and that subsequently he (relator) filed a plea to the court's jurisdiction *ration personæ*.

If we were to assume that the magistrate's court originally had no jurisdiction, the defence on the exception was entirely personal. The question, arising in matter of waiver, was one exclusively of fact, and was one over which the respondent had jurisdiction. The defendant (relator here) could stand in judgment, and the court's decision and the court's return shows that it did appear that it had waived the exception it now invokes and stood in judgment—*i. e.*, prior to its plea of want of jurisdiction *ratione personæ* an exception had been separately filed in effect waiving jurisdiction. If there was error it was one of judgment of respondent regarding the facts. In our view the decision can not be controlled under the supervisory power of this court. Our examination must be confined to the validity of the proceedings, and it can not consistently with prior decisions of this court be extended to a review of the facts on the merits of a question.

The respondent judge has decided that the exception waiving the

plea of jurisdiction was filed prior to the exception to the jurisdiction.

In that case there was a waiver. Stevenson vs. Whitney, Tax Collector, 33 An. 655; Phipps vs. Snodgrass, 31 An. 88; Marqueze & Co. vs. LeBlanc, 29 An. 194.

The judge had the legal power to decide the question of priority in filing pleas and he has decided it without disregarding or overlooking the forms pointed out by law. The record before us shows no incorrectness in the proceedings.

It has been repeatedly held by this court that the writ of *certiorari* is limited to cases in which the proceedings are null. It is also well settled that one who gave sanction to proceedings can not have them avoided through the writ of *certiorari*.

The relator sought, by offering here for the first time, an affidavit of the justice of the peace of facts and proceedings (of date subsequent to the judgment complained of), to contradict the return of the respondent. The affidavit was not a part of the respondent's return, and was made *ex parte* by the magistrate, who is not at all a party to these proceedings. For these reasons, it was not considered by us as forming part of these proceedings.

A legal discretion exercised in a matter within the court's jurisdiction offers no ground for *certiorari* or prohibition. City of Baton Rouge vs. Crimonini, 35 An. 366.

Moreover, it does not appear affirmatively that the respondent committed an error. The burden of proof was with relator. The presumption *omnia rite acta* applies. Stevenson vs. Whitney, Tax Collector, 33 An. 658.

The facts are not before the court showing that the documents were filed differently from what is stated by the District Judge.

It is therefore ordered and adjudged that the rule *nisi* be discharged, and the application for writs of *certiorari* and prohibition refused.

No. 12,671.

JAMES T. CHIVERS VS. ERNEST ROGER.

The right of action which survives in favor of certain designated persons as beneficiaries, for the recovery of damages for personal injuries to a deceased, perishes with the deceased claimant, notwithstanding suit has been filed and put at issue by an answer.

50	57
50	479
50	57
105	80
50	57
109	1066
50	57
117	846
117	985
117	987

Chivers vs. Roger.

An action for damages for personal injuries arising *ex delicto* does not survive the death of the claimant, in case in results from the injury inflicted.

The general rule is, as established by the Civil Code, and Code of Practice, that an action does not abate by the death of the plaintiff after answer filed; but the right of action for the recovery of damages to an injured person who dies from the effect of the injuries received survives only upon the express terms of the act of 1894, and in favor of the beneficiaries therein designated, and its provisions must be construed strictly.

APPEAL from the Eighteenth Judicial District Court for the Parish of Lafourche. *Caillouet, J.*

Beattie & Beattie for Plaintiff, Appellant.

Clay Knobloch & Son for Defendant, Appellee.

Submitted on briefs December 28, 1897.
Opinion handed down January 24, 1898.

The opinion of the court was delivered by

WATKINS, J. This is an action for the recovery of twenty-five thousand dollars damages for the death of the plaintiff's son, which was caused by the alleged negligence and want of care on the part of the defendant.

It is alleged that the deceased was employed in the sugar factory of the defendant as a sugar maker, "and was literally cooked to death in a vat of boiling water," and that "having suffered untold pain and anguish," he died soon after the accident happened.

The cause was tried and submitted on the 23d of March, 1896, but on account of the near approach of the adjournment of the court, an agreement of parties was reached, that the decision of the court might be rendered at the next term of the court; but that, at that time, no judgment was rendered.

That on the 18th of September, 1896, the plaintiff, James T. Chivers, died, and on the 30th of that month his heirs were duly cited and made parties plaintiff to the suit.

That the judge *a quo* refused in this attitude of the case to pass upon the merits, but dismissed the suit on the ground that the plain-

tiff having died, his right of action for the damages claimed did not survive him, and continue in favor of his heirs.

It is from the judgment of dismissal that the heirs of the deceased plaintiff prosecute this appeal.

The contention of the plaintiff's counsel is, that the law gave to the plaintiff, James T. Chivers, the right to institute this suit against the defendant for the recovery of the damages his son had suffered at his hands, resulting in his death; and having instituted the suit, and obtained a contradictory trial thereof in the District Court, prior to his death—notwithstanding no judgment had been pronounced upon the issue joined—his *right of action* survived him and became vested in his legal heirs as an inheritance, entitling them to prosecute the suit to final judgment. Revised Civil Code, 2315, 944, 945.

Per contra, the contention of the defendant's counsel is, that the precept of the civil law, and that of the common law as well, is, that an action which is merely personal, one arising *ex delicto*, perishes with the person who is entitled to it.

Actio personalis moritur cum persona. 4 Institutes, 315; 3 Blackstone Com. 302.

That, by the positive terms of our law, this right of action survives in case of the death of the claimant, in favor of the minor children, or widow of the deceased; or in default of the same, in favor of the surviving father or mother. R. C. C. 2315.

That in the event of neither the beneficiaries named having survived the deceased claimant, the right of action abates, and ceases altogether.

The purport of this contention is, that if the heirs of the parent, James T. Chivers, are recognized as having acquired a right of action by inheritance from him at his death, it would be in effect, to enlarge the provisions of Revised Civil Code, 2315, and the statute of 1884 amending it, by conferring same upon a class of persons that is not included in either.

Our learned brother of the District Court prepared an interesting and instructive opinion, in the course of which he says:

"It seems clear to my mind, that if the plaintiff had died before bringing this suit the right of action would have expired with him.

"His heirs could not have brought suit by right of representation, for they are not embodied in the statute," and it must be construed strictly. Walton vs. Booth, 34 An. 914.

That "the right was purely personal and not transmissible with the succession of the (plaintiff), but died with him."

Again:

"If this language"—that of the Code and statute quoted—"means anything, it means that the right of action shall exist for the space of one year after the death of the party injured in favor of, first, the minor children and widow; and of, second, the father and mother, or either of them. The right is to exist in favor of all, in the order named, during one year; so that, if the minor children and the widow of the deceased should die within the year, and before having reached their right to possession, the right of action would descend, not to either heirs or legal representatives, but to the father and mother, or either of them, as the case may be. To hold otherwise would be to make persons not mentioned in the law the beneficiaries, to the exclusion of the beneficiaries expressly provided for in the law.

"Such a conclusion has no foundation in law, or in reason.

"It seems clear, therefore, that the right conferred is a purely personal one, which, if not reduced to possession, expires with the beneficiary."

Our predecessors examined and construed the provisions of Art. 2294 of the Civil Code—Art. 2315 of the Revised Civil Code—to be inapplicable to a case in which death had resulted from personal injuries, and in the course of this opinion the court said:

"The plaintiff and her children, in this case, do not complain of wrongs to their own persons, and it can not be pretended that they had any right of property in their husband or father.

"It appears to us, therefore, that without a special statute authorizing such actions, they can not be maintained." Hubgh vs. Railroad Company, 6 An. 495.

The decision in that case was affirmed in Herman vs. Railroad Co., 11 An. 5, and in Earhart vs. Railroad Co., 17 An. 245.

It is well to recur to the provisions of the article of the Code, which are as follows, viz.:

"Every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them; and in default of these, in favor of the surviving father and mother, or either of

them, for the space of one year from the death." R. C. C. 2315 (2294).

It thus appears that "the *right of this action* shall survive," *first*, in favor of the minor children of the deceased; *second*, in favor of his widow, and *third*, in favor of the father and mother of the deceased, or either of them. Each of the persons acquires "the right of this action" in the order named; and, obviously, the acquisition by one of them of that right of action, would have the legal effect of excluding those who follow him.

The statute referred to enlarged the remedy which is afforded by the aforesaid article of the Code, and supplemented it in the following terms, viz.:

"The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband, or wife, as the case may be." Act 71 of 1884.

This court had occasion to construe and apply the provisions of hat statute in a recent case. Walton vs. Booth, 34 An. 913.

The case as stated in that opinion, was that of the father and mother who sought to recover damages of an apothecary who sold their daughter a dose of deadly poison by mistake, through the administration of which she died.

In that case an exception of no cause of action was taken; but same was by the court disallowed, on the ground that the right of action which the statute conferred was in favor of the father and mother of the deceased, and not of her husband, as contended.

On this question the court said:

"The right of action which plaintiff's daughter would have been entitled to exercise, if she had not died, did not survive in favor of her husband, but in favor of her father and mother.

"Such a right accrued only in favor of the minor issue, the widow, the father and the mother, as regulated by the Code. Those not included are excluded.

* * * * * * *

"It took special legislation to bestow (the right of action) upon certain named beneficiaries, and that legislation can not be liberally interpreted."

It is noticeable that the act of 1884 merely supplied a remedy which the court held, in Hubgh vs. Railroad Company, did not exist under the Code, that is to claim damages in a case of the death of

the injured party, by means of the accident, but the Legislature carefully confined the transmission of the right of action therefor to "the survivors above mentioned"—that is to say, those who are mentioned in the Code. R. C. C. 2315.

The result of this investigation is, that *the right of action* for damages for a personal injury, whether the injured person died from the effect thereof, or subsequently, from some other cause, is just the same, under the legislative amendment of 1884, as it existed under the Code previously.

We are thus brought to the discussion of the principal question, whether or not the father's right of action perished at his death, or survived his demise and vested in his legal heirs as part of their inheritance.

It is not doubted—on the contrary conceded—that had the father died without instituting an action for the recovery of the damages, the right of action would have lapsed altogether; but it is the contention of plaintiff's counsel that a different rule obtains in a case like the instant one—suit having been filed, put at issue, and actually tried, during the lifetime of the plaintiff.

They cite and rely on the provisions of the Code of Practice, which are as follows, viz.:

"Actions do not abate by the death of one of the parties after answer filed." Article 21, 361.

The provisions of the Revised Civil Code are to a like effect, for they declare, viz.:

"The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is, that *the heir transmits the succession to his own heirs*," etc. Article 944 (our italics). "The second effect of this right is to authorize the heir to institute all actions, even possessory ones, which the deceased had a right to institute, *and to prosecute those already commenced*," etc. Article 945 (our italics).

But the contention on the other side is, that conceding the full force of those articles of the codes, and the difficulty suggested is not overcome; because, under the well settled jurisprudence of this court, and the cited provisions of the Civil Code and its amendment, an action for the recovery of damages for personal injuries sustained is a purely *personal* one, and does not survive the death of the beneficiary. That consequently no *right of action for damages for personal*

injuries, survives the death of a beneficiary, notwithstanding the Code of Practice states the general rule to be that "actions do not abate by the death of one of the parties, after answer filed."

To meet this proposition it is submitted on the other side that once a suit is filed and put at issue by an answer, the *action* survives and passes at the death of the *actor* to his beneficiary heirs.

In solving this question we must keep in mind the underlying and cardinal distinction which exists between the Civil Code and Code of Practice, the former being the legislative embodiment of the civil law and the latter being a codification of the rules of practice.

In Beard vs. Russ, 34 An. 315, this court made this distinction between the provisions of the two codes.

It is true that our predecessors held in Vincent vs. Sharp, 9 An. 463, that a personal action for damages resulting from an assault and battery does not expire with the person who instituted it.

But that case was tried and decided in the District Court and a verdict of the jury rendered in favor of the plaintiffs, and from that judgment an appeal has been prosecuted. The plaintiff and appellee having died during the pendency of the appeal, counsel for the defendant and appellant insisted that the heirs of the deceased had no standing in court to prosecute the appeal, because the right of action lapsed at the death of the plaintiff and appellee.

On casual inspection that decision would seem to favor the plaintiff's theory, but on reflection it does not.

That case was circumstanced differently from the instant one, in that it had ceased to be an action and had become merged into a judgment, and this court has decided that an appeal was not an action.

In Beard vs. Russ, *supra*, our predecessors said that "it is clear that an *appeal* is a mere incident to an *action*, and not at all the same thing. The judgment is the result or the consequence of the *action*, and the appeal is the mode of seeking to have the judgment of the inferior court corrected by the appellate tribunal."

A judgment is the property of him in whose favor it is rendered, therefore it may well be that a judgment would pass, at the death of one in whose favor it is rendered, to his heirs when an *action pending* would not, because the right of action had lapsed on account of his demise.

But there is a marked distinction between the Vincent case and the instant one, in that the plaintiff in that case was himself the

party injured, and instituted the suit for damages which he had suffered and recovered a judgment, and afterward died pending an appeal. On this statement, his heirs came within the plain terms of the Code.

The Code provides that the right of this action for personal injuries survives the death of the person injured, in favor of certain designated individuals, as beneficiaries in the order named; and in default of one or more of them, by death or otherwise, the next one in order acquires that right of action, in his or her favor.

If, then, one of the beneficiaries first enumerated should institute a suit and cause it to be put at issue, and thereafter die, and his beneficiary heirs should, on that account, inherit the pending action, the result would necessarily be to confer the benefit of the statute on persons not contemplated therein; and defeat the claim of the one who would otherwise have succeeded the deceased thereto.

The Supreme Court has furnished the true solution of this proposition in giving an interpretation to a statute of West Virginia quite similar in terms to that of our Code of Practice, Art. 21, in the following extract, viz.:

"The reasonable inference is, that the clause relied on, like the rest of the chapter, is intended to prescribe the mode of procedure in actions, *the cause of which survives*, either at common law, or by virtue of other chapters of the Code; and that its whole effect is to avoid the necessity of bringing a new action *when the right of action survives*, and not to give a new right of action which did not exist before." (Italics are ours.)

Gerling, Administrator of Martin, vs. Railroad Company, 151 U. S. 673. There is a line of decisions by this court upon a similar question which bears a strong analogy to the instant case; we refer to the cases in which it has been held that if the surviving widow, left in necessitous circumstances, dies without having *actually received* the sum of one thousand dollars, which the law accords her, same does not pass as an inheritance to her legal heirs at her death; because, say the court, "the right of the widow is personal and does not constitute a part of her succession." Succession of Durkin, 30 An. 669; Succession of Robertson, 28 An. 832; Succession of Tugwell, 43 An. 879: Succession of Justus, 44 An. 721.

True those decisions do not proceed upon the theory that the right of action of the widow is based upon a tort, or is one which arises

ex delicto, but on the theory that it arises upon a pure gratuity of the statute, which authorizes her to *demand and receive* that sum out of her husband's succession in preference to his creditors. R. C. C. 3252.

Being a provision of law in derogation of common right, same has always been strictly construed.

In the Tugwell case we said:

"It is a right which must be asserted and reduced to possession; be demanded and received before it is vested in the party.

A judgment obtained by the widow for the amount is not any more heritable than the claim itself prior to its possession. The law mentions the widow and the minors as the beneficiaries. The widow having died before it was bestowed upon her—before it was severed from the estate, and before possession—the major heirs can not recover."

That doctrine goes further than the exigencies of this case require that we should go; because the action of the deceased claimant had not been merged into a judgment. Nor need we hold that the two causes of action are similar; though they logically lead to the conclusion that the death of the claimant resulting during the pendency of the suit, notwithstanding an answer has been filed, the right of action perishes *eo instanti*, and the action ceases to exist.

But this doctrine is strictly confined, in the present case, to the beneficiaries' right of action for the recovery of the damages which the predeceased injured person suffered, and which occasioned his death; and does not extend to a case in which a person has sustained personal injuries and subsequently dies from some other cause.

There is undoubtedly strong argument in favor of the opposite view, but on mature reflection our deliberate conviction leads us to hold that the action has abated because the right of action perished with the death of the beneficiary, this opinion being more in consonance with the jurisprudence of this court.

Judgment affirmed.

DISSENTING OPINION.

BLANCHARD, J. The abstract *right* of action was not transmissible to the legal heirs of the plaintiff.

If he had not prior to his death instituted the suit, they could not do so after his death.

But that is not this case.

The father of the dead son had exercised his *right of* action.

He brought the suit claiming damages. It was tried, submitted and taken under advisement. Before the judge had prepared his opinion and rendered judgment the father and plaintiff died.

His right *in the action already pending* passed to his heirs.

Actions do not abate by the death of one of the parties after answer filed. C. P. 21, 361; C. C. 942, 943, 944, 945.

The opinion of the majority of the court rejects the distinction that should be drawn between the attempted exercise of a mere personal right of action, right to originate proceedings, right to institute suit, and the transmission to legal heirs of the *right of property* in an action already instituted, in proceedings already commenced.

The one is a right *in posse*, not transmissible; the other a right *in esse*, transmissible.

The right of action had accrued and been exercised before the death of the father. The mere right of action had, therefore, been merged, prior to his death, *into the action itself*.

What descended to the heirs was not his right of action, but *the action*.

It was a property right and inheritable.

I respectfully dissent.

No. 12,567.

SUCCESSION OF ESTEVE MARQUEZE.

1. The statement in the certificate to nuncupative will by public act, "Before me, C. R., a notary public for the parish of Orleans and city of New Orleans," without "duly commissioned or sworn," or other addition, is sufficient to express the official character of the notary.
2. The law does not exact the use of the very words of the Code by the notary in the express mention required of him that the requisites of the will in nuncupative form by public act have been fulfilled. Hence, to describe the witnesses as all of this "city," following "C. R., a notary public for the city of New Orleans," is equivalent to stating the witnesses to be residents of New Orleans, and meets the requirements of the statement in the certificate of their residence. Civil Code, Art. 1578; C. N., Art. 978; 16 La. 81; 40 An. 597; 2 Mourlon, p. 400; 2 Baudry-Lacantinerie, p. 878; 16 Dalloz Repertoire, p. 818, par. 2835, p. 916, par. 3144; 3 Troplong, p. 118.
3. The law does not require the mention in the will that the witnesses are not disqualified. C. C., Art. 1591.

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APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Succession of Marqueze.

Theo. Cotonio for Plaintiffs and Intervenors, Appellants.

Charles J. Théard for Defendants, Appellees.

Argued and submitted November 18, 1897.
Opinion handed down November 29, 1897.
Rehearing refused February 7, 1898.

The opinion of the court was delivered by

MILLER, J. The plaintiffs, the legal heirs of the deceased, Esteve Marqueze, are appellants from the judgment dismissing their suit to annul the last will of the deceased in nuncupative form by public act. The grounds on which plaintiffs rely to maintain their suit are that the certificate does not show the capacity of the notary by whom it is stated the will was received, nor state the residence or the qualifications of the witnesses. The certificate of the notary in so far as it is material to this discussion is: "Before me, Charles Rolle, a notary for the parish of Orleans and city of New Orleans, therein residing, and in the presence of J. F. H. J. C. and M. H., all of this city, witnesses hereto required."

The deficiency suggested in the statement of the capacity of the notary is, that it does not appear from the certificate he was commissioned by the executive and had taken the oath required of public officers. The statement he is a notary public for the parish and city fairly implies he was appointed and qualified. There is no form of expressing his capacity exacted by law. It suffices that the certificate in the usual significance affirms the capacity of the notary. "Faut il sous peine de nullite que le notaire enonce sa qualite. Il suffit que le testament renferme des expressions equivalents, car la loi n'a pas prescrit cette enonciation expresse sous peine de nullitie." Boileleux, Chapter 5, p. 3.

The Code, in prescribing the requisites of the nuncupative will by public act, enumerates besides that it shall be received by the notary, the dictation by the testator, the writing by the notary as it is dictated, the reading to the testator in the presence of the witnesses, the witnesses are to be residents of the place where the will has been executed, and express mention is to be made of the whole in the

certificate of the notary. C. C. 1578. Under this article it is settled that the residence of the witnesses must appear in the notary's certificate. LeBlanc vs. Barass Heirs, 16 La. 80; Weick vs. Henne *et als.*, 41 An. 1153; Succession of Vollmer, 40 An. 597. But the question is whether the certificate does not contain the equivalent of the statement of the residence of the witnesses. They are designated as "of this city," referring to "for the parish of Orleans and city of New Orleans," used in designating the notary. The French commentators dealing with Art. 973 of the Napoleon Code, corresponding with Art. 1578 of the Revised Civil Code, have discarded the use of the very words of the Code as necessary to the statement in the notary's certificate of compliance with the requisites of the will by authentic act. The lawmaker in other words has exacted no acramental words for the notary, but is satisfied if equivalent language is employed. While exacting express mention of compliance with the formalities requisite for wills in this form, the commentators all concur in the sufficiency of words equivalent to those in the Code. Thus: "Du reste il n'y a pas ici d'expressions sacramentelles; tout ce qui exige la loi c'est que la mention soit concue de telle maniere qu'ell contienne une affirmation non equivoque de l'observation de chacune des formalites. 2 Mourlin, 400; 2 Baudry-Lacantinerie, 378; 16 Dalloz Repertoire, 818, par. 2335. The words "of the city of New Orleans," used in this certificate to designate the residence of the witnesses, in natural significance conveys residence. It would be straining to suppose anything else was intended. This is the view too, of the French commentators. Thus: Ainsi jugé; qu'il suffit de ces mots tels et tels endroit, qu'il n'est pas necessaire d'employer les mots demurant à . . . . ; Que pareillment une cour d'appel a pu declarer, sans violer aucune loi, que l'enonciation suivante fait en presence de MM. tous quatre de Sauveterre contient d'apres l'etat et la qualite des temoins, une indication suffisante de leurs demeures. 16 Dalloz Rep. p. 916, par. 3144. See also 3 Troplong p. 118. In the cases cited on behalf of the plaintiff the Court held that the expression "competent witnesses" announced the notary's conclusion and would not suffice, and that the certificate was insufficient, and neither would "neighborhood" be a sufficient designation of residence. Here, however, the certificate uses the word equivalent to residence. We conclude, therefore, the certificate in this respect meets the legal requirement.

The law excludes as witnesses to wills women, children under sixteen, the deaf, dumb, blind, the insane, and persons disqualified by crime for civil functions. C. C., Art. 1591. It can hardly be deemed reasonable to hold the law required the certificate to negative these disqualifications. Our jurisprudence, while exacting the mention of residence, has never sanctioned the necessity for the affirmance in the certificate that the witnesses were not disqualified. Nor do the French commentators, searching as they are in the examination of this subject, intimate any such essential in the certificate.

It is therefore ordered, adjudged and decreed that the judgment, of the lower court be affirmed with costs.

No. 12,668.

GEORGE INGRAM ET AL. VS. HYPOLITE LAROUSSINI.

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A parish judge, in writing at the foot of the petition of a mother praying appointment as tutrix of her minor children the words: "Let the prayer of the petitioner be granted and let her be qualified as natural tutrix of the minors," follows the form usually employed by the probate court in granting orders for the appointment of tutors of minors.

Article 321 of the Civil Code, which declares: "In the several cases in which the tutor is not required by law to give bond, it shall be the duty of the clerk of the District Court of the parish in which the appointment (of tutor) is made, to furnish a certificate of the amount of the minor's property, according to the inventory on file in his office. This certificate must be recorded in the mortgage book of the parish in which the tutor resides and a certificate to that effect, signed by the recorder of mortgages, must be presented to the judge before he can make the appointment or authorize letters of tutorship to be issued," is intended as a protection to the interest of minors, and not an instrumentality by means of which they can enrich themselves at the expense of the creditors of their father, under whom they claim as heirs.

Where the succession of the father has been settled throughout, with the mother of the minor children of the deceased acting as its legal representative in her capacity as natural tutrix, and where, in the course of its administration, property has been sold on the application of such representative, and upon her truthful allegation that the succession was insolvent and that the property was specially mortgaged for an amount many times more than its value, and where such property has been adjudicated to parties holding promissory notes evidencing the entire purchase price of the property sold, who credit the succession with the amount of the bid, such sale will successfully resist an attack made upon it by the children of the deceased, claiming under him as his heirs based simply on the ground that their mother was appointed tutrix and had received letters as such in violation of Art. 321 of the Civil Code.

Ingram et al. vs. Laroussini.

Where the probate court has granted an order for the sale of "all the property of a succession," a commission to sell, directed to the sheriff, which follows the wording of the order, is not null because it fails to give specific descriptions of the properties to be sold under the order in the body of the commission. The sheriff is authorized to have recourse for descriptions to certified extracts from the inventory of the succession on file in the court.

A sale is not attackable because the sheriff, in his *proces verbal* of a particular sale, annexes thereto a certified extract of the inventory containing the description of a particular piece of property and a printed copy of the advertisement under which the sale was made, and after detailing the various steps in the execution of the commission of sale in his hands, refers to the annexed extracts from the inventory and the printed advertisement as being descriptive of the property sold and adjudicated.

APPEAL from the Sixteenth Judicial District Court for the Parish of St. Tammany. *Reid, J*

Clay Elliott for Plaintiffs, Appellants.

Saunders & Miller (*Walter H. Saunders* of Counsel) for Defendants, Appellees.

Argued and submitted December 28, 1897.
Opinion handed down January 24, 1898.

Defendant Laroussini is in possession as owner of certain property in the town of Covington which he acquired by purchase from the succession of Adam Thompson; Thompson himself having purchased the same at a succession sale made in the matter of the succession of George Ingram, on the prayer of the wife of said Ingram claiming to be the natural tutrix of the minor children issue of her marriage with said Ingram.

Plaintiffs as heirs of their father and mother bring this action against Laroussini and the succession of Adam Thompson, praying to be declared the owners of said property and put in possession thereof; to recover from the succession of Thompson the sum of twenty-eight hundred dollars, and from Laroussini, eight hundred dollars, for fruits and revenues of the property during the period of their respective possessions. Plaintiffs couple with their petitory action an attack upon the judicial sale by which Thompson claims to

have acquired ownership, and upon that of Laroussini from Thompson. They declare that the former sale was absolutely null and void to the knowledge both of Thompson and Laroussini, and that they were both possessors of the property in bad faith. The attack on the judicial sale on the Ingram succession is made on the ground that their mother was never appointed, nor confirmed as their natural tutrix, nor was she authorized to stand in judgment for them or the succession of George Ingram, and on the further ground that even upon the hypothesis that she was their tutrix the formalities of law required for the divestiture of their title had not been observed, and they are the owners of the property as if the proceedings on which defendants rely had never been taken.

They allege:

1. That no certificate of the amount of the minor's mortgage was recorded in the mortgage book of the parish; that no decree of the court had ever been rendered appointing or confirming their mother as their tutrix, nor authorizing letters of tutorship to issue to her. That she had no authority to petition the court for a sale of their property on the proceedings mentioned.

2. That she was incapable of being their tutrix and acting as such, as she never took the oath required by law.

3. That the parish judge had no power to order the sale mentioned without the advice of a family meeting upon a petition presented by a turix appointed, and qualified as the law required; that no such petition was presented and no advice of a family meeting was asked or obtained.

4. That the commission under which the sheriff acted in making the sale did not describe any real estate, and said property was not described in his return.

Laroussini called the succession of Thompson in warranty through a curator *ad hoc*. Both defendants pleaded the general issue, maintained the validity of the sale in the succession of Thompson, and that from the succession of Thompson to Laroussini, and their possession as being in good faith. They detailed minutely the circumstances under which the succession sale was made; the condition of Ingram's succession, the steps taken in the matter of the appointment of plaintiff's mother as their tutrix, and the various formalities which were observed in the matter of the settlement of the succession. They averred that the property in controversy was, at the

time of the succession sale, in a dilapidated condition, and that both Thompson and Laroussini had, while holding and possessing the same as owners, placed valuable and expensive improvements thereon, which had greatly enhanced its value; that they had also paid a large amount of taxes upon the property.

The right and interest of the plaintiffs to attack the sale was denied, as it was averred that the succession of Ingram at the time of his death was utterly insolvent, and the property in question was for many times its value encumbered with special mortgages, among which was a special mortgage for a large amount which was owned by Adam Thompson at the time of the sale mentioned. The right of the plaintiffs to institute the proceeding was also denied, as no offer or tender had been made to return to the parties the amount of moneys which had been used in the payment of the debts of their father and mother, and which had enured to their benefit, or to reinstate the succession of Thompson in its position as mortgage creditor. It was averred that plaintiffs' rights were merely residuary, and they could take nothing from the succession until after its debts had been paid. Both defendants urged and claimed that should the succession sale made in the succession of Ingram be set aside that the mortgage claim held by Adam Thompson against the property and against the succession of George Ingram, and the community between him and his wife, should revive and be reinstated with interest on the claim and the right to attorney's fees in case of suit.

Defendant Laroussini claimed to be entitled, under his purchase from the succession of Thompson, to be subrogated to all claims which the latter held against the succession of Ingram. He also claimed that the mother of the plaintiffs, after the sale of the property to Adam Thompson, made a formal deed of transfer of the property to the purchaser, and that being a widow in community, entitled to one-half of the community property, the effect of said act was under any and all contingencies to transfer her one-half of the said property to Thompson, and that both she and her heirs were and are estopped from questioning his title to that extent. He prayed that plaintiff's demand be wholly rejected, but should the court rescind the sale, that under no circumstances it be not rescinded for more than one undivided half thereof. That should it be rescinded in whole or in part there be judgment reviving and declaring exigible the claim which Adam Thompson held against the

succession of Ingram and the community of acquets and gains between himself and wife for fifteen hundred dollars, with eight per cent. per annum interest thereon, from March 6, 1875, till paid, five per cent. on the aggregate amount of said principal and interest as attorney's fees and all costs of suit, and that same be decreed to be secured by special mortgage and vendor's privilege on the property sued for; that the same be sold to pay said sums and the proceeds of said sale be applied to pay said sums by preference and priority over all debts due by said George Ingram or by his succession or heirs; that there be judgment in favor of the succession of Adam Thompson for the sum of two thousand dollars expended by him in repairs, improvements and taxes on said property, and that he be subrogated to said claim and judgment in favor of said Adam Thompson against George Ingram, his succession and heirs. That should he be evicted from the property or any part thereof, there be judgment in his favor and against the succession of Thompson, his widow and heirs for the sum of twenty-seven hundred and fifty dollars, the price paid by him to the succession of Thompson for said property, and for one hundred and fifty dollars attorney's fees, and the further sum of two thousand dollars expended by him on said property for improvements and taxes.

The curator *ad hoc* prayed for the rejection of plaintiff's demand and contingently (as did Laroussini) for the reinstatement, revival and enforcement of the mortgage and mortgage claim of Adam Thompson against the succession of George Ingram and his heirs, and against the said property. He prayed judgment contingently against the said succession and heirs for the sum of two thousand dollars, amount expended by Adam Thompson in necessary repairs and useful improvements and taxes upon the property, and that defendant, Laroussini, be subrogated to all said claims so far as was necessary to protect him. That the demand in warranty of Laroussini against the succession of Adam Thompson, his widow and heirs, except as to said subrogation, be rejected.

The District Court rendered judgment in favor of defendant, Laroussini, and against the plaintiffs, rejecting the demand of the latter and rejecting the demands of Laroussini against the heirs of Adam Thompson as warrantors.

Plaintiffs appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. We find in the record the following admissions of the parties:

Civil District Court, Parish of Orleans.

GEORGE INGRAM
vs.
H. LAROUSSINI ET AL.

In order to save expense the facts in this case are admitted as follows:

1. It is admitted by the defendant in this case that no certificate of the minor's mortgage as shown by the inventory in the succession of George Ingram was ever recorded in the mortgage books of St. Tammany parish, where the succession of George Ingram was opened, or elsewhere.

Defendant admits that the plaintiffs in this suit are the only heirs of George Ingram and Catherine A. Ingram, his wife, both of whom died at the dates stated in the petition herein; and the defendants further admit that the property herein sued for is worth three thousand dollars. The plaintiffs herein file a complete transcript of all the papers in the record of the proceedings in the succession of George Ingram and Catherine A. Ingram, his wife, as now found in the clerk's office of St. Tammany parish, Louisiana, and the defendant admits that the transcript filed is a full and complete transcript of all the papers now in said record.

It is admitted that the rental value of the property herein sued for has been on an average not less than one hundred and fifty dollars per year since the sale to Adam Thompson, on April 4, 1877.

FOR THE DEFENDANT.

It is admitted by the plaintiffs that George Ingram bought the property sued for on March 6, 1875, for the price of fifteen hundred dollars. That said purchase was entirely on credit, and that George Ingram gave to represent the said price of one thousand five hundred dollars, his two notes of seven hundred and fifty dollars, each bearing eight per cent. per annum interest from date until paid. That said act was recorded in the mortgage and conveyance book of the clerk's office of St. Tammany parish, as stated in the supplemental petition herein, and as shown in the copy of the act of sale which is filed in evidence.

2. It is admitted that as stated in the supplemental answer herein on June 19, 1876, Andrew Patton who was then clerk and representative of Adam Thompson, instituted executory proceedings on the above mentioned note for seven hundred and fifty dollars, maturing March 6, 1876, for the purpose of seizing and selling the property herein sued for, said proceedings being entitled Andrew Patton vs. The Succession of George Ingram, No. 1293 of the docket of the Sixth Judicial District Court for St. Tammany parish.

That an order of seizure and sale was signed in said proceedings, but that nothing ever was done thereon.

3. Parties hereto admit that the copy of the act of sale of date April 4, 1877, by Mrs. Catherine A. Ingram to Adam Thompson is a true and correct copy of said act and that the said act was registered in the conveyance records of St. Tammany parish, as stated in the supplemental answer herein.

4. It is admitted by counsel for plaintiffs that the succession of George Ingram was insolvent to a considerable extent.

5. It is admitted that Judge James Thompson, who was the attorney of the succession of George Ingram, would testify that the debts stated in the certificate of mortgages of date April 3, 1877 (found in the transcript of the record of the succession of George Ingram), were due as stated in the supplemental answer herein, and that no creditor of said succession ever objected to the administration of the said succession by Mrs. Catherine A. Ingram as tutrix.

6. It is admitted that H. Laroussini, the defendant herein, purchased the property herein sued for from the succession of Adam Thompson for two thousand seven hundred and fifty dollars, and on the terms stated in the supplemental answer herein.

7. It is admitted that the average taxes on the property sued for from 1877 to date have been twenty dollars and fifty cents per year, and that said taxes have been paid by said Adam Thompson and the said H. Laroussini.

8. It is admitted that the necessary lessor's repairs to preserve the property herein sued for, and to keep it in tenantable repair from 1877 to date, amount to at least six hundred dollars, and were expended by the said Adam Thompson and H. Laroussini.

9. It is admitted that the enhanced value of the property resulting from the additions and improvements placed thereon by Laroussini is at least three hundred dollars.

We agree to submit case on above statement of facts and the copies referred to in the pleadings on January 26, 1897.

(Signed) SAUNDERS & MILLER, *Attorneys for Defendant.*
CLAY ELLIOTT, *Attorney for Plaintiff.*
GEORGE E. WILLIAMS, *Curator ad hoc.*

On the 9th of December, 1875, the mother of the plaintiffs applied to the parish court of St. Tammany parish, praying that she be qualified as their natural tutrix. At the foot of her petition to that effect the parish judge wrote an order, of which the following extract covers all that is necessary to be copied for the purposes of this case:

"Let the prayer of the petitioner be granted, and let her be duly qualified as natural tutrix of the within-named minors, George and Margaret Ingram."

Appellant contends that this order is fatally defective as an order of appointment. It would have doubtless been better had the parish judge in direct terms declared that he then and there by his order appointed the petitioner (naming her) as natural tutrix of the minors mentioned, but the order is in the form ordinarily used in probate proceedings for the appointment of tutors, for the taking of inventories, for the holding of family meetings, and other similar acts. "Let an inventory be taken," "Let a family meeting be held as prayed for," is the usual language employed in acting upon applications of that character. Even in executory proceedings asking for a writ of seizure and sale to issue, it is customary for the order to read: "Let a writ of seizure and sale issue," instead of reading: "It is hereby ordered that a writ of seizure and sale issue."

We see no force in the objection raised. On the 10th of December the mother took an oath before the District Court in which she declared that "she solemnly swore that she would well and faithfully perform all the duties of natural tutrix of the minors George and Margaret Ingram, minor children of George Ingram, deceased, to the best of her (my) ability. So help her (me) God."

On the same day the District Clerk issued to her letters of tutorship in which it was declared that she had been appointed and qualified as natural tutrix; that she had complied with and fulfilled all the requirements of the law, and that all her acts as such were enti-

tled to full faith and credit. An inventory of the succession was made, but it was not recorded. In this inventory figured, fully described, the property which forms the object of the present controversy. On the 23d of February, 1877, the widow as tutrix of the minors filed a petition in which after alleging that the estate of her husband was very much in debt, that the assets were not sufficient to pay the same; that there were mortgages to an amount exceeding seven thousand dollars existing against the real estate, being many times more than the value thereof, and that the movables would not suffice to pay the privileges thereof, prayed for and obtained an order for the sale of all the property, real and personal, for cash. It is admitted that the recitals of the tutrix' petition were true. It appears that at that time the property in question was affected by a special mortgage and vendor's privilege securing the payment of two promissory notes representing the purchase price which the deceased had agreed to pay for the same; that Adam Thompson, through his clerk, had applied for and obtained an order for the seizure and sale of the property to satisfy his claim, he being the holder of either one or both of said notes.

This order was not followed up, but the widow and tutrix came forward and applied for and obtained the order referred to for a sale of all the property of the succession.

By so doing she waived the necessity of the various services upon her which the law would have called for under the executory proceedings had they been continued and carried on to completion. The sale took place under the *probate order with this order of seizure and sale still standing unrevoked though not yet executed.* Possibly Adam Thompson might have had legal ground of complaint of a sale of the property made through such an order, but we see no legal ground of complaint which these minors could urge on that account. Can it be said that the minors could receive, or did receive, any injury from the mere fact that the tutrix, instead of permitting the sale to be consummated as prayed for, with herself proceeded against as defendant in executory proceedings, should have herself, as tutrix, taken up the proceedings about to be carried into effect and caused them to be executed under probate, instead of ordinary jurisdiction. The same result would have been reached by either proceeding. The sale would have been made for cash by the sheriff, under either order, and we fail to see how the minors could have sustained any damage in the premises.

There can be no question that if plaintiffs' mother was not their tutrix at that time (as they claim she was not), that Adam Thompson could have legally proceeded against a tutor *ad hoc*, who would not have been compelled to give bond, and that their title or interest (if any such they can be said to have really had) would have been legally divested without reference to the fact whether plaintiffs' rights were secured by mortgage or not, and without reference to the advice of any family meeting.

The relations of the minors to the property were, under the circumstances of this case, really nominal. They were heirs of their father, it is true, by effect of law, but they were beneficiary heirs, and their father's succession was insolvent. Their tutrix would not have been entitled, simply as such, to have administered the succession, without security, if the creditors had objected. Her administration, as tutrix, without opposition, did not increase the rights of these minor beneficiary heirs in this property beyond what they would have been had their mother been forced to apply for and had obtained an appointment as an ordinary administrator of the succession. Her administration was in the interest of the creditors, as matters stood, rather than in the interest of the minors. The minors would have been entitled had their mother been forced by the creditors (by reason of their being beneficiary heirs), to qualify as a regular administratrix, to receive only the balance which would have remained in the succession after payment of all debts. C. C. 1058. Time has not extended their rights so as to authorize them, without incurring any obligations whatever, to take away from their father's creditors that which they were justly and legally entitled to have applied to the payment of their claims. Plaintiffs' demands are utterly without equity. At the sale which they seek to have declared null, the holder of the vendor's privilege notes (representing substantially the rights of the vendor himself), by purchasing the property, simply regained the ownership of the property on which not one dollar had been paid, nor has been paid up to the present day, if the sale passed no title to the adjudicatee. Plaintiffs' proposition is that they can wrench this property out of the ownership and possession of the purchaser through the law, without the payment of a cent for it. The law works out no such result through force of a provision in a statute which was intended to protect the actual interests of minors, and not to enable them to enrich themselves at the expense of their

father's creditors. When a case is presented to us in which minors have been really aggrieved by the failure of the court officers or of their father or mother to have recorded the abstract of inventory, by the recording of which they would have acquired a mortgage on their tutor's property to secure the faithful performance by them of their duties, it will be time enough to pass upon the effect of an appointment of tutrix and of issuing of letters of tutorship to a tutrix without the recording prior thereto of the abstract of inventory which the law directs should be placed of record.

The order of the parish court directed the sale of all of the property of the succession, real and personal. This property belonged to the succession and its sale was covered by the terms of the order.

Plaintiffs complain that the *proces verbal* of the sale of the property does not contain a description of the same. It is true that it does not do so directly in the body of the *proces verbal*, but the sheriff annexed thereto a certified extract from the inventory of the succession and also a copy of the advertisement under which the sale was made, and having declared that he had done so, declared that he had advertised for sale according to law the property described in the annexed extract from inventory, and after reading the advertisement, had offered said property for sale; that after receiving various offers he had adjudicated said real estate described in said inventory to Adam Thompson for the sum of seventeen hundred dollars, being the owner of the first mortgage and vendor's privilege, amounting with interest to the sum of seventeen hundred and forty dollars, the said purchaser retaining the same in his hands, less the sum of forty-two dollars, cost of selling the said property.

In addition to this the tutrix and the purchaser appeared, on the 4th of April, 1877, before a notary public, and the former made a formal and complete deed of the property to the purchaser, fully and minutely describing it as it had been described in the advertisement and inventory under full recitals as to the facts and circumstances under which she made the deed. The purchaser and the defendant have been in possession of the property under the adjudication and deed ever since that date.

It would have been much better for the sheriff to have given a complete description of the property in the body of the *proces verbal* than to have described it by reference to annexed documents which

might have become detached and rendered identification difficult, but they were not in this instance detached, and there can be no question as to what property was ordered to be sold, what was advertised to be sold, and what, in point of fact, was sold to Adam Thompson. We think the objection raised to defendant's title on these grounds is without foundation. C. P. 690, 695. We think the District Court has dealt with the case according to law and the evidence and according also to equity.

The judgment appealed from is affirmed.

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No. 12,461.

ROMERO & BAYARD VS. H. & C. NEWMAN.

A factor holding as collateral security for the payment of the ultimate balance to be due him on his factor's account the negotiable note of his customer, bearing interest after maturity, and secured by mortgage on his plantation, must be prepared to surrender the collateral when the account is closed, and payment of the amount due is tendered him by the debtor.

If such collateral note has been transferred by the creditor before its maturity to a third person, and by reason of such fact the factor can not surrender it, he will be responsible to the maker of the note for any amount over and above that due on the account (payment of which has been so tendered) which he was forced to pay to the third holder of the note.

Where such a collateral note had been given to a factor to secure a specific debt, the latter can not refuse to surrender the same when the debtor tenders payment of the debt which it secures, by reason of alleged indebtedness of the customer upon unliquidated and disputed claims arising from other separate and distinct contracts.

A creditor who in bad faith retards or prevents the execution of a contract to do can not claim from the debtor damages for the non-execution of the contract. C. C. 1934, par. 4.

Where the execution of a contract has been rendered impossible in its entirety by reason of a fortuitous event not preceded by some fault of the debtor, the creditor can not exact damages for non-execution. C. C. 1933.

If the contract to do, consists of successive obligations to be performed at different times, the non-execution by the debtor of one of these successive obligations by reason of a fortuitous event not preceded by some fault of the debtor, withdraws from the creditor the right to exact damages for the non-execution of that particular obligation. C. C. 1898.

A contract between a factor and a planter by which the latter binds himself to ship his crop to the factor, who is authorized to charge two and a half per cent. commission on sales of the same, does not justify the factor in charging two and a half per cent. commission on the amount of the bounty paid by the government to the planter in the crop. The bounty does not represent sales made by the factor.

Romero & Bayard vs. Newman.

In a contract between a planter and the owner of a refinery, the planter engaged to grind for a number of years the cane upon his plantation, at his own sugar house, to there convert it into syrup and then to convey it to the refinery through pipes purchased and laid down at its own expense by the refinery, the refinery engaging to convert the syrup into sugar at a fixed price per pound. During the second year of the contract a fire destroyed the planter's sugar house, placing it out of his power to comply further with his obligations. The contract contained a clause, that the planter should, at the end of the contract, purchase the pipes at their value. *Held*, that the refinery owners in thus assuming the deterioration of the pipes during the contract did so in view of continuing benefits to itself to result from it, and being deprived of those benefits by the fire, the court would give the refinery the benefit of the highest estimate placed upon the value of the pipes sustainable under the evidence.

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

Fenner, Henderson & Fenner, Foster & Broussard and *Joseph F. Poché* for Plaintiffs, Apellees.

Clegg & Quintero for Defendants, Appellants.

Argued and submitted December 4, 1897.
Opinion handed down January 10, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiffs are the owners of the Daisy plantation in the parish of Iberia, which they have been cultivating as a sugar plantation.

The defendants are factors and commission merchants in the city of New Orleans. They are also owners of the Linden plantation in Iberia parish, upon which they operate a sugar refinery.

On the 31st of August, 1890, a contract was entered into between the plaintiffs and defendants by which the latter agreed to lay a two-inch pipe from the Linden refinery to the sugar house of the plaintiffs and to furnish a pump to pump the syrup made by the latter from their sugar house to the Linden refinery, at the expense of the defendants, and to refine and granulate said syrup at the rate of one cent per pound, and to furnish sugar and molasses barrels in good order at defendants' refinery. Plaintiffs agreed to boil the juice down and to furnish same as well clarified and in as good a condition as

possible. It was well understood that defendants were free from all liability from loss occasioned by *non*-working of machinery, breaking, bursting of pipes or any or whatever loss in the premises before received in their refinery, or from any loss from frozen cane or sour syrup.

It was further understood that the contract should cover a period of five years, to-wit: 1890, 1891, 1892, 1893, 1894, and at the expiration of the contract plaintiffs should become the purchasers of the pipe and pump so laid down at the price to be agreed on between the parties, or, if necessary, by arbitration of outside parties.

Separate and apart from this contract there existed between the plaintiffs and defendants, the relation of planters and factors. Defendants agreed to furnish the necessary advances in money and supplies for the cultivation of plaintiffs' plantation, and they to secure defendants the reimbursement of their advances delivered to the latter first in 1891, a note for five thousand dollars, secured by mortgage on their plantation, and afterward, on the 24th of February, 1892, a note of that date, for six thousand dollars, payable on the 1st of April, 1893, to the order of H. & C. Newman, at their office in New Orleans, with eight per cent. interest from date, secured by a new mortgage on the same property. The last mortgage was to secure a small balance due on the advances of 1891, as well as those to be made in the future in 1892.

The contract first mentioned continued in force until some time in 1892, when by the destruction of plaintiffs' sugar house by fire they became unable to carry out their obligation to deliver to the defendants syrups made at the same.

During the years 1891 and 1892 differences arose between the parties; plaintiffs claiming compensation for a quantity of syrup which they asserted had been caused to be lost through the negligence of the defendants and their employees, and defendants contending that they were authorized to demand from the plaintiffs the profits which they would have made under the contract had it been carried to completion, and also the price of the pump and pipes.

After numerous negotiations the parties finally agreed to submit their differences to arbitrators. An arbitration was attempted, bu it failed in its purpose, and as neither side claims rights under it, no further reference to it need be made.

On the 21st of March, 1893, defendants forwarded to plaintiffs

a statement of their advance account as being three thousand four hundred and seventy-seven dollars and forty-eight cents, of which two hundred and fifty-four dollars and seventy cents were charged to plaintiffs as commissions of two and one-half per cent. on the bounty which the latter had collected from the United States government.

Plaintiffs had bound themselves in the factorage contract to ship their crops to defendants for sale for their account, and the latter insisted that they were entitled to deal with the bounty money as if sugar to the value thereof had been consigned to them for sale and had been sold by them for plaintiffs on the usual commission on sales.

On the 16th of March Messrs. Foster & Broussard, attorneys of the plaintiffs, wrote a letter to the defendant on behalf of their clients, in reference to said account, in which they stated that the latter were willing and ready to settle their indebtedness to them, but that they would not pay the charges for bounty, which on the account amounted to two hundred and fifty-four dollars and seventy cents. That, in other words, if they would return their two notes (the five thousand dollar and the six thousand dollar notes) to the New Iberia National Bank and their account corrected, that is showing balance due three thousand two hundred and twenty-two dollars and seventy-eight cents, with instructions to the bank upon payment of this last amount they must turn over the notes to the plaintiffs and give full receipt to them, the three thousand two hundred and twenty-two dollars and seventy-eight cents would be paid at once. That this, however, was not to be construed as a waiver of any further reduction which plaintiffs might have as to interest and other overcharges in case of litigation, which they specially reserved.

Shortly after receipt of this letter defendants sent C. H. C. Brown to New Iberia to represent them in this matter in an interview with the parties and their attorneys at that place. A meeting took place between them in the latter part of March, at which the account was fully discussed and an offer was again made on behalf of the plaintiffs to pay the account that day if defendants, through Brown, would deduct the charge for commissions on the bounty money, but this offer was declined. In the course of the conversation which then took place Brown referred to the fact that defendants claimed that

plaintiffs were indebted to them for *profits* on the "refinery account," and for the price of the pump and pipes which they had laid down, but plaintiffs refused to discuss those claims, as they bore upon distinct and separate matters. Brown intimated to plaintiffs that the promissory note for six thousand dollars was not yet due; that defendants could transfer the same before maturity and force any litigation which might arise between plaintiffs and defendants to be prosecuted in New Orleans.

A few days after this, Romero, one of the plaintiffs, and R. F. Broussard, one of their attorneys, called at the office of H. & C. Newman, in New Orleans, and there matters were again discussed, and the agreement to submit their respective claims to arbitration, to which reference has already been alluded, was reached. No allusion was made at that time to the fact that the note of six thousand dollars had been transferred to E. Feibelman & Co.

In ————, 1893, the latter firm instituted executory proceedings in Iberia parish upon that note, claiming to be the owners of the same, before maturity, in due course of trade and for a valuable consideration, and demanding payment of the note with interest, attorney's fees and costs. The present plaintiffs obtained an order for a suspensive appeal from the order of seizure and sale, but the appeal was dismissed in consequence of the appeal bond having been made for too small an amount. In order to stop proceedings, plaintiffs were forced to pay Feibelman & Co., on the 24th of February, 1894, the note with interest, and also attorney's fees and costs. The whole amount so paid by them amounted to the sum of seven thousand four hundred and eleven dollars and twenty cents.

On the 1st of August, 1894, the present action was instituted by plaintiffs against the defendants in the city of New Orleans, in which judgment is prayed against defendants for seventeen thousand four hundred and seventy-five dollars, with legal interest from judicial demand.

The amount is made up, first, of a claim that defendants are indebted to plaintiffs in the sum of twenty-eight hundred dollars for a quantity of syrup lost to them by the negligence of defendants under the "Refinery Contract" in 1891 and 1892; second, of a sum of four thousand one hundred and eighty-eight dollars and ninety-two cents, as being the difference between the amount actually due on the 21st of March, 1893, by plaintiffs to defendants upon their

account secured by their collateral note of six thousand dollars and seven thousand four hundred and eleven dollars, the amount which they were forced to pay Feibelman & Co. to obtain the release of their property from seizure; third, of the sum of four hundred and eighty-seven dollars and sixty-seven cents, proceeds of sugar and molasses sold by them since the 21st of March, 1893, at which date defendants' account was presented to them; and fourth, of the sum of ten thousand dollars claimed of defendants as damages for defendants' illegal and malicious conduct in transferring their note of six thousand dollars to Feibelman & Co., and occasioning through the latter firm the seizure of their property.

They alleged that they were, on the 21st of March, willing and ready, and offered to defendants to pay them in full for the balance which they owed them after deduction of the commission erroneously and illegally charged to them on the bounty money, and to take up their note of six thousand dollars, then held by them and to fall due on the 1st of April, but that defendants peremptorily refused the proffered settlement and transferred said note to Feibelman & Co. That defendants knew with certainty that at the time of the transfer their indebtedness to them did not exceed the balance shown by the statement furnished by them to petitioners, which showed a balance against them of only thirty-four hundred and seventy-seven dollars and forty-eight cents, and that they verily believed and therefore alleged that said transfer of said promissory note was made with the malicious intent to cause damage and injury to them.

They further alleged that defendants had admitted their obligation to account to them for the difference between the amount realized by them on the note of six thousand dollars and the amount due them by petitioners, but that they had declined, neglected and refused to pay the same, notwithstanding amicable demand for the payment thereof. Defendants pleaded the general issue. They averred that the amount claimed of them by plaintiffs for the loss of syrup in 1891 and 1892 had been fully paid in the settlements made between the parties of the refinery account. They denied that in negotiating the promissory note of six thousand dollars they acted beyond their legal rights or in an illegal manner, and that they were actuated by motives of ill will or malice toward plaintiffs or by any desire to injure them in their legal rights; they denied that plaintiffs suffered therefrom any loss or damage which they could not

have averted by the exercise of legal means and slight expense and by ordinary efforts. They denied that the property of plaintiffs was seized as a consequence of the negotiation of said note; that they were deprived of the possession and control of their property as stated in their petition, and that plaintiff suffered any loss or damage thereby in the premises which was not due to their own resistance of the payment of their legal indebtedness, or that they suffered any loss or damage thereby which they are entitled to recover against them.

Assuming the position of plaintiffs in reconvention, defendants alleged that Romero & Bayard were indebted to them in the sum of seventeen hundred and eight dollars and sixty-six cents, and in the further sum of twenty-seven hundred and seventeen dollars and forty-one cents, with legal interest from judicial demand, for which amounts they prayed for judgment.

The first amount was claimed as being due to them as the profits which they would have realized from the refinery contract had it been carried to completion according to its terms, and the second amount as being due them as the price of and value of the pump they had furnished to plaintiffs, and of the pipes which they had laid between the Daisy and Linden plantations.

With reference to the first of these claims, defendants alleged that during the years 1893 and 1894, plaintiffs wholly failed to furnish any syrup to the refinery of respondents for refining; that the profits to which they would have been entitled for the refining of the syrup for plaintiffs during said years would have amounted in the aggregate to the snm claimed; that the failure of the plaintiffs to furnish said syrup was in violation and breach of their contract, and defendants were entitled to recover said profits from the plaintiffs.

The District Court rendered judgment in favor of the plaintiffs for the sum of thirty-nine hundred and ninety-six dollars, and seventy-four dollars, with legal interest from judicial demand.

It appears from the reasons assigned for the judgment that this amount was reached by adjudging that defendants were indebted to the plaintiffs in the sum of four thousand six hundred and seventy-six dollars and nine cents, and that plaintiffs are indebted to the the defendants in the sum of six hundred and seventy-nine dollars and thirty-five cents—the amount for which judgment was rendered, being the difference between these two sums.

The four thousand six hundred and seventy-six dollars and nine cents so adjudged to plaintiffs is the difference between the amounts actually due by the plaintiffs to defendants on the 21st of March, 1893, as per their account furnished that day (striking from said account the amount claimed for commissions on bounty money collected by the plaintiffs), and the amount paid by plaintiffs to Feibelman & Co. to obtain the release of their property from seizure, to which was added the sum of four hundred and eighty-seven dollars and sixty-seven cents, proceeds of sugar and molasses sold by defendants for account of plaintiffs after the 21st of March, 1893.

The six hundred and seventy-nine dollars and thirty-five cents adjudged to defendants is the amount fixed by the District Court as the value of the pipes laid by defendants between the Daisy and Linden plantations.

The court obviously disallowed on the one hand plaintiffs' demand for the loss of syrup in the years 1891 and 1892, and their claim for ten thousand dollars damages, and on the other defendants' demand for profits which they claimed would have been realized on the refinery contract for the years 1893 and 1894, had plaintiffs furnished them with syrup during those years under the terms of that contract, and also rejected the price claimed for the pump furnished to plaintiffs. Defendants appealed.

Plaintiffs in the Supreme Court prayed that the judgment should be amended in their favor by allowing them the ten thousand dollars which they claimed for damages, and by rejecting entirely defendants' reconventional demand, or sustaining it at the very utmost to the amount of two hundred and twenty-six dollars and fifty cents.

We are of the opinion that the judgment of the District Court negativing and rejecting plaintiffs' demand for ten thousand dollars damages and their claim for loss of syrup in the years 1891 and 1892 is correct; that it is also correct in disallowing defendants' claim for the value of the pump which they furnished to the plaintiffs. The claim for the loss of the syrup was adjusted and settled prior to the institution of this action in the settlement between the parties of the refinery account. There is no evidence before us which would justify a judgment in favor of plaintiffs for damages, as is claimed by them for loss of credit, annoyance, etc.

The evidence in the record shows that the pump referred to was

rendered valueless by the fire which consumed plaintiffs' sugar house.

Having disposed of so much of the contentions between the parties, we now direct our attention to the other demands advanced by the plaintiffs. Defendants claim that the six thousand dollars note referred to in the pleadings and in the evidence was their absolute property; that they had the legal right to dispose of it; that having done so they are not responsible for the interest which accrued upon the same after plaintiffs offered to pay their indebtedness to them, nor for the costs of the executory proceedings which were taken out by Feibelman & Co. npon the note, nor for the fees of attorneys provided for by the act of mortgage securing the note. Defendants say that the mortgage securing the note was not negotiable, as was the note itself, and that if plaintiffs had defences to Feibelman's demand, they could and should have urged and made them available in those proceedings. The note was not the absolute property of the defendants; it was simply placed in their hands as collateral to secure the balance to be due upon the factorage account. By placing a negotiable instrument in the hands of the defendants they undoubtedly placed it in the power of the latter to transfer it free from the equities in favor of parties acquiring it before maturity in due course of trade for a valuable consideration. But the power to do this is a very different thing from the right to do it, as between the present plaintiffs and defendants. Granting that defendants could have legally pledged to third parties the negotiable note pledged to themselves by the plaintiffs, they took upon themselves the obligation of being prepared to surrender and of surrendering the same to defendants whenever the latter should offer to pay the principal debt which it secured.

Had the note in question been in defendants' hands, as it should have been when plaintiffs offered, as they did, to pay their account in full, and had they refused as they did refuse to surrender the same on the ground that plaintiffs were indebted to them for commissions upon the bounty money which they had collected from the United States government, litigation which defendants would have provoked under such circumstances on the note would have resulted in the plaintiffs being forced to pay their own attorney's fees and costs, and to have had rejected any claims for the interest which had accrued on the debt after defendants' offer to pay, unless they could have

maintained the correctness of their claim to commissions. And *a fortiori* would this have been the result had the refusal to surrender the note been based upon the pretension of a right of detention of the same until disputed, unliquidated claims upon separate and distinct contracts should be adjudicated upon by the courts.

Defendants can not either in law or in justice alter this legal result and impose increased obligations upon the makers of the note by transferring it to third parties and causing litigation to be carried on in their name so as to cut off an inquiry into legally existing defences and equities. "*Nul prendra de son tort.*"

True it is, that Feibelman & Co. as against the present plaintiffs and themselves might recover the note with interest, costs and attorney's fees, but this increased amount of liability by Romero and Bayard would be the direct consequence of the active violation by H. & C. Newman of their legal duty to surrender the note on an offer by the makers to pay, and they are bound to save plaintiffs harmless from the effect of their act.

There was no actual tender of money by plaintiffs, but defendants by their conduct relieved the latter from making it. Teutonia Bank vs. Loeb, 27 An. 110; Alter vs. Shepperd, 27 An. 210; Laloire vs. Wiltz, 29 An. 329; Zimmerman vs. Langles, 36 An. 68. There is no reason to suppose that plaintiffs were not then and there prepared to make payment, or that they would not have then made payment of their debt had defendants been willing and in position to receive it and surrender plaintiffs' note. They unquestionably determined not to surrender the note or receive payment except upon unauthorized conditions.

We are of the opinion that defendants were not entitled to commission upon the bounty collected by the plaintiffs (Delogny vs. Creditors, 48 An. 488), and, therefore, that that claim furnished no legal basis upon which to decline to surrender the collateral note, and that still less did unliquidated demands upon separate and distinct contracts furnish such a basis.

The item for commissions on bounty having been the only item at issue between the parties—its rejection left the amount justly due on the account that which the plaintiffs admitted to be due and offered to pay.

It is not denied that since the date of that account defendants have received and sold sugar and molasses for account of plaintiffs

to an amount of two hundred and eighty-seven dollars and sixty-seven cents, and that that sum stood to their credit on their books.

The amount, therefore, which the District Court found to be due for plaintiffs' demand in their favor and against the defendants (four thousand six hundred and seventy-six dollars and nine cents) was justified by the law and the evidence, and the finding to that effect is affirmed.

We have now to examine the claim of defendants for profits upon the refinery contract for the years 1893 and 1894, and for the price of the pipes laid by them between the Daisy and Linden sugar houses.

The sugar house on the Daisy plantation was destroyed by fire in 1892, and so far as this record shows has never been rebuilt.

It is not claimed that the burning of the building was the result of negligence either of plaintiffs or their employees.

The District Court held that under the provisions of the second section of Art. 1933 of the Civil Code, which declares that "where by a fortuitous event or irresistible force the debtor is hindered from giving or doing what he has contracted to give or do, or is from some cause compelled to do what the contract bound him not to do, no damages can be recovered for the execution of the contract."

Had the contract in this case been one covering the crop of one single year, and had the building been (without plaintiffs' fault) destroyed during the grinding season, it would have been an utter impossibility for the plaintiffs to have complied with their obligations, and plaintiffs would have clearly been entitled to the provisions of the law cited. So also had the object of the obligationa been certain and determinate thing. (C. C. 2219.) The question is complicated in the present instance by the fact that the contract extended over several years, and had reference to several separate and distinct crops, and that the fulfilment of that obligation by plaintiff was not absolutely and necessarily rendered impossible by the fire. As a matter of course defendants were without right or power to exact specifically that plaintiffs should rebuild their sugar house. Certainly, in the absence of a stipulation by the plaintiff that they should rebuild in case of fire, they could not be constrained to do so. We are not called on to deal with that phase of the question, but with the rights and obligations of parties where they have simply failed to do so.

Article 1891 of the Civil Code declares that "the object of a contract must be possible, by which is meant physically or morally

possible. The possibility must be determined, not by the means or ability of the party to fulfil his engagements, but by the nature of the thing which forms the object of it," and Art. 1899 that "if the contract consists of several successive obligations to be performed at different times, and the equivalent is not given in advance for the whole, but is either expressly or impliedly promised to be given at future periods, then, if the cause of the contract corresponding to either of these obligations should fail, the obligation depending on it will cease also. Thus we learn for years the obligation to pay the yearly rent ceases if the property which is leased shall be destroyed."

Laurent (Vol. 16, Des Obligations, Sec. 250 *et seq.*) refers to the distinction between cases where by force of fortuitous events the fulfilment by the debtor of his obligations is placed absolutely beyond his power, putting an end to the contract, and those where the execution of the same is merely retarded, delayed or made more onerous and difficult, also those where the difficulty in the way of execution is simply relative to the debtor.

He also incidentally refers to certain cases where obligations are to be successively executed (Sec. 270).

The view we take of the situation of the parties to this litigation dispenses us from expressing any opinion as to what their respective rights and obligations would be under ordinary circumstances. We have declined to render judgment in favor of plaintiffs upon their claim for ten thousand dollars damages, but we are of the opinion that the course which defendants pursued of actively and illegally placing obstacles in the way of plaintiffs' ability to rebuild their sugar house, by tying up their resources and causing their plantation to be placed under seizure, withdraws from them any rightful claim to profits, assuming such a claim could have been otherwise urged. We are of the opinion that the District Court placed too low an estimate upon the value of the pipes laid by the defendants between the two sugar houses. It may be true and doubtless is true that in certain places the pipes may be much deteriorated, but we think that the extent of the deterioration of those portions of the pipes which were laid in the high lands between the two buildings was by the court overestimated under the evidence. We think that the value of the piping should be fixed at thirteen hundred dollars. We reach this conclusion the more readily as it accords with the equities of the case. When the defendants entered into the contract by

which plaintiffs were to purchase the pipes at the termination of the contract at the value which they might then have, the value to be fixed by estimation, it was evidently in view of the fact that in the interval between the formation of the contract and its ending they would themselves have drawn certain continuing benefits from the use of the pipes. Of this use they have been deprived by a fire for which they were not responsible.

In view of all the facts of this particular case we are of the opinion that the judgment appealed from should be amended to a certain extent.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment of the District Court upon the reconventional demand set up by the defendants be amended by increasing the amount found due thereon by the District Court from six hundred and seventy-nine dollars and thirty-five cents to thirteen hundred dollars. The effect of this amendment will be to reduce the judgment for which judgment should have been given in the District Court in favor of plaintiffs against defendants from three thousand nine hundred and ninety-six dollars and seventy-four cents to three thousand three hundred and seventy-six dollars and nine cents. For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment of the District Court be amended, and it is now ordered, adjudged and decreed that there be judgment in favor of the plaintiffs, Romero & Bayard, and against the defendants, H. & C. Newman, for the sum of three thousand three hundred and seventy-six dollars and nine cents, with legal interest from judicial demand until paid. Costs of the lower court to be paid by appellants, those of appeal by appellees.

No. 12,587.

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STATE OF LOUISIANA VS. FRANK M. ROBERTSON.

The duty of retreat of one assaulted with intent to take his life or do him bodily harm is not unqualified. There is no obligation of such retreat when, from the suddenness or violence of the attack, retreat would endanger the life of the person assaulted. 1 Arbhbold Criminal Law, p. 791; State vs. Chandler, 5 An. 490; State vs. Spears, 46 An. 1524.

APPEAL from the Fourth Judicial District Court for the Parish of Jackson. *Machen, J.*

State vs. Robertson.

M. S. Cunningham, Attorney General, and *A. B. Hundley*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

Fred. W. Price for Defendant, Appellant.

Submitted on briefs December 31, 1897.
Opinion handed down January 10, 1898.

The opinion of the court was delivered by

MILLER, J. The defendant appeals from the sentence for manslaughter.

Our decision is controlled irrespective of the other question raised by the exception reserved on behalf of the defendant to the charge of the court. The instruction requested by the counsel for the accused was in substance that one suddenly attacked is not compelled to retreat when imminent danger would follow and is apparent. This was refused, and in signing the bill the court states it did charge that the party assaulted is compelled to retreat until some imminent and immediate danger of life, or some great bodily harm arises, and besides the general law as to self-defence had been given. As the court charges as to the duty of retreat of the person assaulted with the intent to take his life or inflict great bodily harm we must assume the phase of testimony was before the jury to call for a charge of that character. While the charge requested might be deemed deficient in some respects we think the accused was substantially entitled to the instruction asked. The court in its refusal to give that instruction informs us the law on the subject had already been given and incorporates in the bill that portion of his charge he deemed sufficient. The obligation to retreat of one who is assaulted with intent to kill or inflict great bodily injury is not unqualified. In the leading cases of Selfridge, Harrigan and others, three cases of self-defence followed by our courts and recognized as correct in the text-books, the law is stated in substance thus: When from the nature of the attack there is reasonable ground to believe there is a design to destroy the life of the accused or commit any known felony on his person, the killing of the assailant will be justifiable homicide, and again: "A man may repel force by force in defence of his person,

habitation or property against one who manifestly by violence or surprise to commit a felony, such as murder, robbery," etc. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kills him in so doing it is justifiable homicide. 1 Archbold's Criminal Law, p. 791 *et seq.*, notes at foot; State vs. Chandler, 5 An. 490; State vs. Spears, 46 An. 1524. The charge given makes the retreat compulsory without that qualification we deem settled that as stated in the Selfridge case, when the attack on the accused is so sudden, fierce and violent that a retreat would not diminish but increase his danger, the accused may instantly kill his adversary without retreating at all. We think the verdict should be set aside and a new trial granted.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be set aside and reversed, the case is remanded for a new trial and he accused be held in custody to abide that trial.

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No. 12,603.

STATE VS. ARCHIE ASHWORTH.

Where a deceased person, at the time of his being wounded, states to a witness that he could not live much longer and that he was bound to die, his declarations made under such circumstances are admissible in favor of an accused as a dying declaration.

There is no rule of practice or of law requiring that a dying declaration should be made all at one time, without interruption or turning aside to other matters.

A failure on the part of the witness to whom the statement was made to have heard, or to have remembered all the conversation which may have taken place at the time between the deceased and other parties, does not do away with the fact that the witness heard everything and remembered everything that was said to him or in reference to that particular subject when he was present.

Rules of evidence relative to the admissibility of dying declarations are not to be as rigorously applied when the fact itself of their having been made has been satisfactorily established, and they are in favor of the accused as when they are sought to be urged against him.

The fact that the declaration was elicited by questions asked the deceased by the witness, instead of being a volunteered statement, does not render it inadmissible.

APPEAL from the Twelfth Judicial District Court for the Parish of Calcasieu. *Read, J.*

State vs. Ashworth.

M. J. Cunningham, Attorney General, and *A. R. Mitchell*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

R. L. Belden for Defendant, Appellant.

Submitted on briefs December 18, 1897.

Opinion handed down January 10, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The accused in this case was indicted in the parish of Calcasieu; was found guilty without capital punishment and sentenced to life imprisonment.

The bill of exceptions on which he relies for reversal is to the effect:

"That on the trial of the cause the accused called to the witness stand one Leonard Doyle for the purpose of proving the dying declarations of Andrew Ashworth, the person the indictment charges the accused of killing on June 29, 1897.

"That the object of proving the dying declaration of the deceased Ashworth was to show that one or two declarations made by the deceased were entirely in favor of the accused and would have had great weight with the jury before whom the accused was tried. That on the trial the evidence was taken in writing by the clerk of court, and after various questions propounded by counsel of defendant and cross-examination by the State—the trial judge, upon objection made to the competency of the witness to testify, sustained the objection. That the testimony which was taken as stated was annexed to the bill as part thereof and for reference. The District Judge signed the bill without comment.

The clerk's note of the examination of the witness Doyle shows the following questions and answers, and also the objections as made by counsel and the action of the court thereon.

"Q. State if you were present in the woods on the 29th of June when you had a conversation with deceased Andrew Ashworth?

"A. Yes, I was there.

"Q. Did you hear Andrew Ashworth make any statement in reference to Archie Ashworth shooting him?

"A. I did.

"Q. Did Andrew Ashworth express to you anything in reference to his dying?

"A. Yes, sir.

"Q. State what it was.

"A. He said he was bound to die, he could not live much longer.

"Q. Do you remember all the conversation; all that was said and all that was asked him?

"A. No, sir.

"Q. Do you remember the substance of all that he said?

"A. I remember all he said when I asked him.

"Q. Did you remain with him until he was removed on this cot?

"A. Yes, sir.

"Q. What time of day was it when they removed him?

"A. I do not know, sir; some time in the evening.

"Q. What time of the day was it when you arrived where old man Ashford was?

"A. I do not know; it was in the morning.

"Q. Who was present at the time you were having this conversation with him?

"A. John Ashworth, Marion Perkins, Roy Roberts, Hollis Buxton and Eb. Buxton.

"Q. Do you remember ail the conversation that took place between yourself and Andrew Ashworth from the time you got there until they put him on the cot?

"A. I do.

"Q. Can you state that conversation?

"A. Yes, sir, I can."

CROSS-EXAMINED BY THE STATE.

"Q. You say you can remember all that he said with reference to his condition? State that in his exact words?

"A. He said he was bound to die—he could not live long.

"Q. You say that you remember all that he said in answer to your questions?

"A. Yes, sir.

"Q. Is it not a fact that others were there asking him questions at the same time?

"A. No, sir; if there was I did not hear it.

"Q. No one spoke to him at that time about this matter but you?

"A. Not that I heard.

"Q. Did you not, in answer to a question a few minutes ago from he court, state that what you had heard of Ashworth's statement at that time was partly in answer to questions you asked him and partly in answer to questions others asked him?

"A. I said he answered questions I asked him. I did.

"Q. Did you not state, in answer to a question asked you by Mr. Belden, that you could only state what he said in answer to questions asked him by yourself?

"A. I did.

"Q. Is it not a fact that others came up there while you were still there and had been there?

"A. Yes.

"Q. Is it not a fact that there was a sort of general conversation going on there with him when this new crowd came up, and continued after they did come up?

"A. Yes, sir.

(By the State.)

The testimony of this witness is objected to by the State for the reasons:

1. That the testimony of the witness does not show that he appreciated that he, the deceased, was in a dying condition and was dying at that time; that he did not have at that time such a conviction of immediate and impending death in his mind as would place the statement in the category of privileged testimony as a dying declaration.

2. That the testimony of the witness shows that the statement was made in answer to questions asked by himself and others at the time. That it was not a continuous and uninterrupted statement; that the witness does not remember all, or the substance of all, that was said at this time in connection with this matter, and that witness can not state all that was said between deceased and other parties other than witness himself, though others participated in the statement.

Objection as to the admissibility of the evidence sustained.

Counsel for defendant excepts to the ruling of the court.

REDIRECT.

"Q. Did you have any conversation with Ashworth or did he tell you at that time you were in the woods with deceased, Ashworth—did he tell you, or did you hear him say that he went too far with Archie Ashworth, and that he was to blame with his own death?"

Objected to on the ground that the witness had shown himself as not qualified to testify to the whole of the statement made at that time—that he can not be permitted to testify to a part without giving the whole statement.

2. That it is an attempt to have the witness testify indirectly to that which the court has ruled the witness could not testify to directly.

3. That the witness has not been qualified before this question was asked to testify to this conversation.

OBJECTION SUSTAINED.

1. Because if it refers to the testimony previously given by the witness the objection is well taken; if not, it is mere hearsay testimony so far as the court is informed. Counsel for defendant excepts to the ruling of the court.

Ordinarily dying declarations are introduced in evidence on behalf of the prosecution—in the case at bar they were unsuccessfully offered to support the defence. Greenleaf, Sec. 159, cites Rex vs. Scaife, 1 Mood & R. 551; Sec. 2, Lewin's Cr. Cas. 150, as sustaining the proposition that the right to offer them in evidence is not restricted to the side of the prosecutor, but that they are equally admissible in favor of the party charged with the death.

With respect to the declarations themselves he says that it is essential to their admissibility and a preliminary fact to be proved by the party offering them in evidence that they were made *under a sense of impending death*, but that it is not necessary that they should be stated at the time to be so made. That it was sufficient if it satisfactorily appears in any mode that they were made under that sanction, whether it be directly proved by the express language of the declarant or be inferred from his evident danger or the opinions of the medical or other attendants stated to him, or from his conduct or other circumstances, all of which are resorted to in order to ascertain the state of the declarant's mind. That it is the impres-

sion of almost immediate death, and not the rapid succession of death in point of fact that renders the testimony admissible. That a belief that he will not recover is not in itself sufficient, unless there be also a prospect of "almost immediate dissolution." That the declarations are admissible *only to those things to which the declarant would have been competent to testify* if sworn in the cause. That they must therefore in general speak to facts only, and not to mere matters of opinion, and must be confined to what is relevant to the issue. That it is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation, but that whatever the statement might be it must be complete in itself, for if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements which he is prevented from any cause from making they would not be received (Secs. 158 and 159).

In Sec. 161 the same writer states (citing authority for the statement) that it has been held that the *substance* of the declarations may be given in evidence if the witness is not able to state the precise language used, and he repeats that it was no objection to their admissibility that they were so obtained in answer to questions, and if it appears that the declarations were intended by the dying person to be connected with and qualified by other statements material to the completeness of the narrative, and that this was prevented by interruption or death, so that the narrative was left incomplete and partial, the evidence is inadmissible.

In State vs. Patterson, 45 Vermont, 308, it is declared that by "complete in itself" is meant that the declarant's statement of any given fact shall be all he intended to say as to that fact, and in (McLean vs. State, 16 Ala. 672) it was held that where the deceased being asked "who shot him," replied: "the prisoner," the declaration is complete and can not be rejected because from weakness and exhaustion he was unable to answer another question propounded to him immediately afterward.

Rice, in his work on Evidence, Vol. 3, Sec. 338, refers to Rex vs. Scaife, and to the comments of the Kentucky Court of Appeals upon the same as follows:

"In the case of Rex vs. Scaife, 1 Mood & R. 551, the declaration was: 'I don't think he would have struck me if I had not provoked him.'" Coleridge, J., hesitated, but finally admitted the declaration

upon the ground that it might have an influence on the amount of punishment. There was no discussion at all as to whether or not the declaration involved a conclusion. It will be observed that the declaration did not involve the one and vital question in the case, and that it was in favor of and not against the prisoner. The prisoner was not endangered by the want of an opportunity to cross-examine the dying witness because the declaration was in his favor."

"In speaking of this declaration the Kentucky Court of Appeals, in the case of Haney vs. Com. (Ky.), 5 Crim. L. Mag. 47, said that it was the expression of an opinion, but was admissible because in favor of the accused. The Ohio court (Wroe vs. State, 20 Ohio St. 460) cites it as being the statement of a fact. It was held in the Kentucky case above, as stated in the *syllabus*, that "the general rule that declarations of the deceased are only admissible when they relate to facts and not to mere matters of opinion, is subject to the exception that declarations of the mere opinion of deceased are admissible when they are favorable to the accused, and explain the conduct or motives of the deceased."

In speaking of such declarations in favor of the accused, the court said, among other things: "The admission of such declarations can do no harm. Frauds can not be practised under cover of the rule. And there is not so much danger of misconception or perjury as where the declarant speaks from hostile feelings, surrounded by sympathizing friends ready to construe his words as favorable to their own views as may reasonably be done."

Rice refers in very warm, approving terms in connection with this subject to the dissenting opinion of Mr. Justice Zollars, of the Indiana Supreme Court, in Boyle vs. State, 105 Ind. 469.

In Mattox vs. United States (13 Supreme Court Reporter, 50), Mr. Chief Justice Miller, speaking for the Supreme Court of the United States, said: "Dying declarations are admissible on a trial for murder, as to the fact of the homicide and the person by whom it was committted, in favor of the defendant as well as against him (1 East P. C. 353; Rex vs. Scaife, 1 Moody and R. 551; U. S. vs. Taylor, 4 Cranch, 338; Moore vs. State, 12 Ala. 764; Commonwealth vs. Mathews, 89 Kentucky, 287; 12 S. W. Rep. 333). But it must be shown by the party offering them in evidence that they were made under a sense of impending death. * * * In Reg. vs. Perkins, 9 Car. and P. 395, the deceased received a severe wound from a gun

loaded with shot, of which wound he died at 5 o'clock the next morning. On the evening of the day on which he was wounded he was told by a surgeon that he could not recover—made no reply but appeared dejected. It was held by all the judges of England that a declaration made by him at that time was receivable on the trial of a person for killing him as being a declaration in *articulo mortis*. There the declaration was against the accused, and obviously no more vigorous rule should be applied when it is in his favor."

In People vs. Knapp, 26 Mich. 117, the Supreme Court, referring to dying declarations, said: "It was held in Scaife's case (Moody and R. 551), that the prisoner had the same right with the people to show them. This rule would be very unjust without this application."

In Com. vs. Mathews, 89 Ky. 287 (12 S. W. Rep. 334), it was proved that the deceased about fifteen minutes after he was shot, when lying upon the ground bleeding and suffering, said that he hoped he would live long enough to take the gun home, and that he died in about twenty minutes. The witness said that deceased did not say whether he believed he would die or not, and he (witness) did not know whether he was conscious or not when he made the statement. The statement in substance was that he and the accused were playing, and that it was an accident. The court said: "To be competent as a dying declaration the statement must not only relate to the immediate circumstances of the transaction resulting in the injury, but it must detail facts and not the opinion of the declarant. In our opinion the statement in this instance conforms to this rule. It is unlike the case where the injured party declared he had been killed for nothing. This was purely his opinion and inference. Here the injured man said that he and the accused were engaged in play, and that the shooting was an accident. This, in our opinion, was the statement of a fact more than the giving of an opinion and the court properly permitted it to be proven."

In Adams vs. The People, 47 Ill. 376, the accused endeavored to obtain a new trial on the ground of newly discovered evidence to prove among other matters, as we understand, certain dying declarations of the deceased. Of these the court said: "The dying declaration of the deceased that he did not wish the accused hurt for what he had done, and that accused had done nearly right, affords no evidence of anything more than a truly Christian spirit on the part of

one who had been unjustly done to death and who in his dying agonies was willing to forgive the malefactor. The further statement that he knocked down the accused three times before the accused touched him was substantially before the jury on the trial." The court said "the testimony, we think, fully sustained the finding of the jury, and it could not have been different had all the evidence alleged to be newly discovered been before them."

In Moeck vs. The People, 100 Ill. 244, the court said: "It is urged that the court erred in excluding the declarations of deceased made shortly before his death, in substance, that he struck accused, and he was not to blame. They were made so long after the occurrence as to preclude all claims that they were a part of the *res gestæ*. They were, therefore, mere hearsay evidence and were not admissible. Under the decision in Adams vs. The People, 47 Ill. 376, they were not admissible in evidence. * * It is true that this was newly discovered evidence, but was said not to be evidence for the jury."

We have carefully considered the question submitted to us in this case. We are of the opinion that the grounds upon which the court excluded the dying declarations sought to be introduced in evidence were not tenable. The witness states that the deceased said that he was bound to die, that he could not live much longer, and the indictment in this case and verdict of the jury show that that opinion was well founded. The statements made by him were made at the time of his being wounded and evidently with a full sense of his dangerous condition. We know of no rule of practice or of law requiring that dying declarations should be made "all at one time without interruption or turning aside to other matters." We do not see anything in the evidence of the witness that would go to take away from the declarations the character of a complete statement to the extent that the deceased desired to make it. Unquestionably general conversation took place while witness was present with the deceased, but nothing goes to show that it had any reference to or bearing upon the facts of the case. Witness says that if any conversation of that kind went on while he was present he did not hear it; that he did, however, hear all that the deceased said to him (witness) on the subject. A failure on the part of the witness to have heard or to have remembered all the conversation which may have taken place at the time between the deceased and other parties does not in our opinion do away with the fact that he heard everything

and remembered everything that was said to him or in reference to that particular subject when he was present. As the correctness of the exclusion of the declarations does not rest upon the correctness of the particular reasons assigned by the District Court for its action we have considered the matter *dehors* those particular reasons. We were at first much impressed with the idea that the declaration was made inadmissible as being the mere expression of a conclusion or an opinion of the deceased, but have become satisfied that the rules relative to the *admissibility* of such declarations are not to be as rigorously applied when the *fact itself of their having been made* has been satisfactorily established, and they are in favor of the accused, as when they are sought to be urged against him. In the case at bar the witness named a number of persons as being present when the declarations sought to be proved were declared by him to have been made, and the danger of a falsification of facts was greatly lessened from what it would have been without such a statement. We do not think that the fact that the declaration was elicited by questions asked the deceased by the witness instead of being a volunteered statement render them inadmissible.

We were disposed to think that counsel in not stating fully in his bill of exceptions what he expected to show by said declarations, or what he had reason to believe they would be, had not placed before us sufficient facts on which to base a conclusion that declarations favorable to the accused of sufficient weight to have in all likelihood affected the result had really been made, but the testimony was cut off at the threshold of the attempt which was made to ascertain what had been said, and the question which was asked suggested with some certainty, at least, from its character, the answer which it was believed would be given to it. Lanier vs. Gallatas, 13 An. 175.

We are of the opinion that the witness should have been permitted to answer the question which was asked of him, and that a refusal to permit the same to be answered was prejudicial to the accused.

For the reasons assigned, the verdict of the jury and the judgment thereon rendered is hereby set aside, annulled, avoided and reversed, and the cause is remanded to the lower court for further proceedings, according to law, the accused to be held in custody subject to further orders of the District Court.

No. 12,695.

J. F. WHITE ET ALS. VS. W. L. WHITE, ADMINISTRATOR.

An action by heirs for the recovery from the succession of their father the amount of their interests in the succession of their predeceased mother is not a personal action prescriptible by ten years, but one for an entire succession, which is prescriptible by thirty years.

Contracts made during the late war in one of the Confederate States, payable in Confederate money, will be enforced in the Supreme Court, when the value of same, as compared with lawful money of the United States at the time and place of contract is ascertained by proof.

An executory contract, made in 1862 in Louisiana, for the future delivery of cotton to the Confederate States government, for and in consideration of Confederate States bonds, to be furnished thereafter, does not evidence a complete sale; only a promise of sale which entitled the promissee to sue for a specific performance, or damages for the non-fulfilment of the contract.

APPEAL from the Third Judicial District Court for the Parish of Claiborne. *Barksdale, J.*

McClendon & Seals for Plaintiffs, Appellees.

J. W. Holbert and *J. E. Moore* for Defendant and Appellant.

Argued and submitted January 12, 1898.
Opinion handed down January 24, 1898.

The opinion of the court was delivered by

WATKINS, J. Alleging themselves to be three of the five children of the marriage of William White and Sophie White, and that the latter died in 1864, and the former in 1895, the petitioners seek to recover a judgment against the succession of their father for the value of three-fifths of their mother's one-half of the community property as it existed at her death and the consequent dissolution of the matrimonial community—their father having lost his right of usufruct in July, 1865, when he married his second wife.

They aver that there was at the time of their mother's death personal property and effects of various kind on hand, and which subsequently remained in their father's possession, of the value of thirteen thousand seven hundred and seventy-one dollars—an itemized

list and valuation of which is annexed to their petition—and for one-half of which sum they pray judgment "for the use and benefit of the heirs," etc., alleging that same had been by their father appropriated to and used in the community with his second wife.

They further aver that W. L. White, as administrator of the succession of William White, their father, is administering the estate of the second community; and that the aforesaid indebtedness is that of the said second community to the first community, and that they are entitled to have same paid from the assets of the second community by preference over any other debts thereof—praying for judgment accordingly.

The answer of the administrator is a general denial, coupled with a special denial, to the effect that William White, deceased, owned the property described in plaintiff's petition, or that, if he was not the owner thereof, that he had used the same for the benefit of the second community. In an amended answer defendant shows that William White paid plaintiffs and other heirs in full the amounts coming to them from their mother's community interest, and for which sums he took their respective receipts—that is to say, from J. F. White a receipt for the sums of seven hundred and thirty-nine dollars and five hundred and twenty-four dollars; from Z. T. White a like receipt for six hundred and sixty-six dollars and two hundred and ninety-five dollars, and from Philan White a like receipt for six hundred and sixty-six dollars and four hundred and seven dollars.

He further represents that those amounts exceed the respective virile shares of the plaintiffs in their mother's succession, or one-half interest in said first community; and that, in addition thereto, two of the plaintiffs are indebted to the succession of their father the amounts of some small notes, which are annexed to and made parts of his answer.

Plaintiffs filed a supplemental petition and alleged that their father acquired, during the existence of the first community, a tract of land upon which he erected buildings and improvements and cleared and laid off a farm; and that he subsequently used, occupied and cultivated same, during the period of his life, for the benefit of the second community, for which same is indebted in the way of rent at the rate of one-half of two hundred and fifty dollars per annum—that is to say, to the amount of seventy-five dollars per annum for their shares of three-fifths of one-half thereof.

They also claim five per cent. per annum interest on each annual instalment of said rent, from the date of their father's second marriage in 1865.

To this amended petition the answer of the defendant is a general denial, coupled with the averment that "the plaintiffs have been more than paid for their shares in their mother's succession, and that they had no interest in the land for the use of which they make claim," etc.

At this stage of the proceedings the defendant filed a plea of no cause of action, as a peremptory exception founded on the law; but there appears to have been no formal disposition made of same, as the court proceeded with the trial and rendered a judgment in favor of the plaintiffs—thereby affirming that there was a cause of action.

The defendant also filed a plea of prescription of three years against the plaintiff's demand for rents.

The trial resulted in a judgment in favor of each one of the three plaintiffs and against the administrator of the succession of William White, for their respective interests in the estate of their mother; that is to say, for the sum of seven hundred and one dollars each—that is, two thousand one hundred and three dollars in all, with legal interest from the first of September, 1865.

And in a judgment for the further sum of three hundred and sixty-seven dollars and fifty cents on the plaintiff's claim for rent, with legal interest from January 4, 1897.

It further ordered that the plaintiffs be charged with sundry amounts which are particularly specified, and that same be awarded to the defendants on their reconventional demand.

From that judgment the administrator has appealed.

In this court counsel for plaintiffs and appellees filed an answer to the appeal and prayed for an amendment of the judgment in their favor, so as to award them the full amount claimed; and they also filed contemporaneously a plea of five and ten years prescription against the defendants' reconventional demand.

And in this court also appears the counsel for the administrator, who filed a plea of prescription of ten and thirty years in bar of plaintiffs' demands.

As neither party has requested that the cause be remanded for the purpose of rebutting the aforesaid pleas which were filed in this

court, it is fair to assume that they rest their respective contentions upon the face of the record before us.

In the first place, we think it appears clearly from the language of the judgment, that all the plaintiff's demand for rent was barred, with the exception of the amount due for the last three years; and in thus decreeing we think the lower judge was right.

We are of opinion that the plaintiffs' plea of five and ten years' prescription against the defendant's reconventional demand is not good, because his claim is, that the sum specified evidenced payments made to them in the course of a settlement between them and their father; of their interests in their mother's succession. The claim is urged as an offset against the plaintiffs' demand; and not as a reconventional demand, properly speaking, for which he claims judgment.

The petition in this suit was filed on the 28th of May, 1896, and it is therefore evident, that the plea of prescription of thirty years bars the action inasmuch as plaintiffs' right of action arose in July, 1865, the date of the second marriage of the deceased father, provided they were of full age at the time. But of their majority the proof does not satisfy us. It is at least doubtful as to one, and clearly shows the majority of the other two.

This is admitted by defendants' counsel, at least inferentially.

To sustain a plea of prescription the proof must be clear. The plea of ten years is directed against this suit as a purely personal action. R. C. C. 3544.

This is not a suit against an usufructuary for an accounting; but one for the recovery of an entire succession, and is only barred by the lapse of thirty years. R. C. C. 3548.

The proof administered at the trial fairly supports the judgment rendered. It satisfies us that the properties were fairly estimated in the opinion of the district judge; and that same were on hand in kind, at the date of the second marriage of plaintiff's father, and were subsequently disposed of by him. Necessarily he incurred an obligation to reimburse the heirs of his deceased wife the value thereof, less the amount he paid them on account.

An agreement to sell cotton to the Confederate government during the existence of the late war, to be paid for in bonds of the Confederate States, and unaccompanied with delivery of possession, did not operate a divestiture of title. Boyd vs. Chaffe, 21 An. 476;

Schmidt vs. Barker, 17 An. 262; Howard vs. Kirwin, 19 An. 432; Huck vs. Haller, 19 An. 257; Levy vs. Baer, 19 An. 469; Biossat vs. Sullivan, 21 An. 565.

In this last case, the court expressed the following view, viz.:

"If full effect be given to the testimony of the witnesses for defendant, and the evidence of the plaintiff be disregarded, it would only prove an agreement to sell an executory contract, and the consideration was Confederate treasury notes. It is well settled that this court will not aid parties to enforce a contract which had Confederate money for a consideration."

In the United States Supreme Court, a different rule of interpreting contracts predicated on Confederate treasury notes has obtained, the purport of which is, that contracts made during the war in one of the Confederate States, payable in Confederate money, will be enforced in the Federal Courts, when the value of such Confederate notes as compared with lawful money of the United States, at the time and place of the contract, is ascertained by proof. Railroad Company vs. King, 91 U. S. 3; Stewart vs. Solomon, 9 U. S. 434; Cook vs. Lillo, 103 U. S. 792; Rives vs. Duke, 105 U. S. 132; Effinger vs. Kenney, 115 U. S. 566.

The theory upon which these decisions proceed is that Confederate treasury notes constituted a currency which was imposed upon a community by irresistible force; and that same must be considered in courts of law as though it had been issued by a foreign government temporarily occupying a part of the territory of the United States. Thorneyton vs. Smith, 8 Wallace, 1.

But in this case no such proof was administered. If it had been it would not have been availing to the defendant for the reason that the price which the witnesses testify they *contracted* to pay William White for the cotton in 1862 was not Confederate treasury notes, but Confederate bonds—an altogether different thing.

They were not at the time *in esse*. They were to have been delivered to White at a future date, and he retained possession of the cotton and sold it in 1865 after the close of the war.

At most the engagement evidenced an executory contract or agreement for the future delivery of cotton to the Confederate government—a mere promise of sale which did not convey a title.

Such a transaction does not constitute a complete sale; only a promise of sale which entitled the promisee to sue either for a specific

performance or the recovery of damages. Collins vs. Desmaret, 45 An. 108; Satterfield vs. Keller, 14 An. 615; Garret vs. Crooks, 15 An. 483; Knox vs. Payne, 13 An. 361; Broadwell vs. Raines, 34 An. 677; Thompson vs. Sheriff, 40 An. 712.

The alleged sale of the cotton by White to the Confederate government is not sustained by either law or evidence.

Judgment affirmed.

No. 12,714.

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STATE EX REL. H. W. McLEOD & CO. VS. W. N. POTTS, JUDGE OF THE FIFTH JUDICIAL DISTRICT COURT, PARISH OF OUACHITA.

The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which by the suggestion of the relator the court is informed he is about to do. If the thing is already done it is manifest that the writ can not undo it, for that would require the performance of an affirmative act; whereas the only effect of the writ of prohibition is to suspend all action and prevent further proceeding in the prohibited direction.

APPLICATION for Writs of *Certiorari* and Prohibition.

A. A. Gunby and *Sholars & Schreiber* for Relators.

Respondent *pro se*.

Submitted on briefs January 10, 1898.

Opinion handed down January 24, 1898.

The opinion of the court was delivered by

WATKINS, J. Relators' complaint is that they instituted suit in a magistrate's court of the parish of Ouachita and obtained judgment therein for ninety dollars, and that they caused an execution to issue thereunder, and the constable of that court to seize certain personal property of the judgment debtor and to advertise the same for sale.

That one McLain filed in said magistrate's court a petition of third opposition in which it is alleged that the judgment debtor was

indebted to him in the sum of two hundred and fifty dollars—one hundred dollars of which represented rent of land, and the remainder necessary plantation supplies—and that for the security of the payment of that sum he had a first lien and privilege on the aforesaid property; and that he obtained from said magistrate an order directing and requiring the constable to retain in his hands a sufficient amount of the proceeds of same when sold to pay and satisfy said demand.

Relators represent that they filed in said court an exception to the jurisdiction thereof *ratione materiæ*, which was grounded on the averment that the demand of a third opponent being for the sum of two hundred dollars was far in excess of the constitutional limit of its authority; and that the justice of the peace sustained that exception and dismissed the aforesaid opposition.

That from that judgment of dismissal the third opponent prosecuted an appeal to the court of the respondent; and that they therein appeared by counsel and filed a motion to dismiss the appeal "on the ground that the District Court had no appellate jurisdiction thereof."

The relators further aver that the respondent overruled their motion, entertained jurisdiction of the appeal, heard and considered the cause on its merits, reversed the judgment of the justice of the peace, and remanded same to his court with instructions to proceed with the trial thereof.

They complain that the judgment of the respondent is contrary to law, and in contravention of the provisions of the constitution, defining and limiting the jurisdiction of magistrates, or justice courts; and that same is consequently absolutely null and void.

And that if, in pursuance of said decree, the justice of the peace should attempt to carry same into effect, his act would be an usurpation of authority, and his judgment an absolute nullity.

The answer of the respondent attracts our attention to the conceded fact that, at the time the relators presented their demand for relief in the premises, the judgment which they complain of as illegal and void had already been rendered by him, and signed, and the record duly transmitted to the court of first instance; and that the said judicial proceedings having terminated *before* the issuance of the supervisory writs from this court, and his connection there-

with having ceased, the remedy sought by them can not be applied, and consequently relief must be refused.

That if this were not so, and further proceedings in said suit were contemplated by him, he had undoubted appellate jurisdiction in the premises—the appeal having been prosecuted from a final judgment of a justice of the peace.

On the merits the respondent returns, that the third opponent did not make the defendant's in the magistrate's court a party thereto, and prayed for no judgment against him; but that he demanded judgment recognizing his privilege as lessor and furnisher of supplies upon the property which relator had caused to be seized under their judgment.

That, as matter of fact, the debt and privilege of third opponent had been previously liquidated and established by a final judgment in his court; and that, in disregard of his rights, the relator had caused same to be seized under a *fi. fa.* issued out the magistrate's court.

That the only course which was open to third opponent was the one he pursued, that of making opposition to the seizure under *fi. fa.* in the court issuing the writ, so that it might fix the rank of the respective privileges of the two claimants, contradictorily with each other—the first seizure of the property affected with the liens having been made under the execution from the magistrate's court.

The record shows, and the foregoing statement from the relator's petition admits, that the respondent had actually tried and disposed of the appeal of third opponent before relators applied for relief by writs of prohibition and *certiorari.*

On this state of facts Mr. High announces the law to be as follows, viz.:

"Another distinguishing feature of the writ (of prohibition) is that it is preventive rather than a corroborative remedy; and (that) it issues only to prevent the commission of a future act, and not to undo an act already performed." High's Extraordinary Legal Remedies, Sec. 766.

In United States vs. Hoffman, 4 Wallace, 158, the Supreme Court, speaking through Mr. Justice Miller, said:

"The writ of prohibition, as its name imports, is one which commends the person, to whom it is directed, not to do something which by the suggestion of the relator the court is informed he is about to do.

If the thing be already done, it is manifest the writ of prohibition can not undo it, for that would require an affirmative act; and the only effect of writ of prohibition is to suspend all action and to prevent any further proceedings in the prohibited direction."

This court had occasion to express a similar opinion in State *ex rel.* Bassetti vs. Judge, 44 An. 1093; and in State *ex rel.* Davidson vs. Judge, 38 An. 178, we held that if the particular grievance complained of "no longer exists there is no longer any need of the relief sought."

On this state of the authorities we are of the opinion that the application for relief by prohibition came too late; but that fact can not seriously affect or impair the relator's rights. For if, indeed, the magistrate's court was not vested with jurisdiction of the matter in dispute in his court, and the respondent decided the appeal erroneously, relators may yet contest third opponent's debt as well as his lien and privilege, in order to protect their previous seizure.

But we are inclined to the opinion that the respondent took a proper view of the case before his court, for two reasons:

1. Because the Constitution confers on district courts "jurisdiction of appeals from justice courts in all matters when the amount in controversy shall exceed ten dollars, exclusive of interest" (Art. 112).

2. Because the Code of Practice provides that when a conflict *of* privilege arises amongst different creditors "all suits and claims shall be transferred to the court by whose mandate the property on which the privilege or right of mortgage is to be exercised was first seized, and said court shall proceed to class the said privileges and right of mortgage according to their rank and dignity," etc. (Art. 126; *vide* Kahn & Bigart vs. Sippili, 35 An. 1041).

We can not perceive any reason why a justice of the peace is not just as much authorized to test and determine the *rank* of conflicting liens and privileges on property which is under seizure in his court as the District Court is. For that question must be determined by the terms of the law or the date of registry, and not by the validity of the debt, except for the purpose of displacing a prior lien and making way for one of inferior rank.

We are of opinion that relators have not presented a case entitling them to relief.

It is therefore ordered and decreed that the preliminary order be set aside, and that relators' demands be rejected at their costs.

No. 12,729.

STATE OF LOUISIANA EX REL. JULES ANDRIEU VS. N. H. RIGHTOR, JUDGE, ETC.

When the record of appeal or the petition of the litigant is suffered to be filed or the cause heard, and it is then ascertained that by inadvertence the record or petition is not properly stamped, or the stamps defectively canceled, if the litigant tenders the requisite stamps properly canceled, the offer should be accepted and the suit not dismissed. 37 An. 573; 46 An. 1203; 43 An. 883; Stamp Act No. 136 of 1880.

ON Application for Writs of *Mandamus* and *Certiorari*.

Charles F. Claiborne for Relator.

Dinkelspiel & Hart for Respondent.

Submitted on briefs January 24, 1898.
Opinion handed down February 7, 1898.

ON APPLICATION FOR WRITS OF CERTIORARI AND MANDAMUS.

The opinion of the court was delivered by

MILLER, J. The relator seeks the writs to compel the judge of the lower court to reinstate and determine the suit brought up to the division of the Civil District Court by appeal from the City Court, and the record of which was not sufficiently stamped. The City Court gave the plaintiff the judgment claimed and afterward, on appeal, the Civil District Court reversed it and dismissed plaintiff's suit, because of deficiency in the stamps.

While it is extremely important that the courts should exercise the necessary supervision and control in respect to the stamps required to be placed on all judicial records we do not think the litigant's suit should be dismissed, if, from inadvertence, he fails to affix the requisite stamps on his petition or record of appeal, but offers to attach the requisite stamps when the error is discovered. It would be entirely proper for the court to refuse to hear the case and the paper or record should not be allowed to be filed at all without the requisite stamps, but if filed, or the cause is suffered to proceed to hearing, the law, in our opinion, does not authorize the

judgment to be annulled and the suit dismissed, because the deficiency of stamps or the defective cancellation is then discovered and the litigant tenders the stamps required.

It is therefore ordered, adjudged and decreed that the writ of *mandamus* issue directing the respondent judge to reinstate and determine the relator's suit on his affixing to the record of appeal the required stamps properly canceled.

No. 12,692.

Mrs. Lena Wellman, Wife, vs. Mack Wellman, Husband.

Charges of adultery, under the circumstances of this case, set forth by the wife against her husband, as a ground for a judgment of divorce, do not, of themselves, constitute a defamation.

The charges had been abandoned by the wife, and her suit dismissed without prejudice to the husband's reconventional demand for a separation from bed and board.

In that condition, the defendant having failed to sustain his demand in reconvention by other than plaintiff's allegations, they were not alone grounds or cause for a judgment of separation.

Excesses, cruel treatment and outrages of the wife form a legal ground for separation, but no acts of ill treatment occurring *after* suit has been brought are alone and of themselves cause for a judgment of separation.

Statements of the wife (made to a committee appointed by a secret order, of which the husband was a member, with the purpose of re-establishing pleasant relations between spouses) can not be taken of themselves as a manifestation on her part (notified as she was to appear and make a statement) of deliberate intention to wantonly injure her husband and publicly defame his character.

APPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

Wise & Herndon for Plaintiff, Appellee.

A. L. Kahn for Defendant, Appellant.

Argued and submitted January 12, 1898.
Opinion handed down January 24, 1898.

The opinion of the court was delivered by
Breaux, J. This was a suit for a divorce.
The defendant filed a plea in reconvention for a separation from

bed and board. This plea was grounded on plaintiff's allegations that he, the defendant, was guilty of adultery, and that she, the plaintiff, had made threats to kill him, the defendant. The defendant charged that the accusation of adultery was false.

On the day the case was called for trial, on motion of plaintiff's counsel her suit was dismissed without prejudice to the reconventional demand of defendant.

Both the plaintiff and the defendant find fault with a ruling of the District Judge permitting the introduction of evidence on the reconventional demand.

The plaintiff (in the suit defendant in the reconventional demand) complained on the ground that there was no allegation on the reconventional demand of public defamation of character.

While, on the other hand, defendant's counsel accepts the *ruling* as correct he complains of the *reasons* for overruling it as error. We take it that the basis of the objection to the ruling is that, in the view of the counsel, the *reasons* were not broad enough, and that if the charge preferred by plaintiff was not a public defamation it was at any rate of a character to bring it within the term "outrages of one toward the other" under another provision of the law of separation, and that under this provision, even if it was not a public defamation, it was admissible. In other words, as we understand, that the court, instead of holding that the answers of the witnesses were admissible because they went to prove defamation of character, should have held that the answers were admissible as evidence of personal and direct outrage committed by the wife toward the defendant husband; which rendered their living together insupportable. If there was anything erroneous in the ruling it was in admitting the testimony at all. At any rate the defendant had no cause to complain.

The facts are, as we gather from the record, after suit had been instituted, the Damon Lodge Knights of Pythias, of which plaintiff was a member, took up the matter and appointed a committee of investigation with the view, as we conclude, to bring on a reconciliation between the parties. They were notified to have their witnesses present, and when the committee met, statements were heard from both the plaintiff and the defendant. The former stated to the committee that her husband had been guilty of adultery with women, one of whom she named.

The District Judge, in his reasons for judgment, said that there could be no investigation by this committee without hearing both, and that the husband tacitly consented that his wife should disclose to the committee her grounds of complaint against him. He also added that the answer did not charge "malice," which is the essence of slander or defamation, and must be proved either by direct testimony or by implication flowing clearly from the language and conduct of the defendant, citing 34 An. 1146, that the statement was justified by the occasion and was not volunteered for the purpose of bringiug her husband into public contempt. "It was made to a secret committee of a secret society acting with the laudable purpose of bringing about reconciliation between the parties."

Upon these grounds defendant's reconventional demand was dismissed as in case of non-suit, and the community was condemned to pay all costs.

From the judgment the defendant husband, prosecutes this appeal.

It is settled in our judgment ordinarily in order that the offence alleged may be cause enough for separation from bed and board, it must be shown that it was committed before the plea for the separation was filed.

At all events a judgment of separation should not be granted for alleged offences committed after suit had been filed and in the absence of all evidence of cause for separation of a date anterior to the suit. If evidence be admissible of utterances *post lites* to prove public defamation, they are not admissible, unless it be alleged that the defamer was actuated by "malice" in making the charges, and that they were of a public character. That was not the reconventional demand of the defendant; it was absolutely silent as to "malice" and only alleged that plaintiff had accused him "of being guilty of adultery."

In so far as the record shows it was only to the special committee that the plaintiff complained of conduct on the part of the husband she deemed was in violation of his marriage vows. The committee was not at all public. In carrying out the purpose it had of restoring harmony between the two, the husband and the wife, the committee sat within closed doors and there heard the real or imaginary grievances of each of the spouses. We have no reason to conclude that they were made public.

The defendant, moreover, in support of his demand in reconven-

tion for separation argues that the charges made by the plaintiff in the pleadings should be considered as grounds sustaining his reconventional demand. As the only other evidence before us is the statement made by plaintiff to the committee, not to be taken acconnt of for reasons we have already stated, it would result were we to grant the demand for a separatton that it would be grounded exclusively upon the allegations of plaintiff in her petition for a divorce in a suit she has chosen to abandon. We do not feel authorized to make such allegations the exclusive basis of a judgment of separation. They are not of themselves grounds for a separation from bed and board.

The law as we take it has in view more particularly facts alleged to have occurred prior to the suit and not mere pleadings in cases of this character without proof of any kind.

In Towne vs. Towne, 9 La. 457, this court said: "The only question we have to examine is whether the facts alleged as having occurred before the suit was brought are sufficient to justify a separation." There is nothing in the case before us requiring that it be taken out of the rule having in view acts preceding the institution of the suit as giving rise to a canse of action. In suits of the nature of the one here allegations of the petition have never, in this State, been taken as cause sufficient for judgment. If the allegations were true the plaintiff had had no cause to complain if they were made in error; it not having been shown that plaintiff acted wantonly or maliciously the error was not of itself cause to decree a separation.

Here the charge of public defamation is not sustained by the allegations of plaintiff in her petition for a divorce; it not appearing that they were prompted by insincerity and conceived in malice. Terrell vs. Boarman, 34 An. 306.

We agree with the judge of the District Court that the defendant has not shown cause for a separation from bed and board considered from any point of view. The wrongs asserted have not been shown.

Therefore it is ordered, adjudged and decreed that the judgment appealed from is affirmed.

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No. 12,694.

MRS. M. C. LUDELING VS. J. GARRETT, SHERIFF, ET AL.

MOTION TO DISMISS.

In testing jurisdiction the title to the property which had been seized (but subsequently released), and the damages claimed in the petition for injunction, presented inseparable issues, as plaintiff's title was denied on trial of claim for damages.

The property seized, the title to which was an issue in the case, and the damages brought the appeal within the court's jurisdiction.

ON THE MERITS.

Only actual damages allowed against the defendant in injunction.

The demand as to the sheriff made by one of the defendants was rejected.

APPEAL from the Fifth Judicial District Court for the Parish of Ouachita. *Potts, J.*

Chas. J. Boatner and *F. G. Hudson* for Plaintiff, Appellant.

Munholland & Munholland for Defendants, Appellees.

Argued and submitted January 13, 1898.

Opinion handed down January 24, 1898.

The opinion of the Court was delivered by

BREAUX, J. This was an injunction. In her petition for a writ of injunction plaintiff complained of a seizure made of her property under a writ of *fieri facias* issued on a judgment rendered in a suit entitled Bonecaze Shoe Company, Limited, vs. Succession of John T. Ludeling. She alleged that no judgment was rendered against her, and that the writ of *fi. fa.* under which her property had been seized was directed against the succession of John T. Ludeling and Maria C. Ludeling, and that the writ of *fieri facias* was not a writ under which it was possible to seize and sell property of a succession.

She alleged that she had suffered damages in one sum of five hundred dollars, occasioned by the unlawful seizure, and in similar amounts in counsel fee for obtaining the injunction.

In September following the date of the seizure made on defend-

ant's, the seizing creditor's order, the seizure was released, and afterward the creditor answered plaintiff's petition for an injunction, pleading a general denial and averring specially that Mrs. Ludeling's individual property had been seized.

The judgment of the District Court sustained the injunction, but rejected plaintiff's demand for damages.

Plaintiff appealed to the Circuit Court. On appeal that court determined *ex proprio motu* that it was without jurisdiction of the issues involved; that in addition to damages claimed there was a question of title to the property seized which brought the amount in dispute within the jurisdiction of this court.

Plaintiff then appealed to this court.

Here the defendant appellee moved to dismiss the appeal on the ground that this court is without jurisdiction *ratione materia*.

The question of jurisdiction is the first before us for determination.

The Circuit Court, in the opinion dismissing the suit, said: "After carefully reviewing the record we did not find that defendant had judicially admitted that the property seized belongs to Mrs. Ludeling, nor can the inference be drawn from the fact that the seizure was released. It was necessary that the court should decide the question of ownership first in order to perpetuate the injunction, for if Mrs. Ludeling was not the owner she had no cause of action."

Defendant's answer especially denies her ownership.

In our view the foregoing statement of facts is correct. With reference to the law in the nature of things plaintiff could not recover damages for the illegal seizure of property she claimed, without proof that she was the owner, as alleged.

The defendants have denied her allegation. As to the ownership of the property, her ownership *vel non* became an issue. Evidently, prior to a determination of that issue, she could not stand in judgment. The release of the seizure, as relates to the jurisdiction of the court, did not affect the question involved. The defendant had denied the title. The abandonment of the seizure did not have the effect of admitting that the property was owned by the plaintiff; nor did it have the effect of admitting that plaintiff was entitled to damages, notwithstanding she did not prove that the property which had been seized was hers.

As against a seizing creditor, one seeking to arrest a sale by

injunction on an allegation of his ownership, is bound to make out his title by clear written evidence. Jones vs. Lake, 43 An. 1024.

In the manner the controversy is before us, title to the property seized and the damages growing out of the seizure are inseparable issues and are considered together in determining the value of interests involved, and the jurisdiction of this court.

The court declined to dismiss the appeal.

ON THE MERITS.

It does not appear that the seizure disturbed the planting operations of the plaintiff. If it was a hindrance to the cultivation of the place, it was not shown on the trial.

We would not feel justified—in assuming that plaintiff's credit was impaired; that her laborers were less controllable, or that the seizure was in any manner harassing. There is a complete absence of all evidence in the record in this respect. This disposes of the question of damages; if any directly grew out of the seizure of the place.

This brings us to the question of the execution, which issued under the judgment.

There can be no controversy about the writ of *fieri facias* as issued. It had no binding force, and gave no right to the judgment creditor to seize succession property, or the property of the plaintiff in injunction.

This the judgment creditor realized and ordered the return of the writ.

It now only remains for us to determine whether the plaintiff in injunction, whose injunction is sustained, is entitled to recover attorney's fee as damages. We recall to mind two cases in which such a fee was sanctioned.

In White vs. Givens, 29 An. 573 a case similar upon this point, the court said: "The seizure was unlawful," and allowed attorney's fee to plaintiff in injunction, whose injunction was sustained. In Gilkerson Sloss Company vs. Yale & Bowling, 47 An. 695, also plaintiff in injunction recovered counsel's fee.

Plaintiff, in order to prevent an unlawful sale of her property, under a writ of *fieri facias* which was absolutely null, was compelled to engage counsel. The appearance of counsel in the case to

assert her right as owner of the property seized is evidence of services rendered for which she is bound.

The amount expended by her for the services, or the amount she owes, is due to her by the seizing creditor.

We must take it that an amount is due, in regard to which testimony was heard without objection in the District Court.

We do not think that the sheriff is liable *in solido* with the defendant Bonnecaze Shoe Company, Limited. The writ was issued in accordance with the latter's instruction. It was issued by the proper officer, from a court of competent jurisdiction, and under a valid judgment. Crow vs. Sheriff, 45 An. 1225; Brainard vs. Head, 15 An. 490.

It is therefore ordered, adjudged and decreed that plaintiff have judgment against the Bonnecaze Shoe Company, Limited, for the sum of two hundred and fifty dollars ($250), with five per cent. interest from the date of this judgment; that the demand for these damages against the sheriff be rejected.

With this amendment, the judgment of the District Court is affirmed at appellee's cost.

No. 12,697.

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MRS. GENIE LAYTON, TUTRIX, VS. MAYOR AND CITY COUNCIL OF MONROE, LA., ET ALS.

Under the Act No. 105 of 1892, providing for the annexation of adjacent lands to the area of incorporated towns or cities, the council of the city has no power to order the election preliminary to any proposed enlargement of the city limits, unless the petition for annexation is before the council from one-third in number and value of the property owners residing within the territory proposed to be added to the city or town.

The owner of property within the area to be added to the town or city has the right to enjoin the execution of the ordinance of the council directing the election prescribed by the statute, when the ordinance is adopted without the fulfilment of the conditions exacted by the Act No. 105 of 1892 as requisite to authorize the ordinance and election.

APPEAL from Fifth Judicial District Court for the Parish of Ouachita. *Potts, J.*

Stubbs & Russell for Plaintiff, Appellant.

Thos. O. Benton, City Attorney (*Percy Roberts & Boatner* of Counsel), for Defendants, Appellees.

Argued and submitted January 13, 1898.
Opinion handed down January 24, 1898.

The opinion of the court was delivered by

MILLER, J. The plaintiff as the owner of property in the parish of Ouachita seeks to enjoin the execution of an ordinance of the council of Monroe proposing the extension of the corporate limits of Monroe so as to embrace the property of petitioner, and from the judgment dissolving the injunction plaintiff appeals.

The petition in substance avers that plaintiff's children are owners of property in the parish, part in use as the plantation and part plotted, or laid off into squares; that the plantation is entirely beyond the city limits, as is a portion of the land laid off in squares, and that there are no other owners residing on the plantation besides petitioner and her children; that the plantation has well-defined limits, is separate from the property laid off into squares, lies in different sections and is not contiguous to Monroe. The petition goes on to aver the presentation of a petition to the mayor and council of Monroe for the extension of the city so as to add thereto the property of petitioner; that the petition was not signed by one-third in number and value of the owners of property sought to be annexed, but, in point of fact, the signers did not represent one-tenth of the property, and many signatures were affixed to the petition by unauthorized persons; that on this petition the council has ordered an election to determine whether the land should be annexed, to be held by the qualified electors, and has fixed the date of the election and appointed the commissioners pretending to act under the Act No. 105 of 1892; the petitioner charges that her property not contiguous to Monroe is not within the parview of the act if constitutional, that the act makes no provision for determining whether the petition is signed by the owners in number and value required by the statute, and it is charged that the council acted on the assumption not in accordance with the fact, that the petition was properly signed; it is charged that the proposed annexation of petitioner's property will

impose burdens on the owners with no corresponding benefits; that illegal and unconstitutional taxes will be levied, and there is the averment of the resulting irreparable injury and the necessity for the injunction to restrain the holding of the election and the enforcement of the ordinance. The defendants excepted that the action of the mayor and council on the petition was final; that the ordering the election was the exercise of legislative power, not reviewable by the courts; that the Act No. 105 of 1892 is constitutional, and the courts can not obstruct, interfere with, or review the execution of the act. The case comes here on the question raised by the exceptions.

The Act No. 105 of 1892 provides that property adjacent to any city or town may be brought within the corporate limits, in compliance with the requisites carefully prescribed by the act. There is required (1) the petition of one-third of the *bona fide* owners in number and value of the property within the limits of the proposed addition, to the mayor and council of the city or town, the limits of which are to be extended by taking in the land described in the petition; thereupon the council is to ascertain by successive elections the sense of the voters within the proposed addition, and of the voters of the city, the area of which it is designed to be enlarged, with reference to the annexation of territory proposed, and if the vote at such election is favorable on the proposition submitted, the annexation is to be deemed accomplished.

The defendants direct attention to the principle that exempts legislative bodies from judicial control. The action of the council in this case is completed in respect to ordering the election. If that action is *ultra vires* the execution of the ordinance may be resisted by the citizen, or, at least, by the taxpayer whose interests are affected. 1 High on Injunctions, Sec. 1241; 1 Dillon Municipal Corporations, Sec. 1246, notes at foot. Again, it is urged the suit is premature, and reference is made in this connection to Roudanez vs. The Mayor and Administrators of the City of New Orleans, 29 An. 271; State *ex rel.* Behan vs. Judge, 32 An. 1276. The election now ordered by the council followed by another, and that by the proclamation of the result, is all the statute requires to complete the annexation, if the basis to authorize the action of the council exists. Act No. 105 of 1892, No. 1, Secs. 3, 7, 10. Irrespective of the question discussed in the text-books, and decisions of the right of the taxpayer

after the annexation proceedings are completed to contest the taxes levied on the property brought within the city limits, we think in a case of this character of action charged to be wholly *ultra vires*, the taxpayer need not wait until the injury from such action is consummated, so far as respects the action of the council. 2 High on Injunction, Sec. 1241. Further, the defendants insist that ordering this election belongs to that class of mere ministerial duties no injunction can control. The power of the council, the exercise of which is dependent on a well defined condition is a ministerial duty, if the condition is fulfilled, but if not there is no power to do the act in question. Our attention is also directed to our decision, that it is not for public officials charged with simple ministerial duties to originate objections and refuse performance of such duties. State *ex rel.* Reynolds & Henry Construction Co. vs. Mayor and Council, 46 An. 1278; Reynolds & Henry Construction Co. vs. The Mayor and City Council of Monroe, 47 An. 1289. It seems to us that the right of the taxpayer to resist an illegal ordinance injurious to his interests is not to be tested by the principle that makes ministerial duty imperative on the public body or official.

It is the legislative province exclusively to incorporate cities or extend their limits, and the citizen must submit, however impolitic or oppressive he may deem the legislative act, although there is an intimation in the authorities that in exceptional cases the judicial control is not even excluded by legislative action incorporating or enlarging the limits of cities. 1 High on Injunction, Sec. 547; Cooley on Taxation, p. 119; 75 Ill. 152; 59 Ind. 225; Laramie County vs. Albany County *et al.*, 92 U. S. 307. The defendants insist that the ordinance of the council ordering this election is as much beyond question as would be the act of direct legislation of the General Assembly extending the limits of Monroe if special legislation were not prohibited. The legislative power over the subject, when capable of being exerted by special legislation incorporating or enlarging the area of cities or towns, is plenary. The Legislature has not undertaken to convey this power to city councils, if, indeed, any such transfer of a legislative function were possible. This act of 1892 confers on the councils of cities or towns the limited function of ascertaining by successive elections the sense of the qualified electors in reference to any proposed enlargement of the city or limits, and, when that sense is ascertained, the

council is to announce the result. Before these functions of the council are called into exercise there must be the petition for the proposed annexation by one-third in number and value of the property owners within the area to be added to the city or town. The petition in this case contains the distinct averment that no such petition was filed, and under this form of controversy that averment is to be taken as true. If the contention of defendant is maintained practically, the council can order the election on any kind of petition, or, indeed, without any petition. Yet to order the election without that petition the statute prescribes, is simply a usurpation of power. It is claimed the council is made the sole judge of the sufficiency of the petition. There is no room for the judgment of the council as to the requisites of the petition, defined as they are with precision by the statute. The argument for the defendant in its effect converts a limited function of the council into an unqualified and unlimited power to order elections for the annexation of territory to incorporated towns, and strips the taxpayer of all right to relief when the council transcends its power. The limitation that no annexation shall take place, and no election by the qualified electors shall be ordered, unless the property holders, one-third in number residing in the district to be added and representing that portion of value, shall first petition for such annexation, is placed in this act of 1892 for the protection of the property owners. In our view, the council in exercising the delegated power under this act of 1892, must observe the condition accompanying that power, and that the taxpayer, in whose interest as well as for the public good the condition is imposed, has the right of appeal to the courts against the action of the council injurious to his rights, and violative of the legislative act, source and measure of the power of the council. See 1 High on Injunction, Sec. 541, citing 58 Ind. 480; 55 Ind. 576.

We omit expressing any opinion on the questions arising on the merits as the contiguity of the property to be added, or on other questions raised by the exception and discussed in argument. We decide that the plaintiff has the right to be heard on the allegations in his petition.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, the exceptions be and they are hereby overruled and that the case proceed to trial on the merits, and that defendants pay costs.

No. 12,731.

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STATE EX REL. H. & C. NEWMAN VS. JUDGES BLACKMAN AND MOUTON OF THE COURT OF APPEALS, THIRD CIRCUIT, PARISH OF ST. LANDRY.

ON APPLICATION FOR WRIT OF MANDAMUS.

The action was revocatory. When plaintiff's claim does not exceed two thousand dollars, and the value of the property involved in the contract sought to be annulled is greater than that amount, inasmuch as in such action the judgment can only affect the complaining creditor and the debtor to the amount of the former's claim, the appellate jurisdiction is tested by reference to the amount of plaintiff's claim.

But when plaintiff's claim exceeds two thousand dollars, and the value of the property, the sale of which is sought to be annulled as fraudulent, is *less than two thousand dollars*, the creditor can not recover an amount larger than the value of the property; that is the only amount at issue, and by it the court's jurisdiction is determined.

ON APPLICATION for Writ of *Mandamus*.

Kenneth Baillio for Relators.

Respondents in person.

Submitted on briefs January 29, 1898.

Opinion handed down February 7, 1898.

The opinion of the court was delivered by

BREAUX, J. This is an action to have an appeal which had been dismissed *ex proprio motu* reinstated on the docket of the Court of Appeals and tried and decided.

It appears that the property which was the subject of the revocatory action in the District Court, was of a value less than the amount of the lower jurisdiction of this court; while relators' claim exceeds the sum of *two thousand dollars*.

The Court of Appeals held, that though the action is revocatory, in view of the fact that the amount of the creditors' claim was, in their judgment, the test by which their jurisdiction was to be determined, they were without jurisdiction.

The facts as disclosed are, that shortly after the relators had instituted their suit, Jules Petetin, their debtor, made a cession of his property to his creditors; the latter, except one or two including relators, voted for the acceptance of the surrender and for his discharge, which was duly granted. They, it is alleged, approved the *dation en paiement* assailed by relators, as hereafter mentioned.

After the debtors' discharge, the relators, ordinary creditors, filed a petition setting forth the facts to which we have alluded, and averring that there remained a very small *pro rata* for his ordinary creditors; that he did not make a complete surrender of his property, as he had fraudulently assigned and delivered the property described in their petition to his late wife as a *dation en paiement* of one thousand seven hundred and sixty dollars, now in possession of her heirs.

That the transfer had been fraudulently made and accepted by both parties to the transaction, and that unless annulled and set aside the effect of the transfer would be to place the property beyond the reach of his creditors.

It appears that after issue joined a judgment was rendered, annulling and setting aside the *dation en paiement*, ordering the property to be carried on the schedule of the debtor's insolvency and ordering the syndic to apply the property to payment of the creditors, and further decreeing that the petitioners in the lower court, relators here, should be paid by preference over all other creditors out of the proceeds of the sale of the property.

From this judgment the relators took a devolutive appeal, which was dismissed as before stated, and which they now seek to have reinstated as before mentioned.

The judges of the Court of Appeals in their return state: that the test of jurisdiction in a revocatory action is the amount claimed of the original debtor, and not the value of the property, the sale of which the creditor seeks to have revoked, citing in support of that view several decisions of this court.

The record does not lead us to infer that there was any contestation between the parties, save as to the sale which had been made by the debtor to his wife; of property worth less than two thousand dollars. It is not contended that the creditors, relators here, were not creditors in the amount claimed, so that the issue is entirely limited to the sale just stated. There was no issue growing out of any denial of relators' claim or any contest as to the indebtedness.

The question before us is purely, whether the amount claimed and not the value of the property of the debtor alleged to have been fraudulently transferred is the test of jurisdiction.

It is a fact that this court has decided in cases in which the creditor's claim was for an amount less than two thousand dollars that the test of jurisdiction in a revocatory action is the amount of the creditor's claim. We do not propose to make any change or the least alteration in this respect. We reiterate: where the plaintiff's claim is not within the jurisdiction of this court, in a revocatory action, this court is without jurisdiction, be the value of the property included in the contract sought to be annulled what it may. Then the only amount which can possibly be at issue is the amount of the creditor's claim who asks to set aside a contract only in so far as it is a hidnrance to the collection of his claim out of the sale of the property.

Here the condition is different; the amount involved necessarily is the value of the property. The creditor can not recover more than that amount, despite the fact that his claim is for a larger amount. The limit of his claim must be the seventeen hundred and odd dollars it is conceded it is worth. Our jurisdiction depends upon the value involved. We have not found that the amount was within our jurisdiction.

Loeb & Bloom vs. Arent, 33 An. 1086: The sum in question is the sum total the creditor seeks to have credited on his claim.

It is ordered, adjudged and decreed that the *mandamus* in this case is maintained and made perpetual; and the respondent judges shall reinstate the cause on the docket of their court at Opelousas, and decide all other issues presented.

No. 12,652.

VINCENT BOAGNI VS. ARMAND WARTELLE; HENRY L. GARLAND, INTERVENOR.

The intervenor's action did not raise foreign issues; it did not change the character of plaintiff's action, and was not revocatory; therefore, the motion to dismiss was overruled.

Separate, independent agreements of which no one knows anything save the creditor and the debtor can not affect third persons, and can not be taken as an absolute basis for prescription.

Boagni vs. Wartelle.

An imputation of payment, made at the time that the insolvent debtor paid, in part, his indebtedness to a senior mortgage creditor can not subsequently be recalled and changed to the prejudice of the junior mortgage.

To the extent that payment is made a mortgage is annulled.

It is not possible to give new life to the part annulled and thereby lessen the chances of recovery on the junior mortgage.

APPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Frazee, J. ad hoc.*

Kenneth Baillio for Plaintiff, Appellant.

E. D. Estillette for Intervenor, Appellee.

Argued and submitted December 13, 1897.
Opinion handed down December 28, 1897.
Rehearing refused February 21, 1898.

The opinion of the court was delivered by

BREAUX, J. Plaintiff sued for five thousand eight hundred and twenty-seven dollars and sixty-two cents interest and fee of attorney and for a sum paid by him for taxes. He alleged for the security as to payment of the former he had a special privilege and mortgage, and for the latter (the taxes), he was subrogated to the privileges and mortgages of the State of Louisiana and the parish of St. Landry.

A default was entered in due time. A creditor of the defendant intervened in the suit. The defendant not having pleaded, the default against him was confirmed.

The plaintiff and intervenor are the parties in interest before this court.

The intervenor alleged that the defendant was insolvent, and that he and plaintiff wrongfully combined to give plaintiff a preference over other creditors. The intervenor complained of the acknowledgment endorsed on plaintiff's note, and avers that the note was paid at the date the suit was brought, but that plaintiff and defendant have kept alive the mortgage claimed by the former in order to pre-

vent the intervenor from seizing the property and having it sold under his judgment.

The intervenor specially alleged that he had procured a judgment against the defendant, and that he had a right of action to have plaintiff's mortgage canceled in order that when defendant's property will be offered for sale under his judgment, no prior claim secured by mortgage will prevent a sale, for after cancellation no certificate of the recorder of mortgages will issue showing that there is a special mortgage on the property.

The prominent facts are: The plaintiff sold a plantation to the defendant. The note secured as before stated represented the purchase price. After the sale the defendant obtained advances from the plaintiff to make his crop.

In compliance with an agreement between plaintiff, Dr. Boagni, and the defendant, Wartelle, part of the property subject to plaintiff's special privilege and mortgage was sold at private sale, and the proceeds were credited to the defendant.

In accordance with the agreement each deed of sale of part of the plantation sold, contains a clause setting forth that the plaintiff, Boagni, who signed each deed, consented to the sale and received, it is declared in the deed, the notes representing the purchase price made by the vendee and handed by the vendor (the defendant, Wartelle, to him Boagni). The intervenor in the deed (Boagni, creditor) expressly declared that upon payment of the notes given by the purchaser he would cancel his special privilege and mortgage, and that the proceeds of the notes would be applied to the payment of defendant's indebtedness on note held by plaintiff, secured as before stated. Each deed was inscribed in due time.

It appears that an account current was opened between plaintiff and defendant at the time that the former began to make advances to the latter, and that advances were made as claimed by plaintiff.

The plaintiff's petition is that he credited the proceeds of those sales to the account, and the remainder, after his account current had been paid in full, was credited on the note upon which his suit was brought.

It is shown by an entry in plaintiff's books that on the date that three of the sales were made by defendant Wartelle to several purchasers for the purpose of applying the proceeds to the payment of Wartelle's indebtedness to the plaintiff, he, plaintiff, received the

total cash paid by the purchasers. We do not gather from the testimony that on the day these sales were made, in the year 1889, the defendant was indebted to the plaintiff save as maker of the note secured by privilege and mortgage held by the plaintiff.

The indebtedness of defendant in open account for advances began in January, 1890, and continued for some time thereafter.

After a number of payments had been made, it is urged by the plaintiff that it was agreed between him and the defendant to apply the payments already made on the land and the proceeds of the notes plaintiff held, to the payment of plaintiff's claim on current account—that is, the account unsecured was substituted to the note secured by mortgage.

Judgment was rendered for plaintiff, against the defendant as prayed for, and directed that the property be seized and sold to pay the plaintiff's claim with interest, etc., subject to a credit of two thousand seven hundred and forty-six dollars and sixteen cents, and the further sum of two hundred and six dollars and twenty cents, and bearing interest as stated; also, a snm of five hundred and four dollars and forty-four cents, all having been paid before maturity, were deducted from the principal, and six hundred dollars collected, to be credited as having been paid on the 11th of November, 1890.

The payment of taxes to plaintiff, as claimed, also was decreed.

As between the plaintiff and the intervenor the court *a qua* held that intervenor is entitled to preference to the amount remaining due him.

From the judgment the plaintiff prosecutes this appeal.

The plaintiff interposed an exception to the intervention, on the ground that third opposition, after seizure of the property mortgaged, was the proper remedy, and not an intervention prior to seizure.

The intervenor has, if his allegations be sustained, an interest as creditor, which will be affected by the proceedings between the plaintiff and the defendant. He has an interest opposed to both.

But it is urged by the plaintiff that an intervenor should not be permitted to change the character of the action, much less be permitted to interject into the suit a proceeding of the character of a revocatory action, nor make new parties in such suits.

It does not appear to us, as relates to the asserted change of issues between the plaintiff and defendant, that the change made

their case different to an extent rendering it proper to dismiss the intervention. There were conflicting claims to the same fund: to the proceeds of one sale of property mortgaged to the plaintiff and the intervenor.

Plaintiff's action remained one of foreclosure of his mortgage *via ordinaria*. The intervenor has not questioned the right of the plaintiff to bring the suit, or to stand in judgment.

The issue tried was closely connected with the principal issue, in that both laid superior claims to the same property. The conflicting claims gave rise to no issues foreign one to the other.

Prompted by the objection that the action is revocatory, we have examined the issues from that point of view.

The intervenor, as we take it, does not primarily seek to have a contract rescinded. He petitioned, by way of intervention, to uphold the binding effect of payments he claimed as having indirectly enured to the benefit of his judicial mortgage. He sued for the recognition of an alleged right.

If his petition be sustained it will cut short the effect of subsequent agreements in so far as he is concerned. It does not follow that the intervenor tendered issues in effect revocatory in character from the mere fact that the intervention may interfere with agreements (of date subsequent) to plaintiff's mortgage. We do not find that the intervenor seeks to put issues between plaintiff and defendant alien to the case, or is endeavoring to make parties to the suit persons without substantial interest. The clerk of court, a party to the suit, plaintiff urged, is a third person; in effect interposing new questions. He is, we think, a party only in name. He was needlessly called in the suit by the intervenor. He has no interest, controls no issue and is not to be considered in arriving at conclusions. His presence in the suit in his clerical capacity is no cause for dismissing the intervention.

Upon this point the plaintiff insists that the issues should not now be passed upon for the reason that the property may sell for an amount sufficient to pay both his mortgage and the junior mortgage, rendering in that case a decision unnecessary.

We are not led to so infer from the pleadings and facts before us. If it should sell for enough, the decree here will not affect the interest of any one.

The plaintiff, in the first place, sought to meet the issues on the

merits by interposing the plea of prescription as a complete bar to any attempt to offset the agreement made with his debtor.

The intervenor contends in answer, that prescription runs from the date the agreement became known to him, and he cites in his support the case of Byrne vs. Their Creditors, 33 An. 202, in which it was held that the law can hold no one to impossibilities, which would be the very task imposed on a party if required to assail an act which has no existence as to him.

Thus in regard to the very point here involved a precedent has been established.

While it was not intended to conceal the agreement, practically it was hidden from the possible knowledge of the intervenor until a few days prior to his intervention in this suit.

There was as to third person no date; no commencement under an agreement; there was no document recorded, nor could there be delivery of property operating in effect a notice.

A creditor can make nothing of the plea of prescription against third persons based upon his own personal agreements with his debtor, under the circumstances here.

This brings us to the question bearing upon the imputation of payment.

The defendant was an insolvent. He was in consequence without right to make the changes he undertook to effect. It was not possible, legally, to countermand payments already made and impute them to the payment of a debt contracted at a date subsequent to the mortgage indebtedness.

To the extent of the payment the mortgage had been annulled. It was not possible under the circumstances to revivify and give new life to that part of a mortgage annulled to the prejudice of plaintiff's fellow-mortgagee. It would be giving an advantage never contemplated by the law-making power, if the mortgage creditor first in rank could thus lessen the chances of recovery of amount due to a creditor with mortgage second in rank.

After the imputation of payment to the amount of the partial payment the junior mortgage was benefited as against the insolvent debtor. The mortgagee acquired a right which could not be affected by a change in payments made.

For the reason of the law and the evidence being in favor of the intervenor and against plaintiff and defendant, it is ordered and adjudged that the judgment appealed from is affirmed.

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No. 12,632.

SOUTHERN COTTON OIL COMPANY VS. BOLAND S. LEATHERS ET AL.

An injunction was issued to prevent the defendant from buying seed cotton in sacks; the latter, the sacks (not the cotton), were owned by the plaintiff in injunction.

The planter, it was alleged, had, to the knowledge of the defendant, bound himself to fill the sacks with new cotton, and to ship the cotton to the plaintiff. Instead of so doing, he had sold the cotton, or was about to sell it, to the defendant.

The injunction was set aside on bond. Plaintiff appealed from the order authorizing the defendant to bond.

The value of the sacks, as compared with the value of the cotton, was small There was no injury, irreparable.

When an injury is reparable an injunction restraining it may be dissolved on bond.

An order dissolving on bond an injunction not working irreparable injury is not appealable.

The plaintiff may be entitled to damages, for which the bond was given. As to defendants, there is no question of specific performance. C. C. 1926.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

Edwin T. Merrick for Plaintiff, Appellant.

Geo. W. Flynn for Defendants, Appellees.

Submitted on briefs November 15, 1897.

Opinion handed down December 13, 1897.

Rehearing refused February 21, 1898.

The opinion of the court was delivered by

BREAUX, J. Plaintiff sued the defendant for seven hundred cotton seed sacks, valued by it, at ten cents each; also for one hundred and fifty dollars, value of the use of the sacks during defendants' possession.

A writ of sequestration for the sacks was issued on plaintiff's petition.

In matter more particularly of the injunction which was issued at its instance (in addition to the writ of sequestration) it sets out its

custom of furnishing seed sacks and avers that some three hundred thousand of its sacks had been delivered to cotton farmers to be filled, and those not filled to be returned in accordance with written agreement.

Plaintiff charges that one of the defendants, who is engaged in the carrying business, though he had full knowledge of this agreement and was fully aware that it was the owner of these sacks, notwithstanding bought the seed for his account, or that of a company in which he is interested, and thereby it would divest its trade (unless prevented by an injunction) and cause it irreparable injury.

This defendant was allowed by the court *a qua* to bond the injunction on a bond of fifteen hundred dollars.

An order for suspensive appeal was granted to this court, and the appeal was taken by plaintiff. An affidavit was filed on the appeal with the view of supplementing the allegations of its petition regarding the value of the interest involved in the suit.

In the motion to dismiss the appeal a number of grounds are alleged.

We think the following ground, of the number set forth, is ground enough to sustain the motion: "the injuries alleged can be compensated in money."

Appellant seeks to bring its case within the application of principles laid down in several decisions of this court, in which it was held, in substance at least, that the claims set up had no equivalent in money, as, for instance, where the feelings and sensibilities of the one complaining have been greatly outraged, or where he has been deprived of an object of affection or of things deemed of great value because of the affection and regard with which they are associated. The loss of the shelter of one's house, if lost by an act of injustice, is another instance of injury which may not be compensated for in money and is included in the class of cases in which an injunction should not be dissolved on bond.

Here the case is not of that class of cases just indicated.

The offending here consisted in buying cotton in sacks, which the defendant knew was plaintiff's property. The value of these sacks is alleged. The purchase by the defendant of cotton in bags owned by another than the seller is not an injury in so far as it may be actionable, which can not be compensated for in dollars and cents.

This brings us to the trade and business which appellant alleges

has been established by it through years of effort and careful attention, and which it is alleged would be diverted and irreparably lost if the injunction be not made perpetual.

It will be borne in memory that we have naught to do at this time with deciding any question going to the merits of the injunction.

The conclusion of appellant above quoted from his petition in regard to business diverted and irreparable damages, taken with the facts alleged, offer very slender ground upon which to hold that a bond can not contain provisions sufficient for the payment of all recoverable damages.

The issue, traced to its origin, grows out of the alleged disposal of cotton, and the unwillingness of those to whom plaintiff's sacks were delivered to comply with their promise.

The debtors, or promissors, not being before us we will not pass upon the nature and binding effect of the alleged agreement between them and the plaintiff, further than to say if the contract was one "to do" the equivalent for the loss was assessable in damages at any rate as relates to defendants, third persons, with notice as alleged.

Toute obligation de faire on de ne pas faire se resout en dommages et interets en cas d'inexecution de la part du debiteur. Baudry-Lacantinerie, Vol. II, p. 620.

It follows, in our opinion, if the defendant aided them, or is engaged in or is about to aid them to any extent and in such a way that he is responsible, the injury may be compensated for in money.

Taking each case of alleged purchase of cotton from the planters, it does not seem that the injury alleged to have been caused by their failure to fill the sacks and consign them to the plaintiff, and the asserted share taken by the defendant therein, are irreparable.

For instance, if one originally holding three or four thousand sacks were to sell them to another than the owner of the sacks after having filled them with cotton, and the former were sued and the buyer from him enjoined, the injunction set aside as in case of bond, the order authorizing the bonding would not offer ground for appeal as working an irreparable injury.

The same, we believe, is true of the large number of sacks distributed by the plaintiff among cotton planters to be filled with cotton seeds. The injury would be greater, but would not be irreparable.

The whole sum of the business can be ascertained, and the loss to its business on plaintiff's theory determined.

Article 307, relative to bonds, we think, may include the case where the number of purchases have been made, and which amount to an interference with another's business, for which damages may be recovered.

In fine it will be time enough to determine that such injunctions can not be dissolved on bond when it will have been proven, in the action here, that plaintiffs will be subjected to continuous grievance or subjected to any grievance at all.

Where the injury is irreparable, not susceptible of adequate return and the damages occasion a persistent grievance that can not be in any other manner stopped, injunction as a remedy may from the first be made so peremptory that a dissolving on bond will offer ground for sustaining an appeal.

On the face of the papers we do not take it that such is the condition of affairs in this case.

The method followed to get possession of property, delivery of which has been promised, has given rise to questions that are *res nova*. Though concerned not to anticipate, we, as relates to remediable injury, are not impressed by the reason that looks forward to the possibility of forever enjoining all buyers at times, however distant, from buying goods in open markets in the sacks or bags of another.

Neither are we impressed by the argument, upon the theory that the one who promises to sell can be coerced into the discharge of his promise to sell by enjoining all buyers from buying from him.

But if the loss should be as argued the bond upon which the injunction was dissolved will not be an obstruction to a proper judgment. In the meantime it is ample security, we think. The court *a qua* has not overstepped the bounds of its discretion. We must, at this time, withhold our interference.

The value of the cotton (not owned by plaintiff) as compared with the value of the sacks in which it was, is much larger, and in consequence a claim through or grounded upon the state of being the owner of the sacks does not impress us as being one of the kind of injuries to be considered irreparable.

In support of the position taken it is also urged by the plaintiff that the defendant having suggested in his motion to bond, that the

writ of injunction works an irreparable injury to his interest, the defendant was concluded by that allegation, as relates to plaintiffs; in other words, that there was inconsistency between the two: when he (defendant) sought to bond the injunction and his position when he seeks to prevent relator from appealing from an order to bond.

We think that it is answer enough to this assertion to say that the injury may be irreparable as to the defendant seeking to set aside the injunction on bond; and not irreparable as to the plaintiff seeking to appeal from the order granted defendant to bond the injunction.

Moreover, a defendant does not admit by the suggestion of his injury that the other (the plaintiff) has been or is injured.

Similar allegations are made in nearly all petitions for injunctions. It never has been held that it gave to the defendant an additional right to set aside the injunction on bond.

We note that Mr. High in his Treatise on the Law of Injunctions, Sec. 1497, 3 Ed., views the matter as resting in the sound judicial discretion of the court of the first instance and cites two decisions of this court. State *ex rel.* Cummings vs. Judge, 29 An. 360; State *ex rel.* N. O. and Havana S. S. and Lottery Co. vs. Judge, 23 An. 766. We, nevertheless, have not treated the case as one in which the court *a qua* had exclusive jurisdiction to determine whether or not the injury was irreparable. We have found that it was not irreparable. It follows that the appeal must be dismissed.

It is dismissed and a decree of dismissal will be accordingly entered.

MR. JUSTICE MILLER dissents.

No. 12,629.

STATE OF LOUISIANA VS. AARON JOHNSON.

When the accused does not choose to testify it is not error on the part of the judge to charge the jury that he is not bound to testify, and that his not having testified must not be construed against him.

The admonition by the judge to the jury was not a comment on the fact.

It was a compliance with the langnage of the statute, and, although not requested by the accused, it was not reversible error to instruct them not to interpret his silence against himself.

State vs. Johnson.

APPEAL from the Eighteenth Judicial District Court for the Parish of Terrebonne. *Caillouet, J.*

M. J. Cunningham, Attorney General, and *L. C. Moise*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

Beattie & Beattie for Defendant, Appellant.

Submitted on briefs December 4, 1897.
Opinion handed down February 7, 1898.

The opinion of the court was delivered by

BREAUX, J. The accused was charged with larceny. He was convicted and sentenced to hard labor.

He prosecutes this appeal and complains of the charge of the judge to the jury, in which he instructed them that while under the statute the accused was permitted to testify, yet it did not require him to testify; and if he did not, that fact was not to be taken against him.

His counsel in his behalf urged that it was error on the part of the judge to allude at all to the matter, as it tended to injure the cause of his client. Counsel does not contend that the trial judge stated that his not having testified was to be taken in any manner against the accused, but on the contrary he admitted that the trial judge's statement was absolutely fair and correct as to what happened on the trial.

We are referred by counsel for the defendant to the case of State vs. Carr, 25 An. 408.

The judge in the cited case, *supra*, had been requested to charge "that the fact that defendant had offered no evidence is in no way to be taken as an admission of guilt." The judge refused to thus charge, and instead instructed the jury "that all circumstances against the prisoner within his power to explain, which he refuses to do, are to be taken and weighed by the jury as circumstances against the prisoner."

On appeal, this was held: Error, and the judgment was reversed

for the reason that it might have prompted the jury to conceive that defendant, by not offering any evidence, had admitted his guilt.

The accused here sought to apply the rule just announced to his own case, and urged, as we take it, that, as in the cited case, he was warranted in depending on the deficiency of the proof offered by the State, and could without prejudice to his cause decline to avail himself of the right to testify in his own case.

We do not detect that the charge, as given in the case before us for decision, trenched upon the presumption of innocence which exists in favor of an accused. If, in the cited case, the requested charge had been given as part of the original charge, the accused would have had no right to a reversal on the ground that the court had called attention to the fact that the defendant had offered no evidence; if followed, as it should have been in the District Court, with the instruction that this was not to be "taken as an admission of guilt;" that it was his right to rely upon insufficiency of proof.

For the reason that would have sustained the reversed judgment in the case cited above, in the case here the presumption of innocence was safeguarded by the instruction given.

Counsel for defendant cites Wilson vs. United States, 149 U. S. 60; Austin vs. People, 102 Illinois, 261–264, and State vs. Cameron, 40 Vermont, 556.

In each of these cases the indiscreet remarks of the prosecuting officer, while addressing the jury, gave rise to the question involved. The prosecuting officer had commented upon the fact that the accused did not testify. In each case the trial judge had permitted counsel to proceed with the comment, and the court had failed to stop counsel.

From the first cited case immediately, *supra*, we quote: "This view of the effect of objections taken to the cause of the District Attorney, and to the failure of the court to properly condemn it, renders unnecessary to consider any other alleged errors. This quotation serves as a correct reference to the similar point decided in each case; all growing out of the indiscreet remarks of the prosecuting officer, not stopped as he should have been. Here a different question arises. The trial judge, in obedience to the statute, instructed the jury that the silence of an accused, who has the right to testify, if he chooses to, is to have no effect.

We are, in considering the objection to the charge, impressed by

the fact that it is made the duty of the court to give to the jury a knowledge of the law applicable to the case.

The last proviso of the statute, No. 29 of 1886, declaring who are competent witnesses in criminal proceedings reads: "That his failure to testify shall not be construed for or against him, but all testimony shall be weighed and considered according to the general rules of evidence, and the judge shall so charge the jury."

In giving the jury the instruction he did, he obeyed the letter of the law.

Ingenious counsel for the accused in the brief state: That no judge would presume to comment upon the fact that a witness had not been called by the accused, and that even if the other evidence in the case plainly showed that a certain person knew all about the matter, still if the accused failed, or refused to place the person on the stand the judge could not legally call the attention of the jury to the fact; that he would not be allowed to say "there seems to have been a witness who knew all about this matter—he could have been produced by the accused—indeed, the accused was the only one who could have made him a witness—no one else could have done so; but, gentlemen of the jury, that fact must not be construed against the accused—he was not bound to do so."

The affirmative statement of the court as put by counsel in argument is so pronounced and so directly bears on the case of an accused for not producing a witness that it renders of no effect all subsequent admonition of the court.

Here the case is different. It was not assumed that a certain person knew all about the facts. On the contrary, the court informed the jury in substance that the statute protected the accused if he chose not to testify, and the instruction was given entirely with the view of protecting the accused.

There are accused persons, without self-command, timid, easily agitated, against whom there is circumstantial evidence difficult, even by himself, to explain, who may well be advised not to testify; others for other reasons may deem it desirable to remain silent.

As to these and all other accused who do not testify in their own defence, surely the court may give the instruction as given in this case. In our judgment the statute was intended, in aid of justice. If it should appear, that by the manner of its execution or the effect

it had on the case, it was an instrument of oppression, it would then become necessary to interpose judicial authority.

The case before us presents no such issue. The accused remained silent, and the judge informed the jury that the privilege of silence should not occasion question or suspicion of any kind. We would not be justified in assuming that the jury took a contrary view, and upon his silence found him guilty, despite the instruction of the court.

There is no evidence before us that the statute was applied in a manner harsh and unjust, or that such was its effect before the jury.

The proviso of the statute complained of is *germane* to its purpose and covered by the title.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 12,592.

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MARION B. MONROE VS. H. WESTON LUMBER COMPANY ET ALS.

AS RELATES TO THE UTTERANCES OF THE ATTORNEY DURING THE TRIAL, ONE OF PLAINTIFF'S GROUNDS.

The attorney, not his client, is responsible for (alleged) defamatory utterances of the former in the course of the trial of the latter's cause. R. S. 123.

AS RELATES TO PROCEEDINGS COMPLAINED OF.

The burden of proof to show a want of probable cause was upon the plaintiffs. In other words, the want of probable cause will not be inferred from the mere fact of the prosecution.

The evidence for plaintiff did not prove that defendants instituted suit against him, and made the damaging allegations complained of, without cause for such action.

Verdict of jury, and judgment of court affirmed.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

A. B. Philips and *Albert Voorhies* for Plaintiff, Appellant.

Merrick & Merrick and *George C. Walsh* and *James J. McLoughlin* for Defendants, Appellees.

Argued and submitted December 1, 1897.
Opinion handed down January 10, 1898.
Rehearing refused February 21, 1898.

The opinion of the court was delivered by

BREAUX, J. In this case the plaintiff averred that the defendants are indebted to him *in solido* in the sum of ten thousand ($10,000) dollars, because in the matter of Marion B. Monroe vs. His Creditors they combined and confederated to prosecute him for fraud in order to defeat his discharge; that they falsely charged him with fraud in concealing his commercial books and in knowingly omitting property from his schedule of assets and in other respects; that said proceedings were malicious and without probable cause, and were maliciously prosecuted from the date of their filing up to the final decision of the Supreme Court in his favor.

That in the course of the proceedings they maliciously slandered and libeled him by verbal and written accusations of fraud before the lower court, and more especially in the Supreme Court, in their briefs and in oral argument of their counsel.

That these charges and accusations were false and published by defendant maliciously; they well knowing at the time there was no truth in them.

That the petitioner has been injured in consequence thereof, in his feelings, good name and business, in the full sum of ten thousand ($10,000) dollars. He admitted that he had been vindicated by the judgment of the Civil District Court and Supreme Court, rendered in his favor.

To this petition Horace U. Beach, one of the defendants, excepted on the ground that the petition was too vague and indefinite for him to safely answer, for the reason that the petition did not disclose time, place and circumstance.

That the dates were not set out, and that the petition did not show whether the plaintiff was suing the defendant individually, or as agent of the lumber company, or whether the plaintiff was suing to obtain judgment against the defendant, or the lumber company.

He therefore prayed that his exception be sustained and plaintiff's petition be dismissed.

J. J. Clarke, another defendant, excepted to the petition on the

ground that the petition was too vague and indefinite for defendants to safely answer the same, and that he did not state the time, place or circumstances, and that the date of the alleged acts of the defendants were not set out. He therefore prayed that the plaintiff's petition be dismissed.

J. A. Blaffer also excepted substantially on the same ground.

Hinderer, another defendant, excepted on the ground that if he was intended he had been improperly cited, and improperly described in the petition, as his name was Frederick Hinderer, and that he did not know any one by the name of Ferdinand Hinderer.

The plaintiff thereupon, with leave of the court, filed a supplemental petition, averring that the commercial firm of Blaffer & Sons was composed of J. A. Blaffer and his son, A. S. Blaffer, deceased; that the latter was unmarried, and left his father and mother, his forced and only heirs.

Reiterating the allegation of the original petition, the plaintiff gave the following dates and places for the purpose of making his charges of libel, slander, and malicious prosecution more specific:

In the Civil District Court, April 19, 1894, defendants filed opposition to plaintiff's discharge in surrender proceedings, and there was a trial before jury on the 13th and 14th of June. Date of filing transcript of appeal, November 5, 1895. Date of filing brief, February 11, 1895; and March 16 and April 6 of the same year.

He averred, in addition, that the defendants had authorized their counsel to make charges against him (the plaintiff), and that they were present during the said proceedings in the court.

The defendants thereupon filed exception to the supplemental and amended petition, to the following effect:

That the proper parties had not been made by the plaintiff, and in the event of this exception being overruled, further excepted, that the supplemental and amended petition attempted to change the issue between plaintiff and the defendants, and that the petition should be dismissed for these reasons.

Further excepting the defendants averred, that the supplemental and amended petition, as well as the original petition, discloses no cause of action. The judgment of the lower court maintained the exception, and dismissed the suit of plaintiff.

Upon appeal to this court, the judgment of the lower court was reversed, the case was remanded, and ordered to be reinstated on

the docket (49 An., p. 594), the court holding that a petition which recites and avers, in certain proceedings, pleadings and printed briefs, in a certain suit, depending in a court of justice and which the parties thereto caused and directed their attorneys at law to prepare and file, are certain libelous and slanderous statements, discloses a cause of action.

Proceedings were renewed in the lower court. The defendants filed a plea of prescription of one year, and an exception of *res judicata*, which were by consent referred to the merits.

The defendants then filed their answer, a general denial, admitting, however, that on the eleventh day of April, 1894, in the case of Marion B. Monroe vs. His Creditors, an opposition was made and filed by their counsel, charging fraud against the said Marion B. Monroe, and they averred that said opposition was made and presented by their counsel in good faith, not maliciously, and with probable cause; further answering the defendants deny, that they instructed their counsel to make any charges against plaintiff in pleadings or argument that were not true, and averred that whatever was done by them, was done in good faith, without malice, and in pursuit of their legitimate rights.

They further averred that they and their attorney had reasonable grounds of suspicion in making the charges.

The case was heard before a jury, and upon their verdict in favor of defendant judgment was rendered by the lower court, rejecting the demand of the plaintiff, at his cost.

The plaintiff prosecuted the present appeal.

The case was remanded chiefly to enable the plaintiff to prove his allegations.

Before us, on the trial of the exception on the appeal which resulted in a decree remanding the case for trial on the merits, the truth of the allegations was not only disputed, but, in the nature of things, they were conceded as true. The rule is well known, proper on the trial of exceptions; all averments of the petition are taken as true.

The plaintiff had in his petition alleged that the defendant had maliciously defamed him by accusations of fraud in the course of judicial proceedings before the court, and by approving the alleged calumnious and abusive words of their attorney in the course of his

argument in the case No. 11,940, Monroe vs. His Creditors, 48 An. 801.

On the trial in the District Court, after the case now before us for our decision, the damage suit for asserted defamation, had been remanded, the evidence in the opinion of the jury did not sustain the averments of plaintiff.

We have carefully examined the testimony upon which the jury based their verdict, and we have not arrived at the conclusion that the verdict was erroneous. Two, the most pertinent, questions for the jury were: whether the defendants were responsible for the words of the attorney; and in the second place whether the defendants had probable cause to believe the allegations made for the writs of attachment they sued out as creditors under the instructions of their attorney against the plaintiff, who was their debtor. The first question stated related particularly to the words of the brief of counsel for the creditors in the case cited *supra*, and the second question to the fraud charged upon which the proceedings were had against the plaintiff, an alleged insolvent debtor. In regard to the first question, first, that if the jury concluded, as we have every reason to assume they did, that fair and reasonable comment, however severe in terms at times, are justifiable by the facts of the case, and in the second place, if the attorney oversteps the proper limits and defames any one, the client is not responsible, they only gave effect to the statute which prescribes that a client shall not be held in damages for the slanderous or libelous words of his attorney. Rev. Statutes, Art. 123.

In support of plaintiff's position counsel urged that the authority of the attorney must be presumed, and that the silence of his client imports that he gave consent to the utterances made. We are constrained to hold a different view.

In our judgment the position is not tenable. When the words are defamatory, in our judgment, the language of the statute from which we have before quoted places the *onus* of proof of the consent and direction of the client upon the plaintiff claiming damages.

The attorney is responsible, we think, unless in some sort or method the client has made his defamatory words his own.

In the contemplation of the statute the attorney is answerable and not the client, even if he does not expressly, at the time, dis-

avow that he has given countenance to the utterances. While it is true the authority of the attorney, acting within the limits of his duty to his client, is presumed—in fact, it can not be disputed, it is no part of the attorney's duty to his client, if he defames any one in a manner not at all necessary to sustain the action. In other words, if the language used was necessary in argument, itwas not slanderous or libelous. If it was not necessary, and was slanderous or libelous; the attorney was responsible.

The second question in the case, which must have been submitted to the jury and is covered by their verdict, grows out of the charge of fraud brought against the plaintiff, by the defendants in proceedings, which resulted in the acquittal of the plaintiff of fraud. Monroe vs. His Creditors, 48 An. 801.

Here the question is probable cause for defendants' action against plaintiff *vel non*. The question for the jury was whether the defendants had probable cause to believe allegations made in court and of record, under the advice of their attorney.

There was conflicting testimony of record as to whether defendants here were correctly informed in regard to the title of real estate involved.

The defendants alleged that they were circumvented and duped by the misstatements of the plaintiff.

Despite the earnest denial of the plaintiff, the jury arrived at the conclusion that the weight of the evidence upon this point was with the defendants. In reviewing the verdict and the judgment of the court *a qua* we have carefully considered the testimony of each witness, and have found no testimony which in our opinion would justify us in reversing the judgment and setting aside the verdict. We have not discovered any want of good faith on the part of the defendants, or that they were actuated by malice or desire of injuring the plaintiff.

This court has held that actions for damages of this sort are not favored by law. Laville vs. Biguenaud, 15 An. 605.

Unless it appears that there was malice and a want of probable cause shown, we think it is our duty to affirm the verdict.

It is therefore ordered and adjudged that the judgment of the District Court is affirmed.

No. 12,576.

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THE STATE OF LOUISIANA VS. NELSON THOMAS.

A *venire* drawn in the absence of two members of the jury commission will not be set aside, it appearing that the absent members had notice of the time and place for the drawing.

The *proces verbal* of the drawing of a *venire* may be supplemented by the certificate of the clerk, made as required by the statute, showing that the absent commissioners had been duly notified. It need not be incorporated in the *proces verbal* of the drawing of the *venire*.

The suggestions of the District Judge in matter of the clerk's certificate were proper, and offer no ground for objection.

The *proces verbal* written by the deputy clerk, under the control and direction of the clerk, is not an irregularity for which a *venire* should be quashed.

The date for the drawing of the *venire* was sufficiently shown, and in time to notify all concerned.

The requested instruction to the jury was sufficiently clear to make it proper to instruct the jury that "concealment after the act, without previous preparation, is not necessarily proof of intent."

The trial judge should, in all trials for murder, instruct the jury under Art. 785 of the Revised Statutes that they may find the prisoner guilty of manslaughter. State vs. Brown, 41 An. 411, and State vs. Jones, 46 An. 1395.

It was a misdirection in matter relating exclusively to a murder trial, in which the court is specially required to inform the jury that four verdicts might be found.

APPEAL from the Tweenty-third Judicial District Court for the Parish of Tensas. *Tullis, J.*

M. J. Cunningham, Attorney General, and *B. F. Young*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

George H. Clinton and *Abner E. Green* for Defendant, Appellant.

Submitted on briefs November 20, 1897.
Opinion handed down December 28, 1897.
Rehearing refused, reasons assigned, February 21, 1898.

The opinion of the court was delivered by

BREAUX, J. The defendant was indicted by the grand jury of the parish of Tensas on the sixth day of July, 1897, for the alleged murdor of Ada Jackson in the parish on the fourth day of July, 1897.

On July 7, 1897, he presented to the court a motion to quash the *venire* and a motion to quash the indictment.

The following were the grounds:

That the *proces verbal* did not set forth that all the members of the jury commission had been notified of the time and place for the drawing of the *venire*, nor that the jurors selected were to serve at any particular term or any specified day, and that two of the members of the jury commission were absent; that the *proces verbal* was written by one who was not a member of the commission. The motion was overruled. The accused also contends that the judge erred in refusing to specially instruct the jury as requested.

The accused was found guilty as charged.

From the verdict of the jury and sentence of the court, he prosecutes this appeal.

The *proces verbal* shows that the commission met on the 24th of May, 1897, to draw persons to serve as jurors at the ensuing term of the court for the parish to serve, beginning on Monday of July, 1897.

The date was left in blank.

This omission the defendant urges, through counsel, was a fatal irregularity.

The order of the court in due time directed the commissioners to summon a jury for the first and second week of the regular term of the court beginning on Monday, July 5, 1897, the date which was omitted from the *proces verbal*. The order was spread on the minutes and was also published in the official newspaper of the parish, and the commissioners manifestly acted with reference to that date. The omission was owing to a clerical oversight which does not appear to have prejudiced the defence.

No prejudice of any kind to the defendant is alleged.

Parol evidence of the clerk having been admitted (over defendant's objections set forth in a bill of exceptions) to supply the omission, counsel assert that the *proces verbal* of the proceedings of the jury commission is in character sacred and should not be changed by the testimony of witnesses or made dependent upon the unreliable memory of men.

The argument in support of the position is not, in our view, convincing. Even with reference to the minutes of a court which have always been considered as clothed with authenticity, unimportant

omissions may be supplied, a date may be inserted. The court for a similar reason may order a blank filled with a proper date, prior to taking any action based upon the document to which the date is added.

The statute from which we quote has not given the importance claimed to omission in the *proces verbal*, for "defects in the drawing of the jury can not be taken advantage of unless it appears that some fraud has been practised, or great wrong committed in the drawing and summoning of jurors that would work a great and irreparable injury to defendant."

There was nothing of the sort in this case—only the omission of a date evidently omitted by oversight which the previous order shows, and every one must have known bore the proper date. The omission and the correction could not take any one by surprise or be in the least misleading. It was not shown that it could have caused the least injury.

We pass to the next point argued by defendants' counsel: that the clerk's certificate showing proper notification of the absent commissioners was not made in due time.

The statute provides: "Three members of said commission together with the clerk of the District Court shall be sufficient number to perform the duties imposed by this act, provided all the members shall have been duly notified by the clerk of the District Court of the time and place designated by him for the meeting of said commission, which notification shall appear from the certificate of the clerk in case of the absence of any member thereof."

As a matter of fact the clerk had given the required notice as shown by his own testimony. The duty had been performed although there was no record evidence, as there should have been, establishing that it had been performed.

The court after the clerk had testified directed the clerk to make a proper certificate based upon his testimony.

In case of the absence of any jury commissioner, it shall be made to appear that he had been duly notified. The time within which it shall be made is not specified by statute.

In our judgment it was not too late to make the affidavit at the time the motion to quash was tried. The evident purpose in adopting the statute was to require notification, in due time, to each of the commissioners. The requirement as to notification had been

complied with and proof of the fact was not in our opinion untimely admitted in evidence.

Notification is required in order that three members of the jury commission together with the clerk of the District Court may be a sufficient number to perform the duty imposed by the act.

The complaint is not that the members of the jury commission were not notified; but that the *proces verbal* does not set forth that they were notified. The language of the statute is a complete answer: it is made the duty of the clerk to frame a proper certificate showing that notice has been given to the commissioners. Although it is desirable that it be made as soon as possible after the notice, the delay within which it should be made is not expressed, nor is it set forth in the statute that the certificate shall be part of the *proces verbal* of the jury commission, as contended by the defendant.

It is true, as stated by counsel for the accused, that it appears of record that it was at the suggestion of the court that the certificate was made.

We do not think there was any impropriety in the suggestion, the court has the authority, in a matter general in character, as this was, to direct that proper document be prepared.

It was offered (after it had been prepared) by the District Attorney in evidence.

We have not found in this ruling of the court anything inconsistent with the possibility of a fair trial. The trial judge has authority and discretion with which it is not our duty, nor only inclination to interfere, unless it clearly appears that he has acted arbitrarily and without due regard to the rights of the defendant. The complaint of the defendant upon this point, grounded upon the alleged improper suggestion of the court to the District Attorney, is not sufficiently sustained by the facts of record to justify our interposition.

It is true it appears that on the trial of the motion to quash the *venire* and the indictment, the court "reopened the note of evidence without a suggestion from the District Attorney."

It was then that the District Attorney offered the order of court, ordering the jury commission to draw a jury for the jury term commencing July 5, 1897, to which the defendant objected.

The reopening of a note of evidence (upon a motion to quash), contradictorily with a defendant, and on the day it had been closed, is not in our judgment a good ground for disturbing the verdict. Such

reopening is not of sufficient gravity to vitiate the proceedings. The trial judge on the trial of such a motion is not always bound for obvious reasons by the strict rules applying when the defendant is placed on his trial before the jury. Of that view the court must have been in State vs. Gonsoulin, 38 An. 462, in which case a witness, after he had testified on the trial of a motion and the evidence closed, was granted leave to return and correct part of his testimony that had been taken down, and the accused was not permitted to reopen the evidence upon the subject of inquiry. Another ground advanced by the defendant to quash the indictment and to set aside the *venire* is that it does not appear from the *proces verbal* of the drawing of the *venire* that it was drawn or summoned to appear at any particular term of court or upon any specific day.

We find, as a matter of fact, that the commission met at the time designated by the trial judge, viz.: on the twenty-fourth day of May, 1897, and drew the number required for service as jurors at the ensuing terms to begin on Monday of July, 1897, and that in the *proces verbal* the date was left in blank, but the order of the court contained the date under which the commissioners acted.

The date the ensuing term was to begin. The omission was not a fatal irregularity. It was a clerical oversight. It is not charged that any of the acts complained of were committed in fraud of the rights of the accused or that they worked upon him irreparable wrong essential to set aside and annul a *venire*. Act 99 of 1896.

In the next place it is urged by the defendant that the *proces verbal* was written in the handwriting of a deputy clerk. The point loses all importanse in view of the fact that the record shows that the whole of the *proces verbal* was written under the dictation of the clerk.

Similar acts of a deputy clerk were passed upon in two decisions of this court of recent date. State vs. Johnson, 47 An. 1092; State vs. McCarthy, 44 An. 324.

The deputy, as in the case here, acted under the direction of the jury commission.

This brings us to the next proposition founded upon the refusal of the trial judge to specially instruct the jury (as requested by defendants' counsel) as follows:

"Concealment after the act where there was no previous preparation is not necessary evidence of intent."

The trial judge incorporated in the bill of exceptions his reasons for declining to specially instruct the jury; these reasons are: "It was calculated rather to confuse than to enlighten the jury."

Further: "If the charge requested means that the concealment of the body of the deceased by the accused after the killing is not necessarily evidence going to show the criminal intent with which the killing was done, it is not a correct statement of the law."

Counsel for accused argued that "proof" and "evidence" are frequently used as synonymous terms and are interchangeable words, and that the instruction requested was equivalent in meaning to the instruction "concealment of the body after the killing without previous preparation was not necessarily conclusive evidence of a deliberate intent to take life."

The contention of counsel meets with some support from highly trustworthy source.

"The word evidence, in legal acceptation, includes all the means by which any alleged matter of fact the truth of which is submitted to investigation is established or disproved. This term and the word proof are often used indifferently, as synonymous with each other; but the latter is applied by the most accurate logicians to the effect of the evidence and not to the medium by which truth is established." Greenleaf, Sec. 1, Vol. 1.

As relates to "concealment" after the act evidence of concealment is admissible, as it goes to show criminal intent, and as such it should be weighed, but it is proper on request to instruct the jury that it does not necessarily constitute proof. It admits of no question.

Concealment after the fact is not proof conclusive of intent to commit murder. For instance, in a case of manslaughter the slayer may seek to conceal the body of his victim without its being an evidence of the previous intent to murder.

We are of the opinion under the circumstances the jury should have been instructed in view of the terms of the original charge: that concealment after the deed was not conclusive proof of intent.

The whole charge appears of record. It was annexed to and forms part of a bill of exceptions. The case in the charge was considered solely from the point of view of murder *vel non*. No instruction whatever as relates to manslaughter was given to the jury. In closing the charge the following was the language used: "The punish-

ment denounced by law for murder in this State is death, but juries are permitted when they see proper to qualify their verdicts that the punishment is reduced to imprisonment for life at hard labor. So there are three verdicts you might render in this case, viz.: 'Guilty as charged,' which means that the death penalty is imposed; 'Guilty with out capital punishment,' which means that the prisoner would be imprisoned at hard labor for life, and 'Not guilty.' "

In remanding the case for error in matter of the charge we desire to state that there are four verdicts which a jury might render in any case in which the accused is charged with murder—that is, the fourth, guilty of manslaughter.

Under the jurisprudence of this State it is as imperative to give the fourth as it is to give the third instruction to the jury.

We are of the opinion, said the court in State vs. Jones, 46 An. 1398, that on all "trials for murder it is the duty of the District Judge *ex proprio motu*, without request from counsel, to charge the jury that among the verdicts which they are permitted by law to return under an indictment charging a person with murder is a verdict of manslaughter, as much so as to inform them that under an indictment for murder it is lawful for the jury to qualify their verdict by adding thereto 'without capital punishment,' and that it is reversible error in any case that the judge should have failed to so inform them. And if this be so how much stronger is the case where a judge not only fails to give such information, but expressly declares that in the case before him such a verdict would not be applicable."

The court cited in support of this position State vs. Brown, 40 An. 725, and State vs. Brown, 41 An. 11. Under this view the failure to instruct the jury as stated was not a mere omission to charge. It was a misdirection.

Upon this point the case is absolutely exceptional and entirely *sui generis*. It does not apply to lesser grades in matter of other crimes charged. It only applies to trials for murder, and is limited in those cases to informing the jury that a verdict of guilty of the crime of the lesser grade, manslaughter, may be found.

It is therefore ordered, adjudged and decreed that the judgment and sentence appealed from be annulled, reversed and set aside as not good in law, and that the verdict of the jury be set aside and the

defendant remanded in custody subject to the orders of the District Court of the parish of Tensas.

The Chief Justice takes no part in this decision.

MILLER, J. dissents.

ON APPLICATION FOR A REHEARING.

BREAUX, J. On reconsideration of the grounds upon which this case was remanded we have concluded to adhere to them, and not to grant a rehearing.

The rule which has heretofore been laid down by the decisions of this court applies to cases in which the accused stands charged with murder.

In cases of that character, it is, in our view, the duty of the trial judge to charge the jury that they may return a verdict of guilty of manslaughter, if they should find that he is guilty of manslaughter and that he is not guilty of murder.

It is not left to the trial judge to determine whether the charge of manslaughter is a part of the law of the case; or whether, in other words, the *facts* call for a charge as to manslaughter.

The matter is left to the jury, who are to be instructed as before stated.

The error being fundamental because of the language of the statute in such a case only; we concluded to remand the case.

The rule is limited exclusively to cases such as the one before us. As relates to other crimes it does not apply. It is in that respect *sui generis* and does not apply in all cases; but we repeat it applies in cases in which the accused is tried for murder.

Rehearing refused.

No. 12,563.

WM. C. RAYMOND ET ALS. VS. EDWARD CONERY.

Upon the organization of the Civil District Court for the parish of Orleans created by the Constitution of 1879 all causes pending in the then existing Civil Courts for that parish were directed by the Constitution to be transferred to the *new* Civil District Court.

This invited legislative action to effectuate more fully the constitutional intendment. But none was taken. This failure resulted, *ex necessitate rei*, in remitting

the method of removal to such regulations as the new courts might prescribe, or such orders pertinent thereto, as they might make, guided by the light of precedent and jurisprudence.

Hence, the supersession of the new courts did not, *ipso facto*, operate a transfer of the causes pending in the old courts to the new, nor were the records of the suits to be considered as of right, or in fact, filed, *eo instanti*, in the new courts.

Something was required to be done by the parties in interest in the pending causes to bring about their transfer, and until this was done the jurisdiction of the superseding court did not attach.

Without such action, the papers, or the record of a cause, remained in the hands of the city officials, appointed to their safe keeping, without preserving, after the long lapse of time as in this case, the status of a pending suit.

The instant case remained thus without action for its transfer for seventeen years, and meanwhile three of the four original parties to the suit had died, and the record was lost. Effort is now made to transfer, revive and substitute the record. This is met by the plea of prescription—held: The cause must be considered as having been abandoned and practically discontinued, and the attempt now made is viewed as tantamount to the bringing of the action anew after discontinuance, and the prescriptions applicable to such action are considerd as having not been interrupted. C. C. 3519-3551.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

W. S. Benedict for Plaintiff in Rule, Appellant.

Howe, Spencer & Cocke and *Bernard McCloskey* for Defendant in Rule, Appellee.

Argued and submitted January 25, 1898.
Opinion handed down February 7, 1898.
Rehearing refused February 21, 1898.

The opinion of the court was delivered by

BLANCHARD, J. Under the Constitution of the State of Louisiana, adopted in 1868, there was established in the parish of Orleans seven district courts known and designated by numbers from one to seven inclusive.

The Constitution of the State adopted in 1879 abolished these courts and substituted in lieu thereof two district courts—one known as the Civil District Court for the parish of Orleans, the other as the

Criminal District Court for the parish of Orleans—the former to have not less than five judges, the latter not less than two judges.

The District Courts thus created were subdivided into what are called "Divisions," and a judge assigned to each division.

The Constitution of 1879 ordained that, upon the organization of the courts created by the new Constitution, all causes pending in the courts established under the Constitution of 1868 "shall be transferred to the courts respectively having jurisdiction thereof under this Constitution." Art. 261.

This article seems to have invited legislative action to effectuate more fully its purposes. But the only enactment on the subject was Act No. 29 of 1880, providing for the transfer of causes pending in certain of the old courts to certain of the new courts established by the later organic law, and has no reference whatever to the transfer of causes from the old District Courts of the parish of Orleans to the new courts for that parish created by the superseding Constitution.

This failure of legislative direction for the removal of causes from the old District Courts of the parish of Orleans to the new court supeseding them resulted, *ex necessitate rei*, in remitting the manner or method of removal to such rules and regulations as the new court might prescribe, or such orders pertinent thereto as they might make, guided by the light of precedent and jurisprudence.

The Constitution of 1879 provided that, in the parish of Orleans, the new courts established by it should supersede the old courts on the first Monday of August, 1880, and they did so.

But this did not, *ipso facto*, operate a transfer of the causes pending in the old courts to the new, nor were the papers and records of the suits to be considered as of right, or in fact, filed, *eo instanti*, in the new courts. Under the constitutional provision the Legislature might have so ordered it, but the Legislature had remained silent. Under those circumstances something must be done by the parties in interest in the pending causes to bring about their removal from the old courts to the new, in order that the practical jurisdiction of the latter might attach.

The law had made no provision even for the proper custody of the records of pending suits. The clerks of the old District Courts became *functus officio* on the first Monday of August, 1880, along with their courts (Cheevers vs. Duffel, 32 An. 649), and there was

no warrant for the clerk of the new Civil District Court to take possession of the records as custodian thereof. The matter seems to have been called to the attention of the municipal authorities of the city of New Orleans and the necessity pointed out for some action looking to the safe-keeping of the records pending removal to the new court. The city authorities appointed a keeper of the records.

It appears that the judges of the Civil District Court provided a method by which a party might take the record of a case from the custody of this city official and file it in the Civil District Court. With reference to this, that one of the judges of the said court who sat upon the instant case says, in his reasons for judgment, that upon the organization of the court, shortly after the adoption of the Constitution of 1879, the judges were very soon called upon to consider the status of the cases pending in the civil courts which had been superseded, and whilst the conclusion was reached that the causes had not abated, it was the consensus of opinion that in order to give such causes the status of *live* cases, in the proper sense of the term, it was the intention of the framers of the Constitution that some action should be taken by the parties in interest, with the view of vesting the jurisdiction of the same in the newly established court. He states, also, it was the opinion of the judges that in the absence of such action, the Civil District Court was without jurisdiction or control over causes pending in the old courts and over the records of such causes, and that these records have been regarded as in the custody of the clerk of the Civil District Court only after they have been transferred upon the application of some party in interest from the defunct courts.

The Legislature having taken no action relative to the causes pending in the superseded courts, nor directed how or in what manner the jurisdiction of the Civil District Court should attach, it was competent for the judges of the latter court to make orders therefor. The Constitution, by investing the Civil District Court with jurisdiction, impliedly conferred the means necessary to its exercise. Prentice vs. Waters, 3 N. S. 522; Thomas vs. Cortes, 6 R. 44; Rhinehart vs. Doswell, 6 La. An. 767.

But the jurisdiction of the superseding court did not attach, nor was the cause transferred unless the action prescribed by the court was taken by the parties in interest. Without such action the

papers, or the record of the cause, remained in the hands of the city official appointed to their safe-keeping without preserving, after the long lapse of time, as shown in this case, *the status of a pending suit.*

These observations lead to the consideration of the case at bar.

In November, 1879, William C. Raymond, Theobald Forstall and Andrew Hero, Jr., as liquidating commissioners of the Louisiana Savings Bank and Safe Deposit Company, began an action in the then Fifth District Court for the parish of Orleans against Edward Conery for the recovery of a large sum of money.

In December following the defendant filed certain exceptions which, in June, 1880, were overruled, and a default entered. Defendant asked and obtained further time in which to make answer, and on July 6, 1880, filed a peremptory exception of no cause of action, a general denial, with reservation of the exception, and prayer for jury.

One month latter the court in which the action was pending ceased to exist, and the present Civil District Court became thereafter the tribunal in which such causes must be prosecuted to final results.

But no action whatever was taken by any party in interest in the case to do that which was necessary to cause the jurisdiction of the new court to attach. No motion was made to have the case transferred; the record was not taken from the custody of the city official and filed in the Civil District Court; no order and no appearance whatever was made or entered, or attempted, in the new tribunal.

The situation remained thus from the time (August 1, 1880) when the old Fifth District Court was abolished down to April 1, 1887, a period of nearly seventeen years, when an attempt was made to transfer the case to the Civil District Court. The cause itself was then only a memory. The record had disappeared, was lost and could not be found, and of the four original parties to the suit—three plaintiffs and one defendant—all were dead save one.

On the day last mentioned, counsel representing Andrew Hero, Jr., surviving liquidating commissioner of the Savings Bank, and sole survivor of the parties to the suit, appeared in the Civil District Court, suggested that this suit was instituted in the former Fifth District Court, that issue had been joined, that all the parties had died save himself, and that he alone now represented the bank. He

averred that William H. Byrnes was the legal representative of Edward Conery, deceased, and asked that he be made party defendant, and that the case be placed upon the docket and assigned for trial.

On the same day he filed a second plea suggesting that the record of the case was lost, and took a rule on Byrnes, administrator of Conery, deceased, to show cause why the lost papers should not be substituted by copies, and a record made up.

The administrator, appearing only for that purpose, filed an exception to the proceedings taken, or any other looking to the revival of the cause, on the ground that the Fifth District Court having been abolished, and no effort having been made to remove the case to the Civil District Court for a period of more than sixteen years, the cause itself had abated, been abandoned and perished; and he pleaded against the proceedings and demand of plaintiff the prescription of one, two, three, four, five and ten years. He averred that the laches of plaintiffs had disentitled them to proceed with the cause, and that it would be grossly unjust and inequitable for any proceedings to be allowed, the defendant having died two months before the effort to resurrect the case was made, and his testimony not being obtainable.

This exception was maintained, the rule discharged and the proceedings dismissed. Plaintiff appeals.

His counsel presents in argument and brief this: "That the sole question to be determined is: Does Article 21 of the Code of Practice state the law governing the case, it being proved and admitted the deaths occurred between the plaintiffs on the one side and defendant on the other, *after issue joined.*" (Italics his.)

We have given careful consideration to the reasoning advanced in support of his case, but have not been able to concur in his view of it.

Our conclusions are that Art. 21 of C. P. does not apply. It is not a question of the abatement, *vel non*, of the action by the death of one of the parties.

The question is, is this action to be considered as having been abandoned, has this suit legally perished by the long lapse of time, has the breath of life been suffered to go out of it entirely by the neglect and laches of the parties thereto?

This question would be equally pertinent were all the original parties alive at this time. It may be conceded that if the suit could,

under the circumstances here presented, be revived were Conery alive, so it may be now that he is dead. The question presented is, therefore, more far-reaching than any covered or contemplated by C. P. 21.

We pass no opinion of what would be the effect of permitting a cause to remain absolutely dormant during seventeen years *in an existing court*. It is not necessary in this proceeding to decide whether such action could be revived and proceeded with, or not; whether it had perished by abandonment, or not; whether it was prescribed against, or not. It suffices, in the instant case, that the suit under consideration has not existed as *an actuality*, a veritable action or cause, upon the docket of any court for the last seventeen years. It had been filed in a court that had existence, but which, nine months later, ceased to exist, from which time to April 1, 1897, nothing whatever was done to keep it alive, to give it the semblance of reality, of tangibility, by transferring it to another court capable legally of receiving it. It has been permitted to die from sheer inanition, to perish from exhaustion; three of the original parties have died along with it; and this attempt to revive it in another court, after seventeen years have passed, might be likened to an effort to galvanize a corpse.

The long abandonment of this case, failing to exercise the rights of the action after filing the suit, permitting the papers constituting its record to remain among the archives of a defunct court in the hands of a custodian not an officer of any court until lost, can not reasonably be viewed in any other light than as a practical discontinuance of the action. C. C. 3519, 3551, 3530; C. P. 491.

And this effort now to revive in an existing court of appropriate jurisdiction is tantamount to the bringing of the action anew after its discontinuance (C. P. 492), and the prescriptions applicable to such action must be considered as having not been interrupted. C. C. 3519, 3551.

The demand must certainly, under the facts of the case, be considered as having been voluntarily and intentionally abandoned, and prescription not interrupted. Elliott vs. Brown, 13 An. 579; Wilson vs. Marshall, 10 An. 327.

Under Art. 2247 of the Code Napoleon, the interruption of prescription is considered as not having occurred if the plaintiff discontinue his demand, or *fail to prosecute his suit*. Art. 3519 of our

Revised Civil Code, while not a literal copy of Art. 2247 of the Napoleonic Code, is its reproduction substantially. The article of our Code uses the word "abandons" for "if he fail to prosecute," as found in the other Code. The language of the French text is: "S'il laisse périmer l'instance." So that "abandons," as used in the article of our Code, may reasonably be construed, so far as applicable to the facts of the case, as having the meaning of *failing to prosecute*.

Judgment affirmed.

MILLER, J., recused.

No. 12,365.

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J. D. S. NEWELL VS. B. S. LEATHERS ET AL.

Jurisdiction sustained—right of possession of certain premises being at issue, with oath of plaintiff that this right is worth more than two thousand dollars, and that he would be damaged exceeding that sum if defendant is not restrained from invading same.

Proportionate area or acreage system for division of alluvion between adjoining riparian proprietors excluded.

Each proprietor of original tracts takes between the lines of his new frontage on the water-course measured back to the old frontage.

Course or direction of side lines of no consequence. Extent of old frontage on the water-course determines extent of the new frontage on the water-course.

APPEAL from the Twenty-third Judicial District Court for the Parish of Tensas. *Dagg, J.*, Eighth Judicial District, in place of *Tullis, J.* recused.

Wade R. Young for Plaintiff, Appellant.

Elam & Dale for Defendants, Appellees.

Argued and submitted January 21, 1897.
Opinion dismissing appeal handed down March 1, 1897.
Rehearing granted March 10, 1897.
Argued and submitted on rehearing June 4, 1897.
Opinion handed down December 28, 1897.
Second application for rehearing refused February 21, 1898.

ON REHEARING.

The opinion of the court was delivered by

BLANCHARD, J. While there are allegations of *actual* possession by both parties, judging the character of the action by the whole pleadings, it does not appear to be solely a possessory action having for its object, on part of plaintiff, to be maintained in the possession of certain premises, or, on part of defendant, to be quieted in the possession of the premises he describes.

The *right of possession* in virtue of certain contracts of lease and purchases, is also put at issue.

Plaintiff claims the right of possession of the entire alluvion in front of the town of St. Joseph from the edge of the pond, in front of the public levee, to the present margin of the Mississippi river.

He avers this right to be worth more than two thousand dollars, and that he would be damaged in an amount exceeding that sum if his right of possession is not vindicated.

Defendant, in turn, asserts his own right of possession of part of the premises in dispute, and prays that this right be recognized and enforced.

The Mississippi river once ran along the immediate front of the town of St. Joseph. Gradually the condition changed. The river slowly receded until now the water line is more than a half mile from the town. In front of above and below the town an extensive alluvion or *batture* has formed. Possessing under certain leases and other contracts, plaintiff established, some years ago, a public landing and warehouse on this batture. This is the landing that steamboats, transporting merchandise and other commodities and passengers to and from St. Joseph, use. Heretofore it has been a monopoly in the hands of the plaintiff, who has derived and still derives large revenues from it.

Defendant Leathers, who owns and navigates boats upon the river, seeking to establish a landing for his boats in front of the town, acquired by purchase and lease certain rights in, to and on the batture. He begun the work of constructing his landing by driving some piles along what he claimed as his portion of the river front. Whereupon plaintiff instituted this suit and caused writs of injunction to issue prohibiting the work.

It will be thus seen that the real contention between the parties is

a landing for boats. Plaintiff seeks to preserve in himself the exclusive right of maintaining a public landing on the batture in front of the town. Defendant resists this exclusive privilege, and attempts to establish another landing along the river front.

It thus appears that there is nothing in dispute in this controversy except the right of defendant to establish a public landing on the land described in his answer, and plaintiff attests under oath that if defendant is allowed this right, his (plaintiff's) public landing will be rendered comparatively worthless, and he will be damaged exceeding the sum of two thousand dollars.

In this view of the case, this court has jurisdiction. 30 An. 798; 31 An. 205; 46 An. 645; 47 An. 863.

The question presented on the merits is simple.

Was the alleged trespass committed on premises held under lease by plaintiff? On whose front line were the two piles driven by defendant?

If on that of the premises acquired by defendant by purchase from R. H. Snyder, or by lease from Mrs. Carrie M. Davidson, then, obviously, plaintiff's case must fail, for it is not pretended that he had the possession, or right of possession of such premises.

Plaintiff's contention is that that part of the river front of the batture where the piles were driven is covered by the lease which was executed to him by Mrs. Jennie Levy, and that the Snyder and Davidson tracts held by defendant have no frontage on the river.

Defendant contends that the Snyder, Davidson and Levy tracts of batture all front on the river, and that the three together give a continuous frontage of about four hundred feet. These tracts lie between St. Joseph and the river. It is further contended by defendant that the piles were driven by him either on the Snyder or Davidson tract.

The town of St. Joseph is situated between the Panola plantation on the upper side and the Duck Pond plantation on the lower side.

Plaintiff's public landing and warehouse is located on the river about opposite the middle front of the town, and about midway between the lower boundary line on the batture of Panola and the upper boundary line on the batture of Duck Pond.

The batture tract on which this landing is was leased by plaintiff from the parish of Tensas. Then next above lie tracts or lots of

batture fronting on the river owned by Moore, Young and the Farrar estate. Then comes the Jennie Levy tract.

Plaintiff claims the possession or control of all of these tracts under his contracts.

Next above the Levy tract is the Davidson tract or lot, and then the Snyder tract—both claimed by defendant.

This brings us to the Panola line.

These several tracts of alluvion were accretions enuring as riparian rights to the owners of the soil along the original front of the town of St. Joseph.

The United States survey was made in 1828. At that time the river line, or front of the tract of land upon which St. Joseph was afterward located, was the same length substantially—about thirty chains—as is the new river line of the batture in front of the town at the present time. Thus we have, practically, the same new river front for each riparian proprietor as the old river front gave, and, therefore, by *lineal division* each proprietor will have the same measure of front on the new line as he had on the old.

To adjust the contentions of the several riparian proprietors in this way accords with the rule laid down by the law for the measurement and division of alluvion.

The language of C. C. 516 is free from ambiguity: "If an alluvion be formed *in front* of the property of several riparian proprietors, the division is to be made according *to the extent of the front line of each* at the time of the formation of the alluvion." (Italics ours.)

The course, or bearing, or direction of the side lines of the tracts or lots of land in front of which alluvion is formed, is, therefore, of no consequence in the division of the batture formed subsequent to the acquisition of the tracts.

What is of consequence is the extent of the *old* frontage of the tracts on the water-course, and from this is to be determined *the extent of the new frontage* on the water-course.

This excludes the idea of a proportionate area or acreage system of division between the several tracts fronting on the alluvion to be divided. Each proprietor of the original tracts takes the quantity of alluvion that may be between the lines of his old frontage on the water-course measured forward to the new frontage. The lines by which the new frontage is reached may be parallel, or convergent, or divergent, according as the extent of the newly formed water line

may be the same in the one case, or less in the other, or greater in the third, than the ancient water line of the tracts. Duranton, Vol. 4, No. 421; Fuzier-Herman, Code Annotés, Vol. 1, p. 749, Nos. 49, 50; Baudry-Lacantinerie, Préces Droit Civil, 3d Ed., p. 773; Deerfield vs. Arms, 17 Pick. (Mass.) 41; Batchelder vs. Keniston, 51 N. H. 496; Jones vs. Johnson, 18 How. 150; Johnson vs. Jones, 1 Black (U. S.) 209; Kehr vs. Snyder, 114 Ill. 313; Armstrong vs. Wheeler, 52 Conn. 428; Crandell vs. Allen, 118 Mo. 403; Gray vs. Deluce, 5 Cush. 9, 12, 13; Porter vs. Sullivan, 7 Gray, 443; Muller vs. Hepburn, 8 Bush (Ky.), 326; Gould on Waters, Secs. 162, 163 (2d Ed.); Am. and Eng. Ency. of Law, p. 477 (2d Ed.).

"This mode of distribution," said the court in Deerfield vs. Arms, *supra*, "secures to each riparian proprietor the benefit of continuing to hold to the river shore, whatever changes may take place in the condition of the river by accretion, and the rule is obviously founded in that principle of equity upon which the distribution ought to be made."

We do not interpret Delord vs. City, 11 An. 699, cited adversely, as establishing a different rule.

R. H. Snyder owned lots or tracts of land in the town of St. Joseph, fronting on the old river line. Alluvion formed along this front; and in 1865 Snyder sold to Jas. Friendship a lot on the east or river side of the levee in front of his town property. This lot was of small dimensions, some sixty feet wide by a depth of one hundred and forty-three feet toward the river, but far from reaching the river.

On the north or upper side it bordered lands of the Panola plantation on the river side of the levee. The sale left in Snyder still a batture frontage on the old river line, as well as the tract of batture between the lot sold to Friendship and the river. Then in 1872 he sold to Bernard Levy a lot or piece of land commencing at the southwest corner of the lot sold to Friendship, thence running in an easterly direction along the southern line of Friendship's lot to its extreme eastern boundary, thence on to the margin of the river at low water, thence down the margin of the river to the northern boundary of batture lands owned by the Misses Murdock, thence westerly along the Murdock line to the levee, thence up the levee to the place of beginning.

By the sales to Friendship and Levy, Snyder may have disposed

of all the batture he owned lying opposite and immediately in front of his original St. Joseph lots, but he still had left the piece of batture on the east or river side of the Friendship lot. This, as we understand it, he sold in March, 1895 to the defendant Leathers, less, perhaps, parts of it previously sold to Beaumont and Woods. In the act of sale to Leathers this ground is described as bounded on the east by the river, and on the south or lower side by batture lands of Mrs. Carrie M. Davidson.

This leads to the tracing of the Davidson acquisition.

Bernard Levy, who bought from Snyder, having died, his widow, Mrs. Jennie Levy came into possession of his estaie. She added to her boldings of batture land in front of St. Joseph by purchasing a tract from A. F. Brown. Then, in 1888, she sold to R. S. Emerson a part of what she owned. The description is that certain lot or piece of ground bounded on the north by a line beginning at the southwest corner of the Friendship lot and running in an easterly direction "parallel to said line" (what line?) to the river; on the east by the river, on the south by a line commencing at a point mentioned on the public levee and *running east, southeast to the river*, and west by the levee. It is stated in the deed that the property sold has a frontage on the levee of about sixty-eight feet. What its river line is is not stated, but it is distinctly described as bordering on the river.

Emerson, who bought from Mrs. Levy, died, and Mrs. Susan A. Brown was recognized as his sole heir at law.

She sold the tract just described to Jos. Moore in 1890. Moore donated it to his daughter, Mrs. Carrie M. Davidson, and she, on August 3, 1895, leased it to defendant Leathers, for a term of five years. A few days before she leased to defendant, to-wit: on July 29, 1895, she secured from Mrs. Jennie Levy a corrected description of the tract, In this conveyance it is set out that the description in the former deed to R. S. Emerson, executed in 1888, is erroneous and ambiguous, in this: that three directious or courses are given, each inconsistent with the other. Mrs. Levy, therefore, in order to correct same, declares it to have been her intention when she sold to Emerson to fix and define the south line of the tract as alone starting on the public levee at the point mentioned in the first conveyance and running to the river in a direction parallel with the line between the lands of the vendor and Robert Murdock outside the public levee.

These several tracts of alluvion being adjuncts of the original holdings on the ancient line of the river were entitled to go to the new river line for frontage, and to have there the same frontage that the original tracts or lots had on the ancient line, for, as we have seen, the river frontage of the two lines are practically equal.

The vendors of these several tracts of alluvion intended to convey and did expressly convey to the river margin, and this intention, purpose and object can not be defeated by running the lines on courses that would render impossible a frontage on the river. A river front was what the vendees stipulated for; it was the object they had in view in thus acquiring property valueless, or nearly so, without such frontage.

To sustain the contention of plaintiff as to these lines would run the lines of the Snyder and Davidson tracts, and part of the Levy tract, on to the batture in front of the Panola plantation and thus defeat entirely a river frontage for the first two tracts.

So, too, to sustain plaintiff's contention that the alluvion must be divided by the area or acreage rule of distribution would run the lines of the tracts mentioned on to the batture that must be held as appertaining to the Panola plantation. To take from the Panola batture to make up acreage quantity for lots fronting on the ancient line of the river below the Panola southern boundary would lead to an absurdity. Such a rule of measurement and division, if carried out, would defeat a frontage on the river, not only for the Snyder and Davidson tracts, but for the Panola plantation as well, though the latter had a front of miles on the ancient river line, and there is the same length of new river line in front of the plantation. St. Louis vs. Rutz, 138 U. S. 226.

The last survey made of this alluvion, by order of the lower court, showed the piles driven by defendant to be on the front of the tract he had acquired from Snyder. Plaintiff does not hold this tract under lease or other contract. The evidence discloses he endeavored to purchase the tract from Snyder just prior to its acquisition by defendant. He must have then believed the tract had a river frontage, or else he would not have desired it. He had no use for it except that it fronted on the river, and was necessary to enable him to maintain his monopoly of the public landing.

So, too, in 1895 he offered to lease the batture tract of Mrs. Carrie M. Davidson. This was after the present suit was filed. What use

did he have for this tract except that he feared it bordered on the river, and was necessary to him in sustaining his exclusive right to a public landing on the town front?

The rule adopted by the surveyor for his measurement and division, which he says he obtained from Hodgman's Work on Surveying is the one long recognized by the law, and precisely laid down in Deerfield vs. Arms, 17 Pick. 41.

As defendant was proceeding to erect a public landing on his own premises, it follows that plaintiff has no case.

It is not necessary to decide other questions of law raised by the pleadings.

Certain questions of practice are raised and insisted on by plaintiff's counsel in argument.

One is a motion to quash the jury venire made by plaintiff, and the other is the refusal of the court to continue the case on application of plaintiff.

His counsel excepted to the rulings of the court and reserved bills of exception.

With regard to the refusal to continue the case, we can not say the trial judge erred. The case had already been several times continued, and much delay had ensued.

When the last motion to continue was overruled the case had then been on the docket about fifteen months—a long time for an injunction suit to remain untried in the court of the first instance.

The granting or refusal of motions to continue rest largely in the sound discretion of the court below and its ruling in regard thereto will not be disturbed unless clearly erroneous. In the last application for continuance defendant agreed to admit that the plaintiff, who was the witness absent because of illness, would testify to the statements set forth if present, and thus the evidence was gotten into the record.

With regard to the motion to quash the venire, it suffices to say we do not think the grounds urged sufficient. Besides, the plaintiff, after having prayed for a jury, waived trial by jury and submitted the case to the court.

For the reasons herein assigned it is ordered that the former decree of this court, dismissing the appeal for want of jurisdiction is set aside, and that the judgment appealed from be affirmed with costs.

NICHOLLS, C. J., takes no part in this decision, because of absence when the case was argued.

No. 12,745.

STATE EX REL. JOHN R. GRIFFITH VS. JUDGE R. R. REED AND W. KENNEDY.

The preponderance of authority establish that *certiorari* lies if notice is not given to parties before adjudicating upon their rights.

ON APPLICATION for a Writ of *Certiorari*.

George E. Williams, Curator.

Hughes & Favrot for Relator.

Clay Elliott for Respondents.

Submitted on briefs February 23, 1898.

Opinion handed down March 7, 1898.

The opinion of the court was delivered by

BREAUX, J. The relator made application for a writ of *certiorari* to have the record brought up in the case of Charles Riette vs. John R. Griffith, and to have the proceedings in both the District and Justice Courts declared a nullity. The plaintiff in the case sued the defendant, an absentee, for forty dollars for material furnished and work done upon Claiborne Hotel, in St. Tammany parish. A writ of attachment issued against the defendant as owner of the hotel and of one acre of ground on which it is situated.

A curator *ad hoc* was appointed and citation issued properly addressed to George B. Williams, curator *ad hoc*, and service was made by handing copies of the papers to him.

The property had been seized and attached prior to service and an inventory was duly made.

The constable failed to affix a copy of the citation and failed to affix a copy of the writ of attachment on the court house door.

In the justice court, after an answer had been filed by the curator *ad hoc*, a judgment was rendered in favor of the plaintiff. From this judgment an appeal was taken by the curator *ad hoc* to the Dis-

trict Court. On the appeal the curator interposed an exception on the ground that no service had been made by posting the papers on the court house door. It does not appear of record that any other plea was filed in the District Court.

The constable made a written return on the writ of attachment, but made no written return on the citation at all. Judgment was rendered against the defendant, and the cause was remanded back to the lower court for execution. The foregoing are the facts disclosed by the record, save that in addition the constable endeavored to supplement his return by an *ex parte* affidavit that he had affixed a copy of the citation on the court house door, on the day of the trial, but prior to the trial.

The issues on the application for a rehearing grew out of the alleged illegality of the service. The judge of the District Court and the justice of the peace were made respondents. In our judgment the return of the officer (the sheriff or constable) in each case should make proof of the manner in which he has executed the writ. Unless he makes answer, by written statement, informing the court of service, the court is without any basis for further proceedings. The return itself must be in writing. It may be amended prior to judgment, but not after judgment has been rendered.

With reference to the writ of attachment, the constable is required to serve the citation on the defendant; if he is an absentee this officer must affix a copy of the citation on the door of the court house. The return does not show that any such a service was made. We are constrained, under the law, to hold, in case of an absentee, that unless the service be made in the manner indicated, the defect makes null the proceedings subsequent. The article touching attachment in cases before the justices of the peace, is substantially similar to Art. 254 of the Code of Practice. Both as relates to the return are silent. Yet, in construing the latter, this court has always held that the return of the officer must show that due service has been made by posting as required. Cire vs. Monteuse, 27 An. 79, and the cases cited in that decision.

Under another article of the C. P. than the one to which we have just referred, in all suits "the constable, after serving the citation on the defendant shall return to the justice the date and the manner of the service." This as relates to return, we construe as applying to all suits before the magistrate courts and renders it necessary

that a return be made on all citations. In this case, there was no return possible.

No service had been made as required at the date that the judgment was rendered. We can not give the least effect to any action subsequent to the judgment in matter of the service of a citation.

Our attention was by respondents drawn to the fact that the case was tried in the District Court after the curator *ad hoc* had answered and trial on the merits in the justice court. The answer of the curator *ad hoc* in the court of the first instance was not a waiver of citation or of any of the rights of the defendant in that respect. When the case was before the District Court it was in season to plead; despite the curator's answer in the court of the justice of the peace; that the defendant could not be held bound by any proceeding, as it did not appear that he had been cited.

In our view the judgment of the District Court and the judgment of the justice of the peace are null and void and we so declare them to be.

The action is not to be dismissed nor the attachment dissolved.

The constable, if service was made as suggested in his *ex parte* affidavit, will have to make a return, showing that service was made by affixing copies of citation on the court house door as required by Art. 1120 of the C. P., or if no such service has heretofore been made he will have to make it and a proper return.

It is therefore ordered, adjudged and decreed that the rule *nisi* which issued in this case be made peremptory to this extent; the judgments above referred to are decreed null and void.

It is further ordered and adjudged that the suit, demand and writ of attachment be reinstated on the docket of the Justice of the Peace Court of the Third ward St. Tammany parish, and proceeded with according to law.

WATKINS, J., dissents.

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No. 12,434.

FREDERICK W. STUCKE VS. ORLEANS RAILROAD COMPANY.

An invitation from the master or proprietor to come upon dangerous premises without apprising him of the danger is just as culpable, and an injury resulting from it is just as deserving of compensation in the case of a servant as in any other.

Stucke vs. Railroad Co.

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A man can not be understood as contracting to take upon himself risks which he neither knows nor suspects, nor has reason to look for; and it would be more reasonable to imply a contract on the part of the master, not to invite the servant into unknown dangers, than one on the part of the servant to run the risk of them.

Whether invited upon the premises by the contract of service or by the calls of business, or by direct request, is immaterial; the party extending the invitation owes a duty to the party accepting it to see that at least ordinary care and prudence are exercised to protect him against dangers not within his knowledge and not open to observation.

The servant assumes the risk of such hazards as are apparently incidental to an employment intelligently undertaken, and those only.

A superior is presumed to know whatever may endanger the person or life of an employee, in the discharge of the duties of his employment, and is bound to specially warn him of the nature of the danger, unless said employee well knew of the existence and extent of the hazard or risk, or willingly exposed himself to it.

If the negligence of the master caused or contributed to the injury of his servant, the former is liable to the latter, notwithstanding the negligence of a fellow servant likewise contributed thereto.

When an injury is caused partly by the negligence of a fellow-servant and partly by the failure of the master to provide the servant a reasonably safe place at which to work, the negligence of the fellow-servant will not exonerate the master,

When the service to be rendered requires for its performance the employment of several persons, there is necessarily incident to the service of each the risk that the others may fail in the exercise of the caution that is essential to their mutual safety.

Consequently, there is implied in the contract of service in such case that each servant takes upon himself the risk arising from the negligence of the other, while in the common employment; always *provided* that the master is not negligent in the selection or retention of the fellow-servant of either, or in providing him a reasonably safe and suitable place at which to work, and reasonably suitable tools and materials with which to work.

It is necessary in order to constitute a fellow-servant within this rule of jurisprudence, that the servants should be fellow-laborers in the same work, or the same department of a common employment.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

T. M. Gill for Plaintiff, Appellee.

Chretien & Suthon (*Denègre, Blair & Denègre*, of Counsel) for Defendant, Appellant.

Argued and submitted May 14, 1897.

Opinion handed down January 24, 1898.

Judgment of this court amended and rehearing refused March 21, 1898.

The opinion of the court was delivered by

WATKINS, J. This is an action in damages, the plaintiff claiming twenty thousand dollars for the injuries he suffered; and the defendant has appealed from a judgment which was rendered against it, predicated upon the verdict of a jury for seventeen thousand dollars.

The petition makes this relation of the state of facts upon which he bases his claim, viz.:

That he was an employee of the defendant as conductor of one of its cars on the St. Peter street line in the city of New Orleans, on or about the 18th of May, 1896, when he was sent forward, by the orders of the company, with directions to repair the brake of car number seventeen (17), which was on the track over the pit in the barn, or station of the company, awaiting repairs.

That at about the hour of 10:10 A. M. of the day aforesaid car number (8) of defendant's French Market line came in upon the pit track--the switch regulating the use of said line of cars having been carelessly left open—and ran off the pit track aforesaid, there being no post, block, or any obstacle placed thereupon to check or control its velocity, or to change its course. That said car number eight (8) thus very suddenly and unexpectedly ran into car number seventeen (17) aforesaid, and caused it to run over him, he being at the time, necessarily under the same, in the pit, and actually engaged in making repairs upon the brake of car number seventeen (17) aforesaid; and that said car number eight (8) aforesaid, in thus running car No. 17 over him, cut off his left leg just below the knee, greatly shocking him physically and mentally.

He avers that, on account of his being thus run over and injured, he suffered great pain and was sent to the hospital for treatment, where he was confined for a period of five months.

That, at the time of said casualty, he was about twenty-two years of age, and physically strong and healthy; and that he had, at the time, no other means of support for himself and family than his earnings, which were one dollar and thirty ($1.30) cents per day, with an expectancy of an increase thereof to fifty dollars ($50) per month.

He alleges that he was guilty of no fault or contributory negligence in causing, or in procuring said injury; but, on the contrary, same was solely due to the fault, carelessness and gross negligence, and want of skill and due care on the part of the defendant, its agents, employees and operatives, over whom it had and exercised exclusive care and control.

He alleges further that the pit track whereat he was engaged in repairing the brake on car No. 17 was within less than thirty feet of said switch, and that same had not been located or constructed with that judgment and care which is required of a master; and that same should have been located at a greater distance therefrom, and entirely secured from all risk and danger.

He further avers that the curves of said pit track were placed in a bad locality, and were also defective in their construction.

That the aforesaid casualty was sudden and unexpected by him, he believing, as he had just reason to believe, that all due and proper care and precaution had been taken for his safety and protection; and that said company would not jeopardize his life or limbs.

He alleges that he did not know that the pit track had been left open, or that the switch had been so placed as to allow a car of the French Market line to run upon the pit track; and that he had not been warned of any danger from that source, nor had he been notified of any defect in the machinery or appliances of the company, notwithstanding same were well known to said company, its officers and employees.

Finally the plaintiff alleges the loss and deprivation of business on account of the loss of his limb in addition to his mental pain and physical sufferings.

The defendant's answer is a general denial, coupled with a charge of gross carelessness and negligence on the part of the defendant, contributing to his injury.

In a supplemental answer the company makes the charge that the accident complained of was due to the fault and negligence of the defendant and of his fellow-servants, to which it in no way contributed.

The defendant's counsel filed an extended application for a new trial in the court below, from which we make the following extracts as furnishing the principal grounds upon which they relied for relief at the hands of that court, to-wit:

1. That it was proved on the trial that the accident was not occasioned through any negligence on the part of the company or its failure to provide necessary and safe apparatus, appliances and machinery.

2. That it was established beyond any question or doubt that the injury which befell the defendant was due "to the gross negligence of one of his co-laborers or fellow-servants, and that if the rules and regulations (of the company) had been carried out by the said fellow-servants the accident would not and could not have occurred, because the appliances furnished were such as experience had demonstrated to be the best, and afforded ample and perfect protection to the defendant."

3. That it was shown by incontrovertible evidence "that the switch which protected the pit track had been opened by Villa and Stucke, acting respectively as motorman and conductor of car No. 16; and that same, not having been closed after them, the accident occurred through their gross negligence or that of their fellow-servant"—said switch having been left open negligently and imprudently.

The foregoing facts being stated, counsel alleges the exoneration of the company upon the following grounds, viz.:

1. "That the employer can only be held responsible for his negligence and failure to provide safe apparatus or appliances to his servant;" and that the evidence indubitably shows that the apparatus and appliances which the company furnished to its employees were of the best and safest, and such as gave to them absolute protection against all danger.

2. That it is the established and uniform jurisprudence of the Supreme Court and of this court "that the employer is not responsible for the injury of a servant when the injury is the result of his own negligence or that of his fellow-servants."

The admissions which are contained in the foregoing motion have so narrowed and restricted the issue that we need only examine the single question of the non-liability of the defendant on the ground that the accident was caused through the plaintiff's own fault and negligence, and that of his fellow-servants—if it indeed be true that the company did furnish its servants with safe, suitable and appropriate apparatus, machinery and appliances for the proper and safe discharge of the duties of their employment.

An attentive and careful examination of the evidence has satified us that the defendant furnished its servants with safe, suitable and appropriate apparatus, machinery and appliances for the proper, safe and efficient discharge of the duties that were assigned to them —the only exception being as to the tongue of the switch in the barn which was employed for the purpose of throwing cars from the French Market track on the pit track, or *vice versa*, being slightly worn, or constructed a little low for safe and convenient use.

But, as alleged in plaintiff's petition, it is shown by the evidence that this switch had been inadvertently left open and opportunity was afforded for the car of the French Market line to pass through, and come into collision with the car which was standing over the pit and inflict injury upon the plaintiff. We are of opinion that the accident was solely due to that particular circumstance, and consequently we need not look further into the condition of the switch in deciding as to the fault or liability of the company.

And in determining that fault and liability *vel non*, we are of opinion that the aforesaid judicial admission of the defendant puts its defence exclusively upon the ground that the negligent act of leaving the switch open was solely that of plaintiff's fellow-servants; and hence it is to that end we must examine and anal yzethe evidence.

We make the following extract from the brief of plaintiff's counsel, as fairly presenting their view of the circumstances under which the accident occurred, and the argument in support of the company's defence, viz. :

"On the eighteenth day of May, 1896, there being a vacancy in the pit work, Mr. Willoz, the assistant superintendent, having in charge that department, sent for Mr. Stucke and told him to go to the work in the emergency pit, to make the small repairs necessary upon the cars of the company. Mr. Villa was then acting as one of the pitmen, in conjunction with Mr. Stucke. Car No. 16 of the company needed some slight repairs, and Mr. Villa and Mr. Stucke, both pitmen, went in the barn of the company, and together took hold of car No. 16, which was then in the barn, for the purpose of bringing it upon the emergency pit, to be there repaired and put in immediate service. Mr. Villa acted as motorman on said car, and Mr. Stucke as conductor. In order to take the car to the emergency pit, it was necessary to lead it, first, outside of the barn within a few feet of

the entrance, and to come back by the general track leading in that part of the barn where the emergency pit was. In order to get to the pit, or the dead track, it was necessary to pass three switches—first, one at the entrance of the barn; next, the one leading to what is known as the Bayou St. John track, and thirdly to the switch which divides the French Market track from the dead track, and which, when properly adjusted (as it was then), offers absolute protection to the dead track.

"After going outside of the barn so as to get on the main track of the company leading into the barn, to reach the place of their destination, they had to open, first, the first switch, which they had closed so as to come out of the general barn where the cars are laid up over night, then to shut the switch between the French Market and the dead pit, or rather to put straight that switch in order to get on the dead pit. Tnis they did. But although it was their duty, under orders received by them and under the rules of the company, to replace those switches in the condition in which they had found them, the French Market switch was left straight, that is, offering free passage to the cars coming into the barn to the emergency pit, the French Market track being (the switch having been left straight) closed to the cars. Car No. 16 was then placed by them on the emergency pit and on the dead track or pit track.

"The repairs having been made on car No. 16, it was moved ahead of the pit, and car No. 17 was ordered by Mr. Villa, one of the pitmen, to be put on the emergency pit for repairs. The crew of car No. 17 was then transferred by Mr. Villa to car No. 16, which had just been repaired, and said car left on its trip to Canal street.

"In the meantime, after car No. 17 had been placed on the emergency track and on the pit, the switch intended to protect this track, which had been put straight to allow car No. 17 to get on the track, was left in that condition, thus closing the French Market track, and opening to the cars coming in the barn the dead track or pit track.

"Shortly after Mr. Stucke had gone under the car to repair the shoe, car No. 8, which was destined for the French Market track, came into the barn on three or four notches, and instead of going on the French Market track, which was closed by the switch being made straight, went on the pit track, knocked against car No. 17, under which Mr. Stucke was working, pushing the car, which rolled over

his leg and broke it to such an extent that it had to be amputated a little above the ankle."

But it will be necessary to examine and consider some of the circumstances attending the accident, as well as some of the statements of the witnesses with regard to the manner in which it occurred, in connection with the foregoing summary of the evidence by the defendant's counsel, before we can arrive at a satisfactory conclusion in the premises.

One of the eye-witnesses of the accident states that the plaintiff was, on the 18th of May, 1896, engaged in repairing a car which was standing over the pit; and at the same time he saw another car come into the barn, the motorman on which was using the ratchet and brake, making a great deal of noise. That the plaintiff said to witness, "Listen how that fellow is using the ratchet"—the witness sitting about two feet distant from the plaintiff—and that he turned his head toward the incoming car, when, almost instantly, he heard the two cars bump together and heard the plaintiff halloa, "Like a miserable dog."

That he and his friends went up to him instantly and tried to pull him away from the car. That plaintiff tried to use his leg, but his foot was hanging down so he could not use it—his left leg having been mashed to a jelly—though he managed to get from under the car in some way or other. That he did not know how he did it, but saw him scramble out from between both wheels of the car; that he and his companions then pulled the plaintiff away—he being about six inches from the rail when they pulled him away.

He says that the plaintiff was at the time of the accident working on a brake and shoe, and was sitting immediately over the pit.

He states that the car came into the barn at such a high rate of speed that it jumped the switch that was about thirty feet from the car which plaintiff was repairing; and that the moving car came into collision with the stationary car that plaintiff was engaged in repairing. That this car should have taken the middle track, which is called the French Market track—that is, the track between the St. Peter street line and the pit track.

That there was no flag nor signal of any kind to indicate to an incoming car that the car which plaintiff was working on was in process of being repaired, and that there was neither post, block or barrier of any kind to prevent an incoming car from coming in on the

switch track and running into a car on the pit track while it was being repaired.

But that after the happening of the accident to the plaintiff the defendant company caused a blacksmith to place pieces of iron across the track. He states further that if the switch had been thrown open to the left hand side the incoming car of the French Market line would have taken the proper track and not come into collision with the stationary car that plaintiff was working on; and that at the time of this accident there was no one attending to the switch.

That the pit spoken of is only for the purpose of making emergency repairs—for instance, when a brake is to be set or a new shoe put on—then the car is run over the pit, which is connected with the main line by the pit track and a system of curves and switches.

The rules of the company make it the duty of the motorman of an incoming car to attend to the switch, or to employ some one to attend to that duty for him.

The witness whose testimony we have related had been previously employed as a motorman and also a conductor, and was consequently familiar with the duties which are imposed upon those officers and the movement of the cars.

The person who was in company with the witness just adverted to makes quite a similar statement of the way in which the accident happened.

Another witness states that he was coming down stairs in the barn and heard the plaintiff halloa, and went down to where the accident happened and was present when he was removed from beneath the car. That the plaintiff was not tall enough to stand in the pit and make the repairs, and he was on that account compelled to sit down; and that a few minutes before the accident occurred he saw him sitting on the ground with his foot across the rail—he being at the time engaged in adjusting a brake or fixing a shoe.

Another witness testifies that he was present on the morning of the 18th of May, 1896, when the accident happened. His name is Frank Lasker, and his statement is that he "was working (with the plaintiff) on the car five or six minutes before the accident happened; and after the accident he was ordered to place an obstruction across the track" as a means of preventing a like occurrence. That he was directed to place them "between the switch and the pit."

That, in keeping with his said instructions, he placed a piece of railroad iron across the track and clamped it down on each side, and placed a weight, or tap, so that it could not be removed. That was done on the same day of the accident, and by the direction of the superintendent of the railroad company.

He further states that the plaintiff had been in the defendant's employ as a conductor, but was "laying off, taking a rest," when he (witness) was sent by Willoz, the foreman of the company, to go and get Stucke to go to work. That he thought maybe he was to take a car; but when he (reached) the station he was sent to work in the pit.

Then occurs the following interrogation and answers of the witness, to-wit:

"Q. Now, if you heard Mr. Willoz, the foreman of the Orleans Railroad Company, giving any instructions, or directions to Stucke, state what they were?

"A. He was to help me on the car, and we were to set to work tightening bolts, and working on the armature; and when we got through with our work I went off, and Stucke went to tightening the brakes, and to fitting the shoes.

"Q. Who did you say ordered Stucke to do that work?

"A. He got his orders from Mr. Willoz, the foreman.

"Q. Were you with Mr. Stucke then?

"A. Yes.

"Q. Were you with him when he was injured?

"A. No; but I was there after the accident happened.

"Q. When you left him, who did you leave with him—when he was repairing the brake?

"A. (He was) *alone*."

The witness states that after the accident happened Mr. Willoz came back to the backsmith's shop and told him that Stucke had been "rolled over."

He states that the accident happened because the car of the French Market line passed through an open switch and ran into the stationary car on which Stucke was making said repairs.

John Villa, the witness to whose testimony the counsel of the defendant particularly refers in his motion for a new trial in the lower court, confirms the statement of the last mentioned witness to the effect that Stucke was pitman at the time of the accident, by the direction of the foreman, Willoz.

As the testimony of this witness is very much relied upon by the defendant's counsel, we make the following extracts from the record, viz.:

"Q. Were you intrusted with any authority to give any instructions, directions or orders?

"A. Only in part when Mr. Willoz was not there.

"Q. Did you or not give any instructions or orders to Mr. Stucke on that occasion?

"A. Yes, I did.

"Q. What were they?

"A. To fix the back shoe on car No. 17.

"Q. Where was that car at that time?

"A. It was over the pit—the emergency pit.

"Q. On what day did you give those instructions?

"A. I am not positive, but I think it was on the 18th of May, 1896.

"Q. Who clothed you with authority, in case Mr. Willoz was absent, to give such instructions?

"A. Himself.

"Q. Mr. Willoz?

"A. Yes.

"Q. What is his position?

"A. He is assistant superintendent of the road."

Upon the cross-examination of that witness, the following occurred, viz.:

"Q. How did car No. 17 come to go on the pit; who ordered it there?

"I ordered the car there?

"Q. That was on the 18th of May?

"A. Yes.

"Q. Was Mr. Stucke working on the pit before the 18th of May?

"A. Not that I know of.

"Q. Was he with you on that day, the 18th of May?

"A. Yes.

"Q. Was he then working with you as pitman?

"A. Yes.

"Q. Had he worked on any other car, on that day?

"A. Yes; on car No. 16.

"Q. Who brought car No. 16 on the pit?

"A. I did.

"Q. Were you alone in bringing car No. 16 on the pit?

"A. I disremember who was with me at the time.

"Q. Do you know where Mr. Stucke was at the time, when car No. 16 was brought on the pit?

"A. I think he was standing by the toolroom.

"Q. Car No. 16 was ahead of car No. 17?

"A. Yes."

The witness states that in moving car No. 16 from the shed to the pit he acted as the motorman, but does not remember who acted as the conductor.

"Q. Was Mr. Stucke there then?

"A. He was standing by the toolroom *when I pulled car No. 16 out.* (Our italics.)

"Q. How far is the toolroom from the pit?

"A. I disremember how many feet.

"Q. About how many feet?

"A. About sixty feet.

* * * * * * * *

"Q. When you took car No. 16 on the pit, was the pit track closed or open?

"A. It was closed."

On that account the witness states that "he had to turn the switch to bring car No. 16 on the pit track;" and that after placing it on the pit track it was *his* duty to have placed the switch back in the same condition it was in, but he is not positive that he did so—that *he was of the impression that he inadvertently left it open.*

He says that after he had completed the repairs on car No. 16 he "turned it out to put car No. 17 in its place;" and "when car No. 17 came in on the pit track * * * the crew of that car (No. 17) took car No. 16 off the pit track."

"Q. Who ordered *them* (the crew of car No. 17) to take car No. 16 off the pit track?

"A. I did.

"Q. Then as soon as they arrived on the pit track they went on car No. 16?

"A. Yes.

"Q. And then went off on the road?

"A. Yes.

"Q. Who ordered car No. 17 on the pit?

"A. I did.

"Q. Where were you at the time?

"A. I was at the end of the shed.

"Q. Where was Stucke at that time?

"A. I disremember where he was."

The witness states that he is not certain whether the switch was in the same condition when car No. 17 came in on the pit track as he had left it when car No. 16 passed in, or not.

Up to this point in the statement of the witness it is quite clear that the car No. 16 was moved from its stationary position in the shed a short distance from the pit by him, unaided by any one upon the pit track, and *that he carelessly left the switch upon.*

That after car No. 16 had been repaired it was removed from the pit track *by the crew of car No. 17*, which witness had ordered upon the pit track—that car having come into the company's barn from a trip on the road just at that time.

That this witness does not claim that Stucke had anything whatever to do with the movement of car No. 16 upon the pit track, but on the contrary disclaims it—and, consequently, was in no way responsible for the switch having been left open, if it was so.

But the further statement of the witness to the effect that he had ordered car No. 17 to come in from the street and take the place of car No. 16 on the pit track, and that it was operated by its own crew and without coming into collision with car No. 16, is full and complete proof that the plaintiff had no agency in their removal, nor in causing the accident which happened afterward by means of car No. 17 rolling over him, because of car No. 8 having passed through the open switch and come into collision therewith.

Upon this witness' statement up to this point the movement of car No. 16 had nothing to do with the accident. The accident was produced by car No. 17, which had taken the place of car No. 16. Car No. 17 was operated by its own crew, and when it arrived at the pit its crew was transferred to car No. 16, and *they* moved it off of the pit track and at once carried it out on the road and made a trip with it.

Without any further explanation the inference would seem to be clear that the motorman of car No. 17 had left the switch open, so

that car No. 8 passed through and came into collision with car No. 17—it then being stationary on the pit—and caused the accident.

But the following questions and answers occur just at this juncture, viz.:

"Q. You are sure that you opened the switch for car No. 17 to come into the pit track?

"A. Yes.

"Q. After opening the switch for car No. 17 to get on the pit track did you close it again?

"A. No, sir.

"Q. Was it not your duty under your orders to close it after you had brought the car on the pit track!

"A. Yes; it was my duty to close it.

"Q. In other words, it was your duty to put the switch back in the condition in which you found it?

"A. Yes."

Then follows a very noteworthy interrogation of the witness, and the tendency of whose answers is to constitute Stucke a fellow-servant of his in the management and operation of car No. 16 in its removal from the shed to the pit track—a position just the reverse of that he had previously assigned the plaintiff.

"Q. Have you ever made any statement previous to this trial to the effect that you were acting as a motorman and Stucke was acting as a conductor, when you took car No. 16 from the shed to the pit?

"A. I don't remember.

"Q. You don't remember having made a statement of that kind?

"A. I don't remember how it was.

"Q. Did you not make the statement that Stucke was acting as conductor and you were acting as foreman on car No. 16 when it was brought on the pit track?

"A. At one time I did.

"Q. What induced you to make that statement, if it was not true?

"A. I disremember.

"Q. At the time you made that statement did you know that Stucke was acting as conductor on car No. 16?

"A. I am not positive.

"Q. Why did you make that statement if you were not positive?

"A. I was not sure whether it was Stucke or not.

"Q. You made that statement because you were not sure it was Stucke?

"A. Yes.

"Q. If you were not sure, it seems to me that you would not have made the statement that he was conductor?

"A. I don't remember that.

"Q. In other words, you made the statement that Stucke was conductor of car No. 16 when you brought it on the pit. Now, is that statement true or false?

"A. It is true.

"Q. Then you admit that Stucke was conductor of car No. 16, and that you were the motorman on that car, when you brought it on the pit track?

"A. Yes.

"By the jury:

"Q. Who did you make that statement to, about Mr. Stucke being the conductor on car No. 16, when it was brought on the pit?

"A. I made it once to the lawyer of the company," etc.

He then supplemented his answer and said that it was a policeman who took his statement.

The plaintiff as a witness confirmed the statement made by the witness Frank Lasker to the effect that he came to his house for him at the request of Mr. Willoz; that accordingly he went to see Mr. Willoz who informed him that he wished him to go to work in the pit; and that he went to work in the pit at once—that being the 16th of May, 1896.

That the second day afterward, car No. 16 was on the pit—that being the 18th of May, 1896—at about 8 o'clock in the morning. That he was ordered to paint the bottom of the car No. 16, that Frank Lasker was helping him, and when he finished that job he went to the end of the barn and then into the lunch room and ate his lunch.

The witness says further:

"While I was eating my lunch, *they* took car No. 16 away from there. After I got through eating lunch, I came back and saw car No. 17 on the pit. Then I went to Mr. Willoz to ask him what was to be done, and he told me to go and repair the brakes. And he told Frank Lasker to do something else back in the shop. * * * Then I went to the pit and sat down and commenced to repair the brakes and put my leg underneath the car, the best way I could.

I was putting in a pin, and the first thing I heard (was a bump) and my leg was off. And before the second wheel struck me I managed to drag the leg out; and somebody, I don't know who they were, dragged me away."

He states that he thought the position he had taken was perfectly safe; and had he taken a position in the pit, he might have lost his head or both of his arms, or been crushed to death, under the circumstances related. That no officer of the company, or employee, gave him any notice or warning of the dangers or risk of that employment. That he had no idea of running any such risk or hazard as his employment had imposed upon him; and had he been so advised he "would not have run any chances." That at the time he was sent to the pit to work he was in the employ of the defendant as conductor of one of its cars of the St. Peter street line, but was at the time enjoying a vacation.

The witness states positively that at the time of the accident he knew nothing of the condition of the switches, and that he never knew of any rule or custom of the company which required a conductor to go back and adjust a switch after the car had passed through it.

The following occurred upon the cross-examination of the plaintiff, viz.:

"Q. Who brought car No. 16 on the pit?

"A. I don't know.

"Q. You did not?

"A. No.

"Q. You had nothing to do with car No. 16 on that day?

"A. Yes, I had.

"Q. What did you have to do with car No. 16 on that day?

"A. After car No. 16 was on the pit I painted the bottom and top and did some sand-papering.

"Q. At the time when car No. 16 was put on the pit what were you doing?

"A. I could not tell you. *I never saw it put on the pit. It was only when I came back that I saw it on the pit.*

"Q. *You are certain that you did not act as conductor on car No. 16 when it was put on the pit track?*

"A. *I am certain I did not.*

* * * * * * *

"Q. Who brought car No. 17 on the pit?

"A. I could not tell you?"

The witness states emphatically and circumstantially that from the 16th to the 18th of May, 1896, he was working under the orders of Willoz and Villa, and by their directions and under their control and management.

The following occurred during the cross-examination of the foreman, Willoz, viz.:

"Q. When Stucke was working in the pit who else was working there?

"A. In the pit?

"Q. Yes.

"A. Frank Lasker was with him.

"Q. Was Frank Lasker there all the time when Stucke was working at the pit?

"A. * * * No; Lasker was working as blacksmith.

"Q. Was not John Villa there with Stucke at the time?

"A. John Villa was there as armature winder.

"Q. Was he working on the car as armature winder at the time when Stucke was working at the pit?

"A. Yes.

"Q. Now, don't you know that John Villa was working in the pit with Stucke?

"A. On that morning; no, sir, he was not.

"Q. You are sure of that?

"A. Yes.

"Q. Why are you sure of that?

"A. Because when I gave the order to those pitmen, it was soon in the morning.

"Q. Which pitmen do you refer to?

"A. Stucke and Lasker.

"Q. You gave Stucke this order again?

"A. I gave my order to John Villa.

"Q. You told John Villa what was to be done?

"A. Yes; I told him to have it done.

"Q. Who did he order to do that work?

"A. Lasker and Stucke."

Again:

"Q. Then Stucke's sole duty was to repair car No. 17, which was on the pit?

"A. He went to repair the car if he was given orders to do so.

"Q. Who gave him the orders?

"A. I am the only one to give orders.

"Q. You and Villa?

"A. No; I am the only one to give orders.

"Q. Then Stucke's sole duty under your instructions at that time was to repair that car?

"A. I did not give Stucke the order directly, I told Villa to have Stucke and Frank Lasker to do the work.

"Q. You told John Villa to have them do the work?

"A. Yes.

"Q. And then you left?

"A. Yes; then I left."

From the foregoing excerpts from the testimony the following facts appear to be established, viz.: That Willoz, the foreman of the defendant company, having in charge the repairs of its rolling stock, etc., had directed the plaintiff, who was in its employ as the conductor of one of its cars, to go into the pit and make some repairs on a car—the witness, Lasker, being directed to accompany him. That with that view, Lasker was sent to the plaintiff's house to summon him to come to the barn; and John Villa was ordered to see that Stucke and Lasker did the work according to directions. That they went to work on the 16th of May, 1896, and worked together in the emergency pit for two days thereafter.

That on the morning of the 18th of May, car No. 16 was moved from the shed near where it was standing, to the pit track, and carried to the pit; and while there, the plaintiff painted it, top and bottom.

That when this work had been completed, car No. 17 came up to the barn and was halted, and by the directions of John Villa, the motorman and conductor thereof were transferred to car No. 16, and they moved it onto the street; and thereupon car No. 17 took its place upon the pit track for the purpose of undergoing some repairs.

That Stucke was at once set to work making repairs upon one of the brakes, when, immediately, car No. 8 of the defendant's French Market line came into the barn and, passing through an open switch, entered upon the pit track and came into collision with car No. 17, causing the accident and resulting injury to the plaintiff.

An effort was made to show that Stucke knew, or must have known, of the danger of the situation and the risks of his employment; and that in accepting same he necessarily assumed the ordinary and reasonable consequences thereof. That having been employed by the defendant company as a conductor of one of its lines of cars, and as such having frequently had occasion to pass the switch in question and in the vicinity of the pit, he must have become sufficiently familiar with the situation to have put him on his guard as to the risk and danger of employment in the pit.

It is quite true that the plaintiff had been employed as a conductor on one of the cars of the defendant's St. Peter street line, and that, as such, he had frequently passed through the switch and saw the pit; but the proof discloses the fact to be that he had never had occasion to critically observe either one or the other, as he had never done any work in the pit prior to his assignment thereto in May, 1896, and had never conducted a car onto the pit track at any time.

The statement of the plaintiff, as a witness, is that during the time of his employment as conductor he had obtained a general knowledge of the situation; but he also states, and emphasizes the statement, that he derived therefrom no information whatever of the situation which brought about the accident. That, on the contrary, he thought the situation perfectly safe, and he had received no information to the contrary from any person or officer, or employee of the defendant company; and that had he known of the danger he was in while he was working in the pit he would have declined the employment altogether.

Our conclusion is clear to the effect that the plaintiff was wholly unaware of the danger he was in while he was at work in the pit; that he had been put to work there by the orders of the defendant's foreman, in an emergency, and upon the spur of the moment; that he had never worked in the pit of the defendant company previously; and that he had not been advised by any officer or employee of the company of the risks and dangers of the situation and employment.

On this statement the plaintiff must be exonerated from the charge of fault or neglect upon his part in accepting the employment to which he was assigned.

The further claim of the defendant is that, even should it appear from the evidence that the plaintiff was himself guilty of no fault or

neglect in the premises, which caused or contributed to the accident, yet the company is not liable, and the plaintiff can not recover, because the proof discloses that same was caused or contributed to by the plaintiff's fellow-servant.

On this score the contention of defendant's counsel is, as stated in the extracts we have made from their brief *supra*, and it may be fairly summarized as follows, viz.:

That in effecting the removal of car No. 16 from the shed where it was standing to the emergency pit, John Villa acted as motorman and Stucke as conductor; and the switch having been left open after same had passed through, both are equally responsible for the consequences of that negligence. And that subsequently, when car No. 17 went on to the pit track and took the place of car No. 16, John Villa again left the same switch open, negligently, so that car No. 8 passed through and came into collision with No. 17, and caused the plaintiff's injury.

Therefore, the argument of defendant's counsel is that Villa's fault as acting motorman is attributable to Stucke as acting conductor—the two being fellow-servants *pro hac vice*.

Their further contention is that Villa and Stucke were engaged at work together in the pit at the time of the accident, and, consequently, the fault of Villa in having left the switch open was attributable to Stucke also on the ground that they were fellow-servants in the further sense that they were both engaged at work as pitmen at the time of the accident.

But, at the outstart, it must be observed that—conceding the facts to be in reality as they were assumed, but for the argument only—car No. 17 passed through the switch onto the pit track after car No. 16 had been repaired and moved out; consequently there was no causal connection whatever between the negligent act of Villa in not closing the switch behind car No. 16, and his alleged negligence in not closing it after car No. 17 had passed through. Car No. 8 did not come into collision with car No. 16; and hence any negligence of Villa in connection with car No. 16 has no pertinency to the accident or injury. The alleged prior fault of Villa as motorman neither caused or contributed to the accident caused by car No. 8. Taking the last proposition first, what is the state of the testimony with regard to Villa and Stucke being pitmen, and therefore fellow-servants? An examination of the record discloses that Stucke and Lasker were

working in the pit together, and that the duty had been assigned to them by the foreman and *vice* superintendent. Both Stucke and Lasker testify to this fact; and it is admitted to be a fact by the foreman in his testimony as a witness. And John Villa states, unqualifiedly, in his testimony that he was authorized and clothed with full power to give orders and instructions to employees of the defendant, when Willoz, foreman, was absent, and that in the exercise of that authority he gave instructions to Stucke and Lasker to go to work in the pit on the day of the accident. And Willoz, foreman, states as a witness that upon that occasion he gave orders to Stucke and Lasker, through Villa, to go into the pit to work on the day of the accident.

But notwithstanding the foregoing statement Villa affirms upon cross-examination that Stucke was engaged at work *with him* in the pit on the day of the accident; and this with full knowledge of the contrary evidence of Willoz, Stucke and Lasker.

Indeed, Willoz was pointedly asked the question whether it was a fact or not that Stucke and Villa were engaged at work together in the pit, and his answer was an emphatic negative, coupled with the affirmative declaration that Stucke and Lasker were the pitmen, and not Villa and Stucke.

We say with perfect confidence upon the faith of this testimony that Villa and Stucke were not engaged as pitmen on the day of the accident, and were not fellow-servants in that respect; and no fault or negligence is attributable to Lasker, who was the fellow-servant of Stucke—he having completed his job and been sent to the blacksmith's shop, and there assigned to duty at the time of the accident.

What is the state of the evidence with regard to Villa and Stucke having been associated as motorman and conductor on cars No. 16 and No. 17, and, therefore, fellow-servants and mutually responsible for Villa's fault in having left the switch open?

In his examination in chief Villa stated that he brought car No. 16 from the shed near by to the pit for repairs, and that Stucke was not on the car at the time, *but was standing at the toolroom about sixty feet away*. That the switch being closed at the time, he had to turn it so as to admit car No. 16 to the pit track; and that, while it was his duty to have closed the switch after the car had passed through, he left it open inadvertently. But, inasmuch as this part of his testimony had failed to connect the plaintiff with *his* negligent act of

leaving the switch open, counsel for the defendant, after having plied him with a great many questions, succeeded in eliciting from the witness (Villa) that Stucke was acting as conductor of car No. 16 at the time it was moved from the shed to the pit—same being diametrically opposed to his previous statement—thus placing upon him (Stucke) a share of the responsibility for the accident. But Stucke affirms the truthfulness of Villa's *first* statement and denies the *second*.

The testimony of the witness is equally as conflicting and equivocal in respect to his movement of car No. 17 as it was with regard to that of car No. 16. As a witness, he said that when the repairs on car No. 16 had been completed "he turned it out to put car No. 17 in its place, and when car No. 17 came into the pit *the crew of that car took car No. 16* off the pit track. That he himself ordered them to take car No. 16 off of the track."

Then the witness, appearing to have overlooked the fact that he had just stated that car No. 17 was brought into the pit by *its own crew*—that is to say, by its own conductor and motorman—*declares that he opened the switch for car No. 17 to pass into the pit* and again left it open, notwithstanding it was his duty to have closed it after the car had passed through.

Upon this evidence of the witness Villa, two questions suggest themselves, (1) why did he *volunteer* his services to open the switch for car No. 17 to pass through, knowing that it was being operated by a motorman whose duty it was to perform that service; (2) and why did he make the statement, that failing to close the switch *after* the passage of the car was his (Villa's) fault, *when he knew there was a conductor on the car whose duty he had sworn it to have been to close it?* There can be no other answer to these queries than that they were *required by the exigencies of the case; as without them there was no possible way of connecting the plaintiff with his own confessed negligence.* For it is evident that his having left the switch open after car No. 16 had passed through, was insufficient to put the blame upon him, as car No. 17, which inflicted the injury, passed through *subsequently*.

But this witness' testimony proves too much, in that it shows that in point of fact the switch was *closed after car No. 16 passed through;* otherwise Villa would have had no occasion to open it for car No. 17 to pass through; consequently the movement of car No. 16 had

no effect on the case. And, in another respect, it proves too little, as it fails to show that the plaintiff had anything to do with the movement of car No. 17.

Our conclusion is that the statements of Villa are too confusing and conflicting to rest an opinion upon, and without them the company's defence is altogether without support; and upon the other evidence the conclusion is irresistible to the effect that the accident and injury were exclusively attributable to the fault of the defendant's agents and employees, who were not the plaintiff's fellow-servants.

Plain as we conceive the proof in favor of the plaintiff to be, we are of opinion that a few of the principles of law applicable thereto may be appropriately cited.

The general proposition on which the claim of the plaintiff is grounded is, that the law requires the master or employer to provide for his servant, or employee, a safe place for the performance of the duties which devolve upon him in the course of his employment.

The Code declares, in express terms, that "masters and employers are answerable for the damage occasioned by their servants and overseers in the exercise of the functions in which they are employed." R. C. C. 2320.

A distinguished author has well said that the "invitation to come upon dangerous premises without apprising him of the danger is just as culpable, and an injury resulting from it is just as deserving of compensation in the case of a servant as in any other case.

"Moreover, no reason of public policy, and none to be deduced from the contract of the parties, can be suggested which would relieve the culpable master from responsibility.

"A man can not be understood as contracting to take upon himself risks which he neither knows nor suspects, nor has reason to look for; and it would be more reasonable to imply a contract on the part of the master not to invite the servant into unknown dangers than one on the part of the servant to run the risk of them.

"But the question of contract may be put entirely aside from the case, and the responsibility of the master may be planted on the same ground which would render him responsible if the relation had not existed.

"Whether invited upon his premises by the contract of service or

by the calls of business, or by direct request, is immaterial; the party extending the invitation owes a duty to the party accepting it to see that at least ordinary care and prudence are exercised to protect him against dangers not within his knowledge and not open to observation. It is a rule of justice and right which compels the master to respond for a failure to exercise that care and prudence.'' Cooley on Torts, Sec. 550.

To the same purport are the following reported cases, viz: Ryan vs. Fowler, 24 N. Y. 410; Strahlendorf vs. Rosenthal, 30 Wisconsin, 674; Perry vs. Marsh, 25 Alabama, 659; Walsh vs. Put. Valve Co., 110 Massachusetts, 23; Horner vs. Nicholson, 56 Mo. 22.

It was held in Wheeler vs. Wason Manufacturing Company, 135 Massachusetts, 294, that "the master must use ordinary diligence and care to provide a safe place for the servant to work in."

In Nason vs. West, 78 Maine, 253, it was held "that the master is liable if he knew or ought to have known of the dangerous condition of the place, and the servant did not and could not reasonably know of the danger thereof."

The same author, Judge Cooley, states the rule again in the following terms, viz.:

"Negligence does not consist in not putting one's buildings or machinery in the safest possible condition, or in not conducting one's business in the safest way; but there is negligence in not exercising ordinary care, that the buildings and machinery, such as they are, shall not cause injury, *and that the business as conducted shall not inflict damage upon those who themselves are guilty of no neglect of prudence.*'' *Id.*, Sec. 551.

In Smith vs. Sellers, 40 An. 527, this court said: "That the servant assumes the risk only of such hazards as are apparently incidental to an employment intelligently undertaken;" and in stating the converse of that proposition we said, that if the servant "is aware that proper precautions have not been taken for his safety, and still continues in the service, notwithstanding the risk, he will be considered as having assumed the responsibility of his own security." Erslew vs. Railroad and Traction Company, 49 An. 36.

Again:

"An employer who is engaged in a hazardous enterprise can not be required to give to every laborer a positive guarantee against danger, and immunity against injury, which might be suffered from

accidental and *fortuitous* causes *over which he could exercise no control*, and of the likelihood of their occurrence he could have entertained no apprehension at the time the contract of employment was entered into, or previous to the happening of the accident occasioning the injury."

The following adjudicated cases in other jurisdictions support the foregoing proposition, viz.: Leovy vs. Railroad Company, 139 Mass. 584; Sullivan vs. Manufacturing Co., 113 Mass. 396; Coombs vs. Cordage Company, 112 Mass. 572; Wood on Master and Servant, p. 809.

In our opinion the foregoing authorities when applied to the evidence fully demonstrate that, as between the master and the servant, the former was at fault; we must, therefore, consider what effect was produced upon their relations by the intervention of a fellow-servant, if there was one.

As a matter of fact, the proof shows that car No. 8 of the defendant's French Market line came into the barn from the street, passed through a switch that had been carelessly left open, and came into collision with car No. 17, which was standing over the pit, and caused the plaintiff's injury.

It shows that car No. 17 came in from the street previously and passed through the switch and onto the pit track for the purpose of having some repairs made, and that said car was operated by its own conductor and motorman.

Hence, the conclusion to be drawn from the evidence is that the switch was left open through the fault of the motorman, or conductor, of car No. 17, one or both; and to their fault and negligence the accident is wholly attributable.

And it is not claimed that the plaintiff was either motorman or conductor of car No. 17.

It is quite evident that the movement of car No. 16, which preceded car No. 17 on the pit track, had nothing to do with the accident, because the proof is positive that the switch was closed when car No. 17 came into the barn, and its motorman had to open it to permit it to pass through.

Taking these facts into consideration the conclusion is irresistible that neither Villa, Lasker nor Stucke had any agency in the matter of leaving the switch open for car No. 17 to pass onto the pit track.

It is equally evident that there was neither co-association or fellow

service between the conductor and motorman who operated car No. 8 of the French Market line of cars and the plaintiff who was working, temporarily, in the emergency pit. Their service and employment sustained no possible relation to each other.

But conceding, for the argument merely, that the relations of fellow-service did exist between the plaintiff and Villa, the alleged acting conductor of car No. 16, or between him and the conductor and motorman of car No. 17, and yet the master is not absolved from liability to the plaintiff as his servant, as he was guilty of culpable negligence in that he placed him at work in the emergency pit upon the spur of the moment, without apprising him of the danger of the situation and the risk he would have to undertake in accepting that employment; and because of his failure to post any notice giving due warning to servants of the danger of the employment, and because of his failure to place in the rear of the cars coming over the pit any block or impediment of any kind to protect same from such a collision as the one which occasioned the plaintiff's injury.

For if the plaintiff had been a fellow-servant of either of said servants, that fellow-service would not relieve the defendant from the just consequences of its own fault and negligence, to which the plaintiff did not contribute. And more particularly is that proposition clear when, as in this case, the alleged fellow-servant, Villa, was authorized and empowered, in the absence of the superintendent, to give orders and instructions to others; and who did actually assign the plantiff to the particular duty in question by order of the superintendent, but in so doing failed to give him any information as to the character of the service which would be required of him, or of the risks and dangers incident to the employment. On this question we find the following authorities pertinent:

In Grand Trunk Railway Co. vs. Cummings, 106 U. S. 700, the court say "that if the negligence of the company contributed to, that is to say, had a share in producing the injury, the company was liable, even though the negligence of a fellow-servant of Cummings was contributory also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of the accident, and it is no defence that another was likewise guilty of a wrong."

In Town vs. Railroad Co., 37 An. 630, this court said that "it is now settled upon the very highest authority that when the injury is

caused partly by the negligence of a fellow-servant and partly by the failure of the company to provide proper and suitable apparatus, the negligence of the co-servant will not exonerate the company from the consequences of its own fault." Citing Grand Trunk Railway Co. vs. Cummings, *supra*, and Ellis vs. Railway Co., 95 N. Y. 546.

In Myhan vs. Electric Light and Power Co., 41 An. 964, this court clearly defined the duty of the master to his servants, in regard to employing them in any dangerous enterprise, in the following emphatic language, viz.:

"At any rate it was the duty of the defendant company to have known of the dangerous character and condition of the electric wires. The knowledge which they ought to have had the law presumes, *juris et de jure*, they had. Even had the company's representatives sworn that they did not know of the same, such ignorance on their part would not have exonerated them.

"A superior is presumed to know, and in law knows, that which it is his duty to know—namely, whatever may endanger the person and life of his employee in the discharge of his duties.

"In such cases, the superior is bound to specially warn the employee of the nature of the danger, and will not be excused in case of injury, unless he prove that the employee well knew of the danger, and, notwithstanding, exposed himself willingly and deliberately to it."

The purport of the doctrine therein announced is, that notwithstanding a servant is employed by a representative of a corporation to perform a dangerous service for the company, and without its actual knowledge, that the duty is imposed upon the representative to warn the employee of the hazard of the employment; and in case of the failure of the representative to give such warning and injury result to the servant, full knowledge of its representative's fault will be imputed to the company and it will be charged with full responsibility therefor.

In Carey vs. Sellers, 41 An. 500, a similar principle was announced.

In Laning vs. Railroad Company, 49 N. Y. 534, the proposition is very well put in these words, viz.:

"That some general agent, clothed with the power to make performance for the master, has not done his duty at all, or has not

done it well, neither shows a performance by the master nor excuses the master's non-performance.

"When it is done, and not till then, his duty is met or his contract is kept.

* * * * * * *

"If a master's personal knowledge of defects be necessary to his liability, the more he neglects his business and abandons it to others, the less will he be liable."

The principle announced in that case was applied in Poirier vs. Carroll, 35 An. 699.

In Railway Co. vs. Ross, 112 U. S. 377, the governing rule in respect to a master's exoneration from liability to his servant on account of the negligence of a fellow-servant is thus stated, viz.:

"When the service to be rendered requires for its performance the employment of several persons, as in the movement of railroad trains, there is necessarily incident to the service of each the risk that the others may fail in the vigilance and caution essential to his safety. And it has been held in numerous cases, both in this country and in England, that there is implied in his contract of service in such a case that he takes upon himself the risks arising from the *negligence of* his fellow-servants, while in the same employment, *provided always the master is not negligent in their selection or retention, or in furnishing adequate materials and means for the work;* and that if injuries then befall him from such negligence, the master is not liable."

But, in applying the foregoing principle, the court said:

"The doctrine assumes that the servant causing the injury is in the employment with the servant (who is) injured, that is that both are engaged in one common employment.

The question in all cases, therefore, is, what is essential to render the service in which different persons are engaged a common employment?

The court in their opinion quote with approval the following excerpt from the opinion of the Lord Chancellor, in Coal Company vs. Reid, 2 Macqueen, 266, viz.:

"It is necessary, however, in each particular case, to ascertain whether the servants are fellow-laborers in the same work, because, although a servant may be taken to have engaged to encounter all the risks, which are incident to the service which he undertakes, yet

he can not be expected to anticipate those which may happen to him on occasions foreign to his employment.

When servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon another, by carelessness or negligence in the course of his peculiar work, is not within the exemption, and the master's liability attaches in that case in the same manner as if the injured party stood in no such relation to him."

The court also cites with approval the following extract from the Lord Chancellor, in McNaughton vs. Railroad Company, 19 Court Sessions, 271, viz.:

That the master's liability "might be sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work; the deceased being a joiner, or carpenter, who, at the time of the accident, was *engaged in repairing a railroad carriage*, and the persons by whose negligence his death was occasioned were the *engine driver and the person who arranged the switches.*"

From that statement, the facts would appear to have been almost identical with those of the instant case. And in the principal case, the court speaking through Mr. Justice Field, in summing up, said:

"To bring the case within the exemption there must be this most material qualification, that the two servants must be men in the same common employment and engaged in the same common work under that common employment."

Again:

"There is, in our judgment, a clear distinction to be made in the relation to their common principal between servants of a corporation exercising no *supervision* over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department in which their duty is entirely that of direction and superintendence.

"A conductor having the entire control and management of a railway train occupies a very different position from the brakeman, the porters and other subordinates employed. He is, in fact, and should be treated as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants.

* * * * * * *

"In no proper sense of the term is he a fellow-servant with the

foreman, the brakeman, the porters and the engineer. The latter are fellow-servants in the running of the train under his direction; as to them and the train he stands in the place of and represents the corporation."

In our opinion, that decision has peculiar applicability to the instant case for the reason that the proof shows that the plaintiff was assigned to duty in the emergency pit by the superintendent of the company, Willoz, and that, by his personal order, the plaintiff was summoned and assigned to that employment through the medium of Villa, as his agent and *vice* principal, representing the corporation.

In Towns vs. Railroad Company, 37 An. 630, this court recognized the principle announced in the *Ross* case, and observed that the doctrine of common employment of several servants being necessary to the master's exoneration from liability "has not had extensive application in this State, but it has nevertheless been recognized." Hugh vs. Railroad.

And then the court announced its opinion as follows, viz.:

"There is a tendency in modern jurisprudence and legislation to limit the extreme operation which has been given to it by the courts of this country and of England.

* * * * * * * *

"And here the Supreme Court of the United States has, in a very recent decision, placed a very important limitation upon it, by holding that the conductor of a train and the employees do not bear the relation of fellow-servants to (each other), and that the company is responsible to them for injuries resulting from his neglect of duty." Railroad Company vs. Ross, 112 U. S. 377.

In Railroad Company vs. Baugh, 149 U. S. 368, the court through Mr. Justice Brewer held that an engineer and a fireman of a locomotive engine, running alone without any train attached, are fellow-servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former; but in so doing the court distinguished that case from the Ross case, and affirmed the latter, and in the course of their opinion said:

"The inquiry must always be directed to the real powers and duties of the officials, and not merely to the name given to the office. The regulations of the company can not make the conductor a fel-

low-servant with the subordinates, and thus override the law announced in the *Ross* case."

The opinion in that case takes a very wide range, and states the principles, as recognized in that court, with reference to a master's duty and liability to his servant, as well as the principles upon which his exoneration from liability on account of the negligence of a fellow-servant depends, with so much care, and with such consummate ability, that, in our view, we can not close this opinion without quoting them *in extenso*, as they are not only the most recent expressions of that court, but bear upon the issues to be decided in this case with especial force and pertinency.

"A master," say the court, "employing a servant impliedly engages with him that the place in which he is to work, and the tools and machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery; and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery than such as is obvious and necessary.

* * * * * * *

"That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety; and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor are taken.

"He has a right to look to the master for the discharge of that duty and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of the obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in those respects.

"Therefore, it will be seen that the question turns rather on the character of the *act* than the *relations* of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the *act* is the negligence of the master," etc.

Not only do the foregoing decisions show that the master is not relieved from liability to the servant is case an injury is inflicted upon him through the fault or negligence of another servant, unless both of them were engaged in a common employment, and, therefore, fellow-servants; but that he is not relieved therefrom if the fellow-

servant, who is engaged in a common employment with the servant who is injured, is entrusted with the additional duty of seeing to it that the injured servant is provided with a reasonably suitable place to work in, and reasonably safe and suitable tools to work with—as in such case the fellow-servant becomes a *vice* principal *pro hac vice*.

And upon this last proposition Justice Brewer, speaking for the court, approvingly quotes the following extract from the opinion of the court in Railroad Company vs. Moore, 29 Kansas, 632, viz.:

"A master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools and implements to work with, with reasonably safe material to work upon, and with suitable and competent fellow-servants to work with him; and when the master has properly discharged these duties, then at common law the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment, or the performance of the particular work, including the risks and hazards resulting from the possible negligence and carelessness of his fellow-servants and co-employees.

"And at common law, whenever the master delegates to *any officer, servant, agent or employee, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent or employee stands in the place of the master, and becomes a substitute for the master, is liable for his acts or his negligence to the same extent as though the master himself had performed the acts, or was guilty of the negligence.*"

The foregoing statement of the provisions of the common law is very clear and unmistakable; and being applied to this case it fully demonstrates that, inasmuch as neither the defendant nor any one of his agents or servants is shown to have provided the plaintiff with a reasonably safe place at which to work, the condition upon which the latter is supposed to have legally assumed the risks and hazards incident to his employment had not arisen.

The learned Justice thus proceeds:

"It would be very easy to accumulate authorities on those propositions, for questions of this kind are constantly arising in the courts. It is enough, however, to refer to those in this court. In the case of Hough vs. Railway Company, 100 U. S. 213, and Northern Pacific Railroad Company vs. Herbert, 116 U. S. 642, this court recognized

he master's obligation to provide reasonably suitable place and
achinery; and that a failure to discharge this duty exposed him
o liability for injury caused thereby to the servant, and *that it is
mmaterial how or by whom the master discharged that duty.*

"The liability was not made to depend in any manner upon the
rade of service of a co-employee, but upon the character of the
ct itself and a breach of positive obligation by the master," etc.

Having made a careful and extended examination of the authori-
ies, State and Federal, English and American, we have reached the
rm conclusion that the liability of the defendant is fully made out,
nd that the plaintiff is entitled to judgment; but we are of opinion
hat for the loss of a leg which was amputated below the knee, the
mount awarded by the jury is excessive and must be reduced.

At the time of the accident, the plaintiff was about twenty-three
'ears of age, and both strong and healthy. He had no other means
f support than that afforded him as a conductor of an electric car,
or which he was receiving about forty dollars per month, or four
undred and eighty dollars per annum. Placing his life expectancy
t thirty years, he might be reasonably expected to earn about fif-
een thousand dollars during that period of time.

But the loss of a leg will not deprive him of the means or ability
f making something in the way of a subsistence for himself and
amily; but at the same time we must take into account the plaintiff's
reat physical pain and suffering as the result of his injuries.

Many precedents may be easily culled from our own reports, from
which an intelligent estimate of the proper allowance may be made.

In Barkedull vs. Railroad Company, 28 An. 180, the court affirmed
a verdict of fifteen thousand dollars for the loss of both of a child's
egs.

In Choppin vs. Railroad Company, 17 An. 19, the court affirmed a
erdict of twenty-five thousand dollars for the loss of one leg. In
Ketchum vs. Railroad Co., 38 An. 777, the court affirmed a verdict
f ten thousand dollars for the loss of an arm.

In Thompson vs. Railroad Company, 47 An. 1107, this court
allowed twenty-five hundred dollars for the loss of an eye.

In Nelson vs. Railroad Company, 49 An. —, this court allowed
twenty thousand for the loss of both legs. In Penniston vs. Railroad
Company, 34 An. 777, the court affirmed a verdict of six thousand
for a fractured leg.

In Railroad Company vs. Stout, 17 Wallace, 19, the Supreme Court affirmed a verdict of seven thousand five hundred dollars for the loss of one foot. In Railroad Company vs. Mares, 123 U. S. 710, the court affirmed a verdict of twenty thousand dollars for the loss of both legs. And in Railroad Company vs. Herbert, 116 U. S. 642, the court affirmed a verdict of twenty-five thousand dollars for the loss of one leg—a case possessing many of the features of this case, and the defence against which was the alleged exoneration of the master because of the negligence of complainant's fellow-servant.

In our opinion the award of the jury should be reduced to the sum of ten thousand dollars, with legal interest from judicial demand.

It is therefore ordered and decreed that the amount of the judgment appealed from be reduced to the sum of ten thousand dollars, and that, as thus amended, same be affirmed, with all costs of appeal taxed against the plaintiff and appellee, and those of the lower court to be taxed against the defendant and appellant.

MILLER, J., concurs in the decree.

ON APPLICATION FOR REHEARING.

A re-examination of this cause has confirmed us in the correctness of our original conclusions in so far as the questions of law are concerned; but on a closer study of the facts and circumstances of the accident, and the character of the injury received by the plaintiff, we incline to the opinion that the allowance of ten thousand dollars is excessive, and should be reduced to six thousand dollars.

It is therefore ordered and decreed that the amount awarded the plaintiff be reduced to six thousand dollars; and that as thus amended same be maintained, and the rehearing be refused.

No. 12,706.

J. A. FAY & EGAN COMPANY vs. OUACHITA EXCELSIOR SAW AND PLANING MILLS, LIMITED; HIRSCH & GATHRIGHT, GARNISHEES.

50 205
51 1709

1. Attempted seizure by garnishment process of rights of judgment debtor under an existing contract. Unsatisfactory answers of garnishees and rule to traverse.
2. Because the interest of judgment debtor could not be definitely determined at trial below, *non constat* that there may not be an eventual right or interest in

or flowing from the contract, which is still in force and operation, accruing, or to accrue, to the debtor at the time of termination thereof and then ascertainable, which may be made available under the seizure.

3. Instead, therefore, of decreeing against plaintiff and releasing garnishees, final disposition of case should have been postponed until termination of contract, with reservation of plaintiff's rights under the seizure.

APPEAL from the Fifth Judicial District Court for the Parish of Ouachita. *Pott, J.*

A. A. Gunby for Plaintiffs, Appellants.

Stubbs & Russell for Garnishees, Appellees.

Argued and submitted February 23, 1898.

Opinion handed down March 7, 1898.

The opinion of the court was delivered by

BLANCHARD, J. Plaintiffs, judgment creditors of defendants, caused execution to issue and cited Hirsch & Gathright as garnishees, under allegations that they were indebted to defendants and had in their possession property belonging to defendants, or in which they had an interest, propounding to the garnishees interrogatories touching this indebtedness and possession of property.

To the answers returned by the garnishees to the interrogatories, plaintiffs objected and took a rule to traverse and for judgment over against them for the amount of their claim.

From an adverse decision on the trial of this rule, plaintiffs appeal.

Their judgment against defendants is dated March 5, 1897.

On April 17, following, the defendant corporation and Hirsch & Gathright entered into a business agreement and contract.

Out of this contract, it is claimed, grew the relationship of debtor and possessor of property on the part of Hirsch & Gathright, toward the corporation, upon which is predicated the garnishment proceedings against them.

The contract had been in force just two months when Hirsch & Gathright were cited as garnishees.

They returned their answers ten days later, or on the 29th June, 1897.

The case turns on the construction of the contract, the provisions of which are substantially as follows:

Hirsch & Gathright owned five thousand saw-logs afloat in the Ouachita river, with facilities for the acquisition of more. They desired to have these logs and others to be acquired sawed into lumber. For this purpose they were to deliver the logs at the mill of defendant company. The term of the contract was one year and all logs acquired by the garnishees IN that time were to be included in it. For the purposes of the contract the logs were to be valued at three dollars per thousand feet, log measure, when delivered. The mill was to manufacture the logs into lumber, and dry and load the timber on cars for shipment according to the orders of the garnishees. For this service the mill was to be paid three dollars and fifty cents per thousand feet, lumber measure. The sale and disposal of the lumber devolved exclusively on the garnishees, and out of the price received therefor they were to retain, first, three dollars per thousand feet, value of the timber, and, next, pay over to the mill three dollars and fifty cents per thousand feet, cost of sawing, drying and loading the timber on the cars. Should the lumber sell for a price exceeding six dollars and fifty cents per thousand feet, twenty-five per cent. of such excess was to be retained by the garnishees as credit on an indebtedness due them by the mill for advances theretofore made by them, and the remaining seventy-five per cent. was to be paid over to the mill. It was stipulated that the delivery of the logs was not to be considered as a sale or transfer of any property interest in them to the mill, and the mill was not to become the owner of the lumber manufactured therefrom, and its interest in the logs was confined to the amount mentioned as compensation for sawing, drying and loading on the cars for shipment. The account for the sale of the lumber to be rendered by the garnishees to the mill people on the 10th of each month for all sales to such date, and the amount due the mill as compensation for the manufacture and shipment of the lumber was to be paid by the garnishees on demand, less the amount of current advances which they might make to the mill to pay the expenses of operating the same. While the contract was for one year, either of the parties thereto could withdraw from the same on thirty days' written notice.

Following the execution of the contract the mill, under the same management and without any apparent change, proceeded to saw up

the logs furnished by the garnishees, the lumber from which was shipped in their name and under their orders, sold and the proceeds received by them.

The seizure under the garnishment process did not and could not put an end to the contract, and the arrangement thereunder has continued in force and operative. At least it was so down to the time the judgment herein was rendered, October 16, 1897, and there was no suggestion in argument, and none in the briefs, that since then it has ceased to be operative, or that either party has withdrawn therefrom after the thirty days' notice provided for. It is proper to assume, therefore, that the intent and purpose of the contract is still being carried out, that the garnishees are still supplying the means to operate the mill and logs to be sawed, and that the mill is still sawing lumber and loading it on the cars for shipment and sale by the garnishees, and that this will continue down to the end of the contract period, April 17, proximo, a little more than one month hence.

In the view we take of the case as presented, we do not find it necessary at this time to pass upon the character of the contract under consideration, to decide whether it be a contract of lease or sale, or partnership, or merely one of employment of the mill by the garnishees to saw their logs into lumber and dry and load the same into cars.

Whichever or whatever it be, the judgment debtor had an interest therein, or rights growing out of the same, which might well be the subject of seizure by the judgment creditor.

It may be that this interest, or these rights, could not be definitely determined when the case was tried below, and that, therefore, no judgment could be rendered therefor at that time against the garnishees.

But this does not preclude the possibility or even probability of an eventual or residuary right or interest in the contract, or flowing therefrom, accruing to the judgment debtor at the time of the termination thereof, which was sequestered under the seizure and may be made available for the payment or part payment of plaintiff's judgment.

It was not simply what the mill was actually entitled to receive from Hirsch & Gathright at the moment of the levy under the writ

that was seized, but also whatever amount should or would be due it on final adjustment and settlement of the contract affairs.

The seizure covered all the rights of the mill and obligations of the garnishees that might accrue under the contract, as well as those existing at the time of seizure. The petition invoking the garnishment process explicitly declares: "For the purpose of garnisheeing and seizing the indebtedness and obligations of said Hirsch & Gathright, under the contract aforesaid, petitioner propounds the following interrogatories," etc., and among the prayers of the petition is one "for the sum that may be found to be due to the Ouachita Excelsior Saw and Planing Mills, Limited." And in the petition for rule to traverse the answers of the garnishees, the distinct claim is made that under the garnishment process plaintiffs had seized in the hands of the garnishees "all they might owe under the contract * * * either at the time of the seizure or subsequent thereto."

The notice of seizure served by the sheriff on the judgment debtor recites, among other things, that he had seized in the hands of Hirsch & Gathright all moneys, obligations, profits or remuneration which said firm may owe the judgment debtor under the contract between them or otherwise.

Instead, therefore, of a final judgment against the plaintiffs on their proceedings in garnishment against Hirsch & Gathright, and dismissing the latter with a decree in their favor, the final disposition of the case should have been postponed until the contract between the judgment debtor and the garnishees had run its period, or was otherwise terminated, with full reservation of plaintiff's right at that time to a full and explicit accounting, adjustment and settlement of affairs under and proceeding from the contract, including the right to oppose all items of debit and credit, the necessity and reasonableness of all advances, whether of supplies or money, made and received, of all labor employed, of all payments made for salaries and on labor account, etc., and with recognition of plaintiff's right to then make amenable to the satisfaction or part satisfaction of their judgment whatever might be found justly due the judgment debtor, if anything, on this accounting and settlement, which would likewise take into consideration and subject to the scrutiny and opposition of plaintiffs the shipments and sales of lumber, the expense account thereof, etc., under the contract. And experts and auditors might be called in and appointed by the court to examine the

accounts, ascertain the true situation and determine what amount, if any, was due the mill on final settlement, submitting their report as the law directs. C. P. 442, 443, 446 *et seq.*

For the reasons assigned it is ordered and decreed that the judgment appealed from be annulled, avoided and reversed, and that this cause be remanded to the court below to be proceeded with according to the views herein expressed, and the law, costs of appeal to be borne by the garnishees, appellees.

NICHOLLS, C. J., dissents.

No. 12,735.

STATE OF LOUISIANA VS. ULYSSES RICHARD.

A grand jury without having heard witnesses may return an indictment into court.

The grand jury may prefer charges founded upon the knowledge of members of the body.

The District Attorney can not be examined on a motion to quash for the purpose of proving by him that the indictment had been preferred without evidence of guilt of the accused.

APPEAL from the Eleventh Judicial District Court for the Parish of Acadia. *Dupré, J.*

M. J. Cunningham, Attorney General, and *R. Lee Garland*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

E. P. Veazie for Defendant, Appellant.

Submitted on briefs February 26, 1898.

Opinion handed down March 7, 1898.

The opinion of the court was delivered by

BREAUX, J. The question before us for determination is whether the preferment by a grand jury of an indictment (if found without any evidence as to the guilt of the accused) may be proved by the prosecuting officer.

The facts are that one indictment numbered 458 had been quashed in this case. The grand jury returned a second indictment No. 46

on January 6, 1898. The next day prior to plea pleaded the defendant interposed the objection that the grand jury entered this indictment without having heard any evidence whatever.

On the trial of the motion to quash the District Attorney was examined as a witness, and was asked if he was present when the indictment was found, to which he replied that he withdrew from the deliberation when the jury's vote was taken.

He was then asked whether witnesses had been examined after the indictment No. 458 was quashed in order to find indictment No. 462. He refused to answer. After this refusal, another question was propounded, to-wit:

"Q. Conceding for the sake of question that the grand jury heard evidence on which they based the indictment 458 did they hear any evidence of any kind in order to find indictment No. 462?" This also he declined to answer. He was sustained by the court and a bill of exceptions was taken to the court's ruling setting forth the facts. A copy of the District Attorney's testimony was annexed to the bill of exceptions.

With these facts before us we have given all attention possible to defendant's position. The statute having made it the duty of grand jurors to inform the grand jury of any violation of the criminal laws, which may have come to his knowledge, it follows that presentment may be made upon the knowledge of the grand jury founded upon the information of one of their number. This knowledge of one of the grand jurors may be sufficient for the exercise of their function and the return of a true bill in a case.

In a charge of Associate Justice Field of the Supreme Court of the United States to a grand jury in the United States Circuit Court for the District of California, he explained to the jurors "that their investigations must be limited to such matters as may be called to their attention by the court or may be submitted to their consideration by the District Attorney, or should the District Attorney refuse to act, they may make their complaints to a committing magistrate, or must be limited to such facts as may come to their knowledge in the course of their investigations into the matters brought before them, or from their own observations, or may come to their knowledge from the disclosure of their associates." We take it that under the statutes of this State, and under the authority of an instruction to a jury, which must command respect in all places where

reasons control, the grand juries have the right to originate charges against offenders. Such we take it, is the view, in other jurisdictions under statutory provisions. Merriam and Thompson, par. 615.

It has been decided in other jurisdictions that, in view of the fact that a grand juror is under oath to make only true presentment, there is no necessity that he should take an oath as a witness. When the grand jury is investigating a criminal charge or afterward, we do not take it that it is possible under the law to compel the District Attorney to divulge to any particular individual any of the secrets of the grand jury not due to the public. With reference to the latter, secrets not due to the public, it is generally agreed that, in case of perjury of any one before that body, a grand juror may be called upon to testify; it may also be that he may also be called upon to testify that the number required (twelve) did not agree to the return. But this is exceptional. The rule is that the proceedings are carried on in secret, and in consequence grand jurors and the prosecuting officer can not be made to divulge any facts not due to the public. The practice has never been under statute similar to the one to which we have referred, *supra*, extended so as to permit an examination of the prosecuting officer, for the purpose of proving by him that the indictment had been preferred without any evidence as to the guilt of the accused. This would imply the right of a defendant to be forewarned of proceedings against him, and to insist in all accusations that evidence be heard despite the fact that all the information needful to the return of an indictment had already come to the grand jury's knowledge; and further it would enable an accused to demand as a right to be informed by the prosecuting officer whether the charge originated with the grand jury, upon information received from one of their number, or after having heard the testimony of other witnesses. This would have the appearance of calling in question the validity of the proceedings of the grand inquest by one of its own members. The practice of admitting the presence of the prosecuting officer, at times during the proceedings, must, in the order of things, require secrecy of him, as well as of the members of the grand jury.

The rule as to secrecy includes the grand jurors themselves, and the prosecuting officer. Greenleaf, Vol. 1, par. 252.

The duty devolving upon the prosecuting officer requires that he shall examine witnesses when called upon by the grand jury, and he may also attend, in the performance of this service, when he judges proper. He may be called upon for instruction, and he may also be present to advise that body, but he should not be present during their deliberations, or when they determine whether or not to return a true bill.

We have no law or decision in support of the position that an accused can avail himself of the fact of the occasional presence of the prosecuting officer, to prove by his testimony, that no testimony was heard by the grand jury prior to the return of the indictment to which he is called upon to plead.

It might be different if the case were one in which the accused was made the victim of the vindictive zeal of some one. There is nothing of the kind pleaded. It would be an injustice if at any time the grand inquest in the most remote manner were to avail itself of the secrecy of its proceedings to become an engine of tyranny or abuse. This is not even suggested or hinted at in the pleadings.

If, as we may infer from the facts in the record, the grand jury had previously heard testimony, and, after hearing it, had returned an indictment into court, which was quashed, there was not the least necessity for re-examining the witness and reconsidering the testimony, to return another indictment into court. The formality of re-examination of witnesses, or of reconsidering the knowledge upon which the grand jury had previously acted, would have been vain and tedious.

It is ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 12,723.

Mrs. Leonore Murphy vs. H. L. Robinson.

While parol evidence is admissible to correct an error in the description of property mortgaged; yet a special demand to correct should be made, and a correct description of the property should be set forth as part of the demand to correct.

The prayer for general relief does not supply failure to ask for an amendment of the mortgage of property incorrectly described.

Judgment was annulled and case remanded for proper amendment.

APPEAL from the Twelfth Judicial District Court for the Parish of Calcasieu. *Read, J.*

Paul A. Sompayrac for Plaintiff, Appellant.

Joseph Moore for Defendant, Appellee.

Argued and submitted February 9, 1898.
Opinion handed down March 7, 1898.

The opinion of the court was delivered by

BREAUX, J. This was an action of foreclosure of a mortgage *via ordinaria*, and to correct an erroneous description of the property mortgaged. The defendant is an absentee represented by a curator *ad hoc*. In her petition plaintiff sets forth her claim and alleged that an error was committed in the deed of mortgage she holds, signed by the defendant as mortgagor. The error was one of description. The property is described in the deed of mortgage as the southwest quarter of Block E of the Reid subdivision of lands in Lake Charles, having a front of one hundred and thirty-three feet on Moss street by a depth running back east between parallel lines one hundred and thirty-three feet.

The property is not in Block E, but immediately south of Block E, and is, in the first place, described in plaintiff's petition as it is described in the deed of mortgage as originally given.

Petitioner alleged in the second place, in a second attempt at describing the property, that there is error in this description owing to the fact that it was copied from the deed of purchase under which the mortgagor became the owner of the property, and in this attempt at description again the property was erroneously described.

Petitioner alleged that the property is not within the limits of Block E, and that it is not at the northeast corner of Moss and Division streets, and that it has a front of one hundred and thirty-three feet by a depth of the same number of feet. This also, it appears, was an error.

An attempt was made to amend the petition on the day the case was tried. The amendment was filed too late, and was an amend-

ment which should have been served. It was not a mere omission in pleading, or amendment correcting the defect of an original petition. Testimony offered, but excluded on grounds urged by the curator *ad hoc*, was at variance with the asserted correct description.

The curator *ad hoc* pleaded a general denial and specially alleged that the property upon which plaintiff claimed a mortgage was not property mortgaged.

The error of description was made manifest by the testimony offered, but excluded on the alleged ground that a written act can not be changed or modified by parol testimony; that the error was not alleged sufficiently to admit proof and that plaintiff had failed to pray for an amendment of the description of the property mortgaged.

The suit was dismissed on the ground that plaintiff had failed to make out a case.

From the judgment of dismissal plaintiff prosecutes this appeal.

The first question before us for our determination is whether plaintiff could prove that there was error in the description, under sufficient allegation, and have the deed of mortgage amended so as to embrace the property actually mortgaged and foreclose the mortgage in one suit. The question is not *res nova*. This court held in two cases that parol evidence is admissible to correct the description of real estate mortgaged and make the deed correct evidence of the intention of the parties. Levy vs. Ward, 33 An. 1033; Armstrong vs. Armstrong, 36 An. 549; Moore vs. Stancel, 36 An. 820.

Reason and authority do not suggest that two suits should be brought, one to have the acts amended to conform with the intention of the parties, and the other to foreclose the mortgage *via ordinaria*.

But plaintiff in order to have the correction made must set forth the correct description in his petition and ask to have the act amended in accordance with allegation made.

In this plaintiff has failed. It has been decided by this court that in petitory action a legal description is required so that courts may know what they have to decide, and the publicwhat has been decided. A designation by public metes and bounds, section lines, surveyors' marks, natural limits or adjacent properties whose boundaries are of record, should be given.

The same requirement applies to mortgages, in so far as necessary

to a sufficient identification and definition of the property mortgaged. It was the duty of plaintiff to make her demand clear and definite.

We can not yield to equities so far as to grant relief beyond that specially asked. The prayer for general relief did not have the effect of supplying the omission of needful allegations and prayer to amend the mortgage of plaintiff.

But there was no necessity to dismiss the suit in the lower court. The case might have remained on the docket and proper amendment and correction made after required notice.

It is therefore ordered, adjudged and decreed that the judgment appealed from is annulled, and the case is remanded to enable the plaintiff to amend her petition, to notify the defendant and to be tried and decided after having admitted evidence admissible under the rules of evidence.

It is further ordered that the costs of appeal be paid by the appellee.

No. 12,477.

A. S. B. Pior, Tutor, vs. D. M. Giddens, et als.

The separate creditor of either spouse can not, after dissolution of the community, deal with an undivided interest of his debtor in any specific piece of property belonging to the community, proceed against it by direct seizure, sell it and apply its proceeds to payment of his debt

His proper course is to force by appropriate proceedings a final settlement and liquidation of the community, and then to subject, by process of law, the interest of his debtor thus found to the satisfaction of his claim.

A wife, owning by inheritance an undivided half of a plantation, purchases during the marriage from her co heirs their interest. The interest so purchased fell into the community of acquets and gains, unless declared and shown to be purchased for her separate account with paraphernal funds.

A husband, who, after dissolution of the community by death of the wife, pays out of his own funds debts of the community, becomes subrogated to the rights of the creditors so paid.

Against his claim for reimbursement of the debts thus paid—he having the administration of the property—prescription does not run until a liquidation and settlement of the community.

Where the separate property of the wife during her lifetime is administered by the husband, the debts incurred in such administration, such as expenses of cultivating a plantation, are community debts, and the revenues assets of the community.

APPEAL from the Ninth Judicial District Court for the Parish of Red River. *Hall, J.*

Pior, Tutor, vs. Giddens et als.

Wilkinson & Wilkinson and *John I. Teer* for Plaintiff, Appellant.

J. C. Egan, Sr., for Defendants, Appellees.

Argued and submitted May 10, 1897.
Opinion handed down December 29, 1897.
Judgment amended and rehearing refused March 21, 1898.

The opinion of the court was delivered by

BLANCHARD, J. In March, 1889, D. M. Giddens contracted a loan of money from the plaintiff and to secure payment thereof executed a mortgage on certain lands forming what is known as "the Sprowls Place" in Red River parish.

This debt remaining unsettled, an action was brought in 1893 to enforce its payment.

A short time prior to the filing of that suit Giddens made what purported to be a final settlement with his sons, R. A. and A. S. Giddens, whose tutor he had been, in which settlement he delivered to them, *as their inheritance*, along with other property, the Sprowls Place, which he had a few years previously mortgaged, *as his own property*, to plaintiff.

Because of this settlement with his sons and this delivery of the mortgaged property to them, the sons were made parties defendant, along with the father, in the action to enforce payment of the debt for borrowed money, and the settlement and delivery was asked to be avoided in so far as the same affected the rights of the complaining creditor.

In that litigation the judgment of the court below was in favor of plaintiff, decreeing recovery of the amount sued for, recognizing the mortgage as existing on the interest of D. M. Giddens in the Sprowls Place, which was fixed at an undivided one-third thereof, and avoiding the settlement and delivery of property made by Giddens to his sons, so far as the same affected plaintiff's right as mortgage creditor to the extent his mortgage was recognized in the judgment.

From this judgment R. A. and A. S. Giddens prosecuted an appeal to this court, and in 1894 a decree was handed down reversing

in part the judgment appealed from and directing that the rights o the plaintiff under the mortgage be restricted to the interest of D. M Giddens in the community between himself and his deceased wife, t be ascertained by proper proceedings in the court below, to whic court the case was remanded for the purpose. In this remanding th rights of the plaintiff were fully reserved to make effectual for th satisfaction of his mortgage the interest of D. M. Giddens in th community. 46 An. 1406.

Following this the present suit was instituted, the purpose of whic seems, first, to have it decreed that D. M. Giddens owns individuall an undivided one-third of the property which he had mortgaged t plaintiff in 1889, and subjecting same to the satisfaction of the mort gage debt; and, failing in this, second, to have determined the inte est of said Giddens in the community between himself and hi deceased wife, to the end that the same may be made amenable t plaintiff's claim under the hypothecation aforesaid.

It is clear that the inquiry herein must be limited to the latter. Th decree of this court in the former suit directs precisely that th rights of plaintiff under the mortgage be restricted to the interest the elder Giddens in the community between himself and his dec wife, to be ascertained according to law. The intention and declara tion of our judgment in that controversy was that the case b remanded for a settlement of community affairs.

This involved, first, ascertaining what were the rights of owne ship of the community in the property which D. M. Giddens ha mortgaged to plaintiff; and, second, how his interest in the shar owned by the community might be affected by indebtedness, if an due by him to the community, or by the community to him, as th case might be. And then, finally, should anything be left to Gidden as the result of such settlement of community affairs, to apply sam to the satisfaction of plaintiff's mortgage claim. The opinion of th court declared that the community between the husband and wif had never been settled and liquidated, and, consequently, that th rights of the spouses had not been fixed and determined. It was co rectly held that the separate creditor of either spouse has the righ after the dissolution of the community, to have the communi liquidated; that he can not deal with an undivided interest of h debtor in any specific piece of property belonging to the communit proceed against it by direct seizure, sell it and apply the proceeds

payment of his debt; that his proper course is to force by appropriate proceedings a final settlement and liquidation of the community, and then to proceed legally to subject the interest of his debtor thus found to the satisfaction of his debt. 46 An. 1145.

Thus is pointed out clearly the only course to be pursued in this later edition *of a long standing* litigation.

Robert H. Armistead died in 1868. He left surviving him a widow, Louisa Armistead. The community between them owned at the death of the husband several small Red river plantations. There were three children of this marriage surviving and of age when the father died. They were, Martha E., Mary Jane and John H. Armistead.

The first was married to J. W. Sandiford. Mary Jane Armistead had married David Briggs, who died in 1862. Three children were born of this marriage, of whom two were living when the grandfather, Robert H. Armistead, died.

Briggs owned some cotton which was sold after the war by Robert H. Armistead and netted fifteen hundred dollars. He retained this sum in his hands and owed it at his death—one half to Mrs. Briggs, widow in community, the other half to the Briggs children.

Mrs. Briggs, the widow, in 1868, just after the death of her father, married D. M. Giddens. Two children sprang from this union—Robert A., born in February, 1870, Albert S. in August, 1872

One of the Briggs children died in 1871. His share of the cotton money (fifteen hundred dollars) was thereupon inherited by his mother, his surviving sister of the full blood, Ella Briggs, and his brother of the half blood, Robert A. Giddens. In what proportion, it is not material to inquire. The other Giddens child had not then been born.

Following the death of Robert H. Armistead, his widow and heirs effected a partition of the estate. The widow and her daughter Mary Jane (Mrs. Giddens) were awarded as their share what was known as the "Armistead place"—the home of the family. Mrs. Sandiford and J. H. Armistead took other property.

By this arrangement Mrs. Louisa Armistead and Mrs. Giddens acquired the Armistead plantation in the proportion of three-fourths to the former and one-fourth to the latter. As widow in community Mrs. Armistead owned in her own right (there being no debts) one-half of the whole place, or three-sixths. Mrs. Giddens, as one of

three heirs, inherited one-third of one-half, or one-sixth of the whole. They each owned a like interest in the property which fell to Mrs. Sandiford and J. H. Armistead in the partition. The parties were effecting an exchange. The two-sixths interest owned by Mrs. Sandiford and J. H. Armistead in the Armistead place was exchanged for the interest Mrs. Armistead and Mrs. Giddens owned in the other property. The latter received, relatively to each other, the two-sixths interest of the former in the Armistead place in the same proportion that three-sixths bear to one-sixth.

Thus it was that Mrs. Armistead's interest thereafter in the Home place was three-fourths and Mrs. Giddens one-fourth.

Mrs. Louisa Armistead died in September, 1871. She had made a will bequeathing her interest in the Armistead place to her daughter, Mrs. Giddens, but the probate of this will was successfully resisted by the other two heirs on the ground of informality, etc. This left her estate to be inherited according to law by her three children. Mrs. Giddens, as one of the heirs, inherited one-third of her mother's interest in the Armistead place. As this interest was three-fourths, it thus appears that Mrs. Giddens, by the death of her mother, became the owner of another fourth in the property—making her the owner of an undivided one-half of the place, and Mrs. Sandiford and J. H. Armistead each the owner of an undivided fourth.

In December, 1871, a settlement of Mrs. Armistead's succession was effected in this wise: Mrs. Sandiford and J. H. Armistead sold to their sister, Mrs. Giddens, their interest in the Armistead place for three thousand three hundred dollars. The interest thus purchased fell into the community existing between D. M. Giddens and his wife. C. C. 2402; De Sentmanat vs. Soulé, 33 An. 609.

The act of sale and transfer does not state the property thus acquired was for the separate account of the wife, nor that its purchase was a reinvestment of paraphernal funds, and there is no proof of either in the record. No cash was actually paid, but fifteen hundred dollars of the three thousand three hundred dollars was acknowledged as cash received by D. M. Giddens, being the amount due by the succession of Robert H. Armistead on account of the Briggs cotton sold as hereinbefore stated, and the succession and heirs released from liability therefor.

By this arrangement the community between Giddens and his wife

became indebted to Mrs. Giddens (formerly Briggs) and the surviving Briggs child for the amount. For the remaining eighteen hundred dollars of the three thousand three hundred dollars purchase money a note was executed in favor of Mrs. Sandiford for nine hundred dollars, another in favor of Lisso & Bro. for six hundred and twenty-nine dollars and fifty-eight cents, and a third in favor of J. H. Armistead for two hundred and seventy-one dollars and forty-two cents—all payable January 1, 1873, with eight per cent. interest from date of sale. The note to Lisso & Bro. was the assumption of a debt J. H. Armistead owed them. This eighteen hundred dollars represented by the three notes was a community obligation.

In January, 1871, D. M. Giddens had purchased in his own name seventy-one acres of land adjoining the Armistead place from Tally Brown and wife. This property, purchased after the marriage, fell into the community. Its price was six hundred dollars. One-half of this sum was advanced by Mrs. Louisa Armistead as a gift to her daughter, Mrs. Giddens. Thus the community became indebted to the wife for three hundred dollars, and it is a claim now due her heirs by the community. The seventy-one acres so purchased was added to and became part of the Armistead place. This place originally embraced two hundred and ten acres. With the seventy-one acres added its area broadened to two hundred and eighty-one acres. It thus appears that in acreage the land bought from Brown (seventy-one acres) constituted one-fourth of what was known as the Armistead or Giddens place at the death of Mrs. Giddens.

And it appears that in value it constituted more than one-fourth, for it was appraised at fourteen hundred and twenty dollars on the inventory taken in the succession of Mrs. Giddens shortly after her death, while the original Armistead place was appraised at four thousand nine hundred and twenty-five dollars.

Mrs. Giddens died in October, 1873. Ella Briggs died in December of the same year.

Robert A. and Albert S. Giddens, sons of the first and half brothers of the latter, were their only heirs. Thus fell to them their mother's separate estate, as well as the claim against the community for the fifteen hundred dollars due for the Briggs cotton. Also, the residuary interest (if any) of their mother in the community property after payment of the debts of the community.

The community owned at the death of Mrs. Giddens, as we have

seen, one-half of the Armistead plantation and the seventy-one acres bought from Brown and added to the place.

D. M. Giddens cultivated the plantation in 1874 and 1875 for his own account, and at the close of the latter year he exchanged the whole of it for the Sprowls place owned by J. H. Beaird. He had qualified as natural tutor to his minor children, and a family meeting, convoked in their interest, recommended the exchange on their behalf.

The Sprowls place contained six hundred and forty-three acres. The Armistead place, though much smaller, was considered more valuable, and Beaird, owner of the Sprowls place, as a further consideration of the exchange, assumed payment of a mortgage indebtedness for eight hundred and seventy-nine dollars resting upon the Armistead place. This eight hundred and seventy-nine dollars was a debt due by the community that had existed between Giddens and his wife. It represented the note executed to Lisso & Bro. for six hundred and twenty-nine dollars and fifty-eight cents, and the one executed in favor of J. H. Armistead, for two hundred and seventy-one dollars and forty-two cents, when the purchase of the interest of Mrs. Sandiford and J. H. Armistead in the Armistead place had been effected in the name of Mrs. Giddens, less a small credit paid on the latter note.

The Sprowls place thus acquired by exchange became the property of the community and of the heirs of Mrs. Giddens in the same proportion that the Armistead place was.

The addition to the Armistead place of the seventy-one acres bought of Brown, all of which was community property, gave the community an excess over the heirs in this place.

The heirs can not complain if we place this excess at one-eighth of the whole, when it is considered that the seventy-one acres was quite one-fourth in area and more than one-fourth in value of the Armistead place exchanged for the Sprowls place.

For the purpose of this settlement of the community, therefore, the interest in the Sprowls place will be computed at five-eighths and the interest of Mrs. Giddens' heirs—Robert A. and Albert Giddens—at three-eighths.

The community creditors must be settled with out of this five-eighths part first, and then one-half of the remainder, if any, will accrue to the heirs of the dead wife and the other half to the living husband. Durham vs. Williams, 32 An. 162.

The only community creditors now are the heirs and D. M. Giddens—the latter because of the fact that after the dissolution of the community by the death of the wife he paid debts of the community, and thereby became subrogated to the rights of the creditors so paid. Shropshire vs. Creditors, 15 An. 705; Caire vs. Creditors, 45 An. 462; Coon vs. Stringer, 14 An. 727.

The heirs jointly hold the following claims agains the community:

Amount for which the Briggs cotton sold	$1,500 00
With 5 per cent. interest from the time D. M. Giddens received it, December 6, 1871.	
Amount received by D. M. Giddens from Mrs. Louisa Armistead and applied to part payment of the seventy-one acres of land bought from Brown	300 00
With 5 per cent. interest from date of purchase, January 21, 1871.	
Three-eighths of $879, paid or assumed by Beaird in the exchange between the Armistead place and the Sprowls place	329 61
With 5 per cent. interest from December 20, 1875.	
Total principal	$2,129 61

D. M. Giddens holds the following claims against the community on account of its debts paid by him after its dissolution, to-wit:

Judgments of Julius Lisso, Gahagan, Perryman, Lisso & Bro., and Abney & Love, aggregating	$1,426 18
With 5 per cent. interest from (say) January 1, 1874.	
Amount of note given Mrs. Sandiford for her share of purchase money of interest in Louisa Armistead's succession	900 00
With 5 per cent. interest (say) from January 1, 1874.	
(The testimony of D. M. Giddens makes it clear, we think that this note was paid after death of his wife)	
Amount paid (one-half) on account of purchase of seventy-one acres of land from Brown, paid by Giddens after death of his wife	300 00
With 5 per cent. interest from January 21, 1874.	
Total principal	$2,626 18

D. M. Giddens individually is entitled to no claim against the community for five-eighths of the eight hundred and seventy-nine dollars paid or assumed by Beaird in the exchange between the Sprowls place and the Armistead place, for the reason that that portion of that sum was exclusively a community asset and was used to settle a community obligation. It was not the payment of a community debt out of his own funds.

The testimony of Giddens that other community debts than those mentioned in the act of exchange between Beaird and himself were assumed by Beaird and afterward paid by Stringfellow, when he purchased the Armistead place from Beaird, should have been ruled out on the objection made and for the reasons urged in the bill of exceptions. Besides, we do not think it established by the evidence received that other debts than those mentioned in the act of exchange were so paid.

It is claimed on behalf of the plaintiff that Giddens is entitled to other credits than those allowed for debts of the community paid by him, but we have not found that this is made clear by the testimony in the record.

As to the plea of prescription urged by defendants against claims set up on behalf of D. M. Giddens against the community, it suffices to say that no prescription runs against claims paid by the surviving spouse, who has the administration of the property, until a liquidation and settlement of the community. Succession of Blakey, 12 R. 155; Succession of Farmer, 32 An. 1037; McKnight, Administrator, vs. Calhoun, 36 An. 408.

The separate property of the wife was not administered by her during her lifetime. It was administered by the husband, D. M. Giddens. The debts incurred in cultivating the plantation were, therefore, community debts, and the revenues assets of the community.

After the death of the wife and dissolution of the community the cultivation of the plantation by the surviving spouse was for his own account—not that of the community, nor the heirs of the deceased spouse.

The community interest in the Sprowls place must be sold to pay the community debts as herein set forth, and the proceeds will be due to the surviving spouse and to the heirs of the deceased wife in the proportion of their respective claims.

The part accruing to D. M. Giddens, as well as his residuary interest in the community proceeds, if any, after payment of the debts, must be applied to payment of plaintiff's mortgage claim.

It is therefore ordered and adjudged that the judgment appealed from be amended as follows: The community of acquets and gains formerly existing between D. M. Giddens and Mary Jane Giddens, his wife, is decreed to be the owner of an undivided five-eighths interest in the real estate known as "the Sprowls place," acquired from J. H. Beaird by act of exchange executed on December 20, 1875.

It is further decreed that the community between said Giddens and his wife is indebted to Robert A. and Albert S. Giddens jointly, and to D. M. Giddens, respectively, in the sums, with interest, as hereinbefore stated.

It is further decreed that the five-eighths interest of the community

in the Sprowls place be sold under execution to pay the said indebtedness of the community, and in the event the proceeds of the sale thereof be not sufficient to settle said claims in full that the same be applied to their payment *pro rata*.

It is further decreed that the payment accruing to D. M. Giddens on the indebtedness due him by the community, as well as his residuary interest in the community proceeds, if any, after payment of the debts herein recognized, be applied first to the payment of plaintiff's special mortgage and judgment for eleven hundred dollars, with eight per cent. interest thereon from April 1, 1890, less a credit of eighty-eight dollars paid February 24, 1891, and costs of suit.

It is further decreed that, as thus amended and substituted, the judgment appealed from is affirmed, costs of appeal to be borne by defendants.

NICHOLLS, C. J., takes no part because of absence when case was argued.

MR. JUSTICE WATKINS recuses himself, having been of counsel.

ON REHEARING.

BLANCHARD, J. It is insisted, on behalf of R. A. and A. S. Giddens, that the judgment of the court decreeing that, in the event the proceeds of the sale of the community interest in the "Sprowls" place be not sufficient to settle the claims asserted on behalf of their father against the community, and those held by themselves, as heirs of their mother, against it, the same be applied to their payment *pro rata*, is erroneous, and that they are entitled to be paid the amount of their claim by preference.

D. M. Giddens himself asserts no claim in opposition to his sons. On the contrary, he is on their side of this controversy. But his mortgage creditor, Pior, tutor, asserts it for him, and is entitled to do so under the law, forcing a settlement of the community, to the end that D. M. Giddens' interest therein, both as creditor and part owner, may be subjected to the satisfaction of his mortgage rights.

When the wife died the acceptance of the community by R. A. and A. S. Giddens, then minors, was, by operation of law, with benefit of inventory. C. C. 977. But time went on, there was no settlement of community affairs, the husband continued in possession and enjoyment of the community property, until, finally, the heirs of the wife became of age and demanded a settlement from their father. He

made a settlement and turned over to them all the real property on hand, under the pretence that it was paraphernal in character and theirs by inheritance from their mother. This is the same property that is adjudged by this court to be community property to the extent of five-eighths thereof. They received it and took possession thereof as owners, ignoring entirely the rights of mortgage thereon claimed by Pior, tutor.

On coming of age, while demanding and receiving this settlement and entering into possession of all the property as the result thereof, they failed to renounce the community. C. C. 1013, 1014, 1017, 1020, 1032, 1033, 1050, 1054, 2410, 2423; Succession of Baum, 11 R. 314. And the serious effect of this omission in cutting them off from competition with this creditor for the husband's share of the community funds might be urged with force. Succession of Plantevignes, 28 An. 562; C. C. 988, 987, 994, 1009, 1010.

But a more equitable and legally satisfactory method of settling this controversy is at hand.

At the dissolution of the marriage, the community, as we have seen, was indebted to R. A. and A. S. Giddens in the sum of fifteen hundred dollars with five per cent. interest thereon from December 6, 1871, and in the further sum of three hundred dollars with like interest from January 21, 1871.

At the same time it owed the various creditors, mentioned in the opinion in chief, amounts aggregating $2626.18.

There was no registry of any legal mortgage affecting the community property. R. A. and A. S. Giddens could claim no priority of payment over the third persons who were creditors of the community along with themselves. The respective claims of these several creditors were, therefore, as between themselves of equal rank and concurrent against the community property.

The surviving husband, out of his own funds, paid all of these outstanding community debts, except that due R. A. and A. S. Giddens, and, by subrogation, became a creditor of the community for the claims so paid by him.

Thereupon he and his two sons, being the only creditors of the community and owning together in equal proportion (he one-half, they the other half) all the community property, their respective claims against the community *instantly* extinguished each other, *pro tanto*, by compensation and confusion. C. C. 2207, 2208, 2217, 2218;

Heirs of Gee vs. Thompson and Burns, 41 La. An. 353; Newman vs. Cooper, 50 La. An. —

The wife died in the latter part of 1873. Taking the first of January, 1874, as the day when this extinguishment took place, the account at that time stood thus:

Aggregate amount of community debts paid by the husband		$2,626 18
The Briggs cotton claim due the heirs	$1,500 00	
With 5 per cent. interest from December 6, 1871 to January 1, 1874	154 00	
The amount due the heirs on account of money supplied by Mrs. Louisa Armistead and used in part payment of land bought from Brown	300 00	
With 5 per cent. interest from January 21, 1871, to January 1, 1874	44 00	
Total due R. A. and A. S. Giddens		1,993 00
Deducting this last amount from the sum of the community debts paid by the husband, a balance of		$628 18
is left, and represents the amount due D. M. Giddens, on the first of January, 1874, by the community.		

From this must be deducted the three hundred and twenty-nine dollars and sixty-one cents, being three-eighths of eight hundred and seventy-nine dollars, paid or assumed by Beaird in the exchange between the Armistead place and the Sprowls place, due the heirs as of date December 20, 1875, as shown in the opinion in chief.

This left a balance of two hundred and ninety-eight dollars and fifty-seven cents due the husband by the community, and the same is still unsettled. It is due, however, without interest. Succession of Fitzwilliams, 3 La. An. 489; Succession of Bringier, 4 La. An. 389.

The community share of the Sprowls place (see opinion in chief) must be sold to pay this balance, and the same, when realized, is to be applied on the debt due by D. M. Giddens to Pior, tutor, and secured by mortgage on his interest in the community share of the Sprowls place; and the residuary interest of the said D. M. Giddens in the proceeds arising from the sale of the community share of the Sprowls place, after payment of the said balance of two hundred and ninety-eight dollars and fifty-seven cents, must be applied to the payment of the remainder of the plaintiff's claim, whose mortgage is recognized as binding upon the remaining interest of said D. M. Giddens in the community share of said property.

It is, therefore, ordered that the decree hereinbefore rendered be amended so as to read as follows:

The community of acquits and gains formerly existing between D. M. Giddens and Mary Jane Giddens, his wife, be decreed to be the

ner of an undivided five-eighths interest in the real estate known "the Sprowls place," acquired from J. H. Beaird by act of change executed on December 20, 1875.

It is further decreed that the community between said Giddens and s wife is indebted unto D. M. Giddens in the sum of two hundred d ninety-eight dollars and fifty-seven cents, for which judgment is reby rendered in his favor.

It is further decreed that the five-eighths interest of the community in the Sprowls place be sold under execution to pay said debtedness of the community, and to ascertain the residuary interest of said D. M. Giddens in said community share.

It is further decreed that the payment accruing to said D. M. Giddens on said indebtedness due him by the community, as well as his siduary interest in the community proceeds, be applied to the payent of plaintiff's special mortgage and judgment for eleven hunred dollars, with eight per cent. interest thereon from April 1, 1890, s a credit of eighty-eight dollars paid February 24, 1891, and costs suit in both courts.

It is further decreed that, as thus amended and substituted, the dgment appealed from is affirmed.

Rehearing refused.

WATKINS, J., recused.

No. 12,651.

JSTAVE A. BREAUX VS. BERTHA A. LE BLANC, WIFE, JOSEPH A. WEBER, HUSBAND.

r Code declares that a partnership may be dissolved for the breach of one of its obligations.

declares that it may be dissolved for just cause without furnishing any interpretation of that term. Hence it is a question for the courts to determine.

rtnership is essentially a relation of mutual trust and confidence, and when they cease the engagement is virtually at an end

ie of the members of an ordinary planting partnership having failed or refused to comply with the terms of his engagement to furnish his proportionate share of the funds necessary to carry the planting operations to completion, violates one of the essential obligations of the contract and gives to the other partner just ground for annulling it.

APPEAL from the Seventeenth Judicial District Court for the Parish of Lafayette. *De Battion, J.*

Breaux vs. Le Blanc.

Gus. A. Breaux, Plaintiff and Appellant, *in propria persona* (*William Campbell*, *R. W. Elliott* and *Fenner*, *Henderson & Fenner*, of Counsel).

Charles D. Caffery, *Joseph A. Chargois* and *W. S. Parkerson* for Defendants and Appellees.

Argued and submitted December 15, 1897.
Opinion handed down January 10, 1898.
Rehearing refused March 7, 1898.

The opinion of the court was delivered by

WATKINS, J. The plaintiff seeks the annulment and dissolution of a planting partnership which he alleges he entered into in February, 1896, with the defendant Weber, under the terms, stipulations and conditions of an act of partnership which was signed by the parties in duplicate, and to which special reference is made—his averment being that said husband was the real partner, although, for personal reasons of his own, the name of his wife was employed and used, and he acted as her ostensible agent.

The contract of partnership declares that it was made and entered into on the 8th of February, 1896, between Mrs. Bertha A. Leblanc, wife of Joseph A. Weber, represented therein by her said husband under a letter of attorney, and Gustave A. Breaux, as the owner of the Oakburn plantation, situated in the parish of Lafayette, for the purpose of operating and cultivating same in sugar cane; and that same was to continue in force for a term or period of three years from the date thereof.

Said act of partnership stipulated amongst other things that said partners should cultivate and harvest crops of sugar cane, and such other crops as are usual and suitable; and that, for said purposes, the owner, Breaux, obliged himself to furnish the plantation with all such houses as then stood thereupon, "including corn-cribs, mule stables, cabins, etc., *reserving to himself* the dwelling house, private stables and buildings in the yard, and lots adjoining said dwelling and yard, pasture for all animals to be used for the benefit of the place, and the stock of each (partner), except such lots as hereinbefore reserved. All repairs to buildings and fences to be made at the common expense."

It further stipulates that the mules, farming utensils, carts, harness, etc., were to be inventoried and appraised, and that the planting partnership should take them at the appraisement—Breaux to receive "credit for same as well as for mules sold."

It further provides that all mules, farming implements, carts, harness, etc., and "whatever else is bought for the place, as well as for provisions purchased for the store to furnish hands, shall be purchased by the firm."

It further stipulated that Joseph A. Weber should give "his undivided time and attention to the management and cultivation of the place without compensation other than such as shall be received from a division of the proceeds of the crops hereinbefore provided."

That "the funds necessary to cultivate the said plantation shall be procured by the firm in amount not to exceed three hundred and sixty dollars per month, until the crop is laid by, and thereafter in such amount as shall be agreed upon."

And it contains the further express stipulation that "no debt of any kind shall be contracted without the consent of both partners previously obtained."

It further provides that "all building material for buildings erected (on the plantation) are to be paid for by said Breaux; and that no building material shall be bought without his consent—expenses of buildings to be at the expense of the copartnership."

The contract stipulated that J. A. Weber was to be the general overseer and manager of the firm—reserving the right of consultation to the said Breaux as to any general disposition of the place.

It provided, that Weber was "to ditch, drain and cultivate the plantation as he judges best to enable him to make profitable crops—the firm to feed two horses for Mr. Weber, which were to be used for plantation purposes."

Finally it specified that "all cane crops shall be sold to the best advantage and for the most money obtainable and after proper expenses and liabilities of the firm are paid the proceeds shall be equally divided between the partners."

The foregoing are the essential stipulations of the contract of partnership which was signed by Gus. A. Breaux and Bertha A. Weber *per* J. A. Weber; and it was thereafter duly filed for record, and recorded according to law.

The grounds of nullity assigned in the plaintiff's petition are substantially as follows, viz.:

1. That notwithstanding an appraisement was made of all the agricultural implements, carts, mules, etc., and said property was nominally transferred to the partnership, neither Weber nor his wife have ever paid a single cent therefor.

2. That agricultural implements and mules were purchased for the plantation account, the plaintiff paying his share; while the defendant failed to pay his share, but on the contrary charged plaintiff's personal account in one instance, and declined making payment in another.

3. That there are some debts due by the firm which have not been paid, because the defendant avers his inability to pay his share, though plaintiff is ready and willing to discharge his proportionate share thereof.

4. That in violation of his contract, and disregard of the rules of prudence, and without just cause, he delayed the commencement of the delivery of the sugar cane for a period of three weeks, thus carelessly and heedlessly endangering the entire crop—notwithstanding plaintiff's protest, and in disregard of his duty as manager of the plantation for the partnership.

5. That by the defendant's gross mismanagement the cost of the harvesting of the crop was increased fully forty per cent.

6. That in January, 1897, notwithstanding the most propitious weather, defendant ordered all plantation work to be discontinued, when he should have been using every exertion to plant cane for the crop of that year; and that in consequence of that action no portion of the crop has been planted. That, during that period of delay the defendant was daily absent from the place, to the utter neglect of the duties of his employment.

7. That in January, 1897, the defendent complained of the manner in which funds for raising the crop were being handled, and demanded that same should be placed in his hands for disposal; and he declared that he would not proceed any further with the partnership unless his demand was complied with—notwithstanding plaintiff's refusal so to do on the ground that the contract of partnership does not thus provide. That thereupon the plaintiff distinctly refused to furnish any more than his proportionate share thereof and demanded of the defendant that he should furnish his

share thereof, and that he must be prepared to pay his share of th January pay rolls, according to the rules governing the plantation

And also demanded that the defendant should be ready to pay hi share of the debts contracted in 1896; and that he defaulted in meeting both of said demands.

Then follows this general averment, viz.:

"Now petitioner avers that, during the whole of the year 1896 and up to this time, the said Weber has persistently manifested disposition to, and has violated the contract of partnership to hi detriment; and that his conduct shows that he has persistentl acted so as to render the continuation of (the) partnership impos sible except on his own terms, and with a disregard of all othe rights"—specifying various details of his exercise of undue an overbearing authority.

Petitioner then specifies that "utterly forgetting the relation that should exist between partners, the defendant at great pain and with evident satisfaction," publicly and to many persons spok in terms of detraction of him, styling him a bankrupt and wholl incompetent for the transaction of business.

He avers that he is the sole owner of said plantation and all th property which is included in the contract of partnership, and that i is his home and the place of residence of his family. And he aver that, for the various reasons assigned, he is entitled to have th partnership dissolved and to retake the possession and control o said plantation and property.

It is upon these allegations the plaintiff asks a judgment dissolvin and annulling the contract of partnership; and to prevent irrepar able injury he obtained a writ of injunction.

The defendant denies all the plaintiff charges, and avers that h has at all times and in every respect been ready and able to peace ably carry out all the provisions of the contract of partnership.

He specially denies that he ever violated any part of the contract and avers his willingness and ability to meet his share of the pa rolls.

On the trial there was judgment rejecting the plaintiff's demand and dissolving his injunction, and from that decree the plaintiff ha appealed.

In his reasons for judgment the judge *a quo* makes this statemen substantially, viz.:

That during the year 1896 the *plaintiff* succeeded in effecting a loan of six thousand dollars with which to run the plantation during that year, and granted a lien on the crop to secure the payment—the crop yielding some five thousand dollars in net proceeds. That in the early part of the year 1897, the partners being unable to make arrangements to obtain money to enable the firm to operate the plantation for the year 1897, they each for himself sought to raise his share of the funds; and that just here arose the trouble between them.

The judge disposes of this entire matter in a few words, viz.:

"It must be borne in mind that six thousand dollars was borrowed on the crop of 1896. That Weber swears that he did not handle any of the money. That the amount of expenses to make out and handle the crop had not been shown; and the proceeds of the crop were shown to amount to about five thousand dollars—and no accounting or settlement had been made of the result of the first year's experience. The evidence fails to show what was the result of the venture for the first year. It was shown, and not contradicted, that Weber did not receive the proceeds of the crop of 1896.

"Under these circumstances, friction was unavoidable, for the contract required an equal distribution of the proceeds after payment of debts. *And so matters dragged on through January, 1897, when work was stopped, as stated above,*" *etc.*

The judge does not say so, but the foregoing statement implies that the defendant was absolved from fault or blame, because plaintiff had not rendered him an account of the proceeds of the crop of 1896.

In so deciding he has evidently overlooked two very important facts: (1) that the articles of partnership bound the partners to furnish each his proportionate share of the funds necessary to operate the plantation during each year; (2) that the partners proved unsuccessful in obtaining the needed funds and the *plaintiff* procured, on his own individual responsibility, the sum of six thousand dollars and granted a lien on the crop to secure its payment. That the total proceeds of the crop amounted to only five thousand dollars —one thousand dollars less than the loan to the *plaintiff*—and yet because the plaintiff did not turn over same to his impecunious partner, Weber, and thus expose himself to the loss of the entire sum, it is suggested that "friction was unavoidable."

The judge in his reasons admits that "the contract required an equal distribution of the proceeds *after the payment of debts*," and not before.

Had the defendant furnished his share of the six thousand dollars, instead of the plaintiff borrowing the *whole* upon his own account, there would have been some propriety in his claim for an accounting.

But the judge concedes that the proceeds of the crop of 1896 amounted to one thousand dollars less than the plaintiff had borrowed, and hence the defendant was without interest in them, or any right to an account—except as a bare technicality.

In the paragraph of the reasons for judgment, which immediately precedes the one just quoted, the judge observes that "the non-payment of debts does not give the right to one partner to have the partnership dissolved;" but that is not the full claim which the plaintiff makes. It is that, notwithstanding the contract of partnership obliged the defendant to support one-half of the expenses of the cultivation of the crops, and to furnish one-half of the money necessary for that purpose, he had totally failed to furnish *any part* of the funds and expenses to make and harvest the crop of 1896, and had failed and refused to reimburse the plaintiff his portion of that indebtedness beyond the value of the crop.

That having the experience of 1896 before him, the plaintiff insisted that the defendant should furnish his *quota* of the funds necessary to liquidate the pay roll for the month of January, 1897; and also to pay his proportionate share of the current indebtedness of the partnership. But the defendant either failed or refused to comply with his demands.

The crop venture of 1896 proving to have been a loss instead of a profit, the defendant had no means, and it seems quite likely that he had no credit.

Under this state of facts what course was open to the plaintiff but the one he pursued, institution of a suit for the dissolution of the partnership? None. The judge in his reasons for judgment states that "the parties being unable to make necessary arrangements to obtain the money for the firm for 1897, they sought each for himself to obtain his share for the necessary expenses."

But the plaintiff procured his share and the defendant failed altogether.

Again: "And so the matter dragged on through January, 1897, when work was stopped," etc.

It was under these circumstances that this suit was filed and injunction granted on February 7, 1897, immediately after the events just recited had transpired.

This was not a mere matter of disagreement which a little forbearance would have reconciled, or a slight difference of opinion which a delicate remonstrance would have cured.

It was very much more serious than that.

The facts developed during the planting operations of the year 1896 had demonstrated the defendant's total inability to supply his proportionate share of the funds to defray the plantation expenses; and that he was utterly without credit.

The plaintiff had risked in the enterprise his sugar plantation, and its outfit of carts, mules and farming implements; and circumstanced as the defendant was, the plaintiff was called upon to risk, also, the *whole* of the plantation expenses, for the year 1897, and then pay the defendant one-half of the profits, if any.

In our opinion the reasons assigned by the judge, when taken in the light of the surrounding circumstances, do not justify his judgment.

In addition to the foregoing, there are several other grounds equally as fatal to the contract as the one just examined and analyzed.

One of these is, that this plantation is the home of the plaintiff and the residence of his family, and that the defendant's systematic course of conduct toward the plaintiff and about his house was a constant source of irritation and annoyance, whereas it should have been his constant endeavor to bring about pleasant and harmonious relations between them.

Besides this, the defendant mistreated one of the plaintiff's personal servants; and more than once invaded the private grounds that the plaintiff had reserved to himself, and was guilty of trespassing thereon.

It would serve no useful purpose to go over any more of the details of the troubles of the partners.

Our Code declares that a partnership may be dissolved for the breach of any of the obligations thereof. R. C. C. 2888; Bruce vs. Ross, 18 La. 341.

It declares that a partnership may be dissolved for "just cause," without furnishing any interpretation of that term; hence it is a question for the court to determine for itself in any given case.

Partnership is essentially a relation of mutual trust and confidence and when they cease, the contract in effect is dissolved. Harrison vs. Tennant, 21 Beav. 482.

It is clear to our minds that the defendant is without right or interest to have the contract of partnership kept in force; on the contrary, we think equity and justice require its dissolution.

And it is so ordered.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the contract of partnership heretofore subsisting between the plaintiff and the defendant be dissolved and annulled, and the plaintiff restored to the possession of his plantation and property; and that his injunction be reinstated and perpetuated, and that all costs of both courts be taxed against the defendant—fully reserving the right of each one of the partners to an accounting and final settlement of the partnership affairs and accounts.

No. 12,542.

W. H. TRIBBETTE VS. L. C. GWIN ET ALS.

Suit having been commenced against several non-resident defendants by attachment and the garnishment of resident commission merchants, as stakeholders, a judgment pronounced against them upon traverse of their answers will be reversed if the evidence substantially shows that they have paid and satisfied the plaintiff's demand.

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

Bernard McCloskey for Plaintiff, Appellee.

J. G. Hawkes, Curator *ad hoc* for absent Defendants, Appellees.

Clegg & Quintero for Garnishees, Appellants.

Argued and submitted December 31, 1897.

Opinion handed down January 24, 1898.

Opinion handed down refusing rehearing March 7, 1898.

The opinion of the court was delivered by

WATKINS, J. This suit is directed against L. C. Gwin, E. C. Gwin and Samuel Gwin, and judgment is sought against them *in solido* for $2797.50, with interest and attorney's fees.

Coupled therewith is a writ of attachment and H. & C. Newman are made garnishers, and certain interrogatories propounded to them, and each and every one of them were answered in the negative.

Upon a rule duly taken the aforesaid answers were traversed, and upon the trial thereof a judgment was pronounced against the garnishees, as well as against the defendants, and from that judgment the garnishees have appealed.

The plaintiffs and defendants reside in the State of Mississippi, and the suit is brought upon a promissory note dated at Greenville, Mississippi, on the 14th of February, 1895,and payable at the First National Bank of Greenville, Mississippi, on the first of January after date; and its payment is secured by a deed of trust, whereby certain movable property was conveyed and warranted to J. Newgas, trustee, same being at the time situated on the Sago plantation, situated in the counties of Washington and Sharkey, in the State of Mississippi.

There was likewise conveyed and guaranteed to said trustee, "all cotton, cotton seed, corn and agricultural products which might be grown by (the makers of said note) or caused to be grown by them on said plantation, as well as all rents, issues and interests that they might have arising therefrom, growing out of said plantation, and any crops growing thereon during the year 1895," etc.

Petitioner alleges that for the security of the payment of said note and other indebtedness, he has by the law a lien, privilege and right of pledge upon all the cotton seed, corn, hay and other agricultural products produced upon said plantation, *wherever situated.*

He alleges that said garnishees have in their possession and under their control certain cotton, cotton seed and other agricultural products, and moneys realized from the sale thereof, and also other moneys, rights, credits and property belonging to said defendants, or in which they have an interest, and upon which his lien, privilege and right of pledge aforesaid rest.

That said garnishees had and have full knowledge of the existence of said trust deed, the recitals thereof, and of the aforesaid

trust estate, and the extent thereof, and that they have already pai
him a portion thereof, which was secured thereby, but decline an
refuse to pay the note sued on, which constitutes a part of same
notwithstanding payment has been demanded of them.

The interrogatories inquired of the garnishees whether or not the
had in their possession, or under their control, any money, rights
credits, or other property of the defendants; and whether they wer
in any manner indebted to them—particularly inquiring of them a
to their possession of any portion of the property covered by th
trust deed, or the proceeds thereof.

To each of these interrogatories their answers were in the nega
tive except to the last one, to which they made the followin
response, viz.:

That they had received and had on hand "one hundred an
twenty bales of cotton, valued at about five thousand one hundre
and fifty dollars, against which (the defendants) owe them si
thousand six hundred and seventy-five dollars and eighty-eigh
cents.

Upon the traverse of the garnishees' answer, the facts pertinent t
the transaction were fully developed, and the following excerp
from the brief of counsel for the garnishees may well preface th
statement thereof, viz.:

"W. H. Tribbette, a resident of Mississippi, agreed to advance th
Gwin Brothers a certain sum of money for the making of the crop o
the Sago plantation. The indebtedness was represented by tw
notes secured by deed of trust.

The original deed of trust recognizes a debt of seventy-two hun
dred and forty-five ($7245) dollars. It was evidenced by two prom
issory notes of twenty-seven hundred and ninety-seven dollars an
fifty cents each, and these notes were bearing ten per cent. inter
est; and the third note, due January 1, 1896, for sixteen hundred an
fifty dollars, also bearing ten per cent. interest.

It was understood that the two first notes represented the amoun
to be advanced through the National Bank in Greenville, Miss., a
various times, and the remainder was for debts which were paid b
Tribbette for account of the Gwins.

Some time during the year 1896 other advances were required, an
the following memorandum was presented to H. & C. Newman i
order to obtain of them the necessary advances for the Gwins:

STATEMENT BETWEEN W. H. TRIBBETTE AND S. C. GWIN.

Gwin Dr. to Tribbette.

On crops	$3,856 00
Interest on land note	165 00
Miller judgment	577 00
Hanover National Bank claim	568 00
Total	$5,165 00
Ten per cent. interest	430 00
In two notes	$5,595 00
Due December 1, 1895	2,797 50
Due January 1, 1896	2,797 50
First interest note on land	1,650 00
Grand total, secured by deed of trust on crops, stock, etc	$7,245 00

If H. & C. Newman, or any other merchant, will make advances in order to get the commission for selling crops, Tribbette agrees to prorate on four thousand eight hundred and fifty dollars, any amount they may so advance, not exceeding one-fourth the above amount.

(Signed) W. H. TRIBBETTE.

Not more than the above amount to be advanced.

(Signed) W. H. TRIBBETTE.

As explanatory of that statement, the subjoined extract from the deed of trust may be appropriately considered, viz.:

"Whereas, we acknowledge ourselves indebted to *W. H. Tribbette*, in the sum of seven thousand two hundred and forty-five ($7245) dollars, which is evidenced by two promissory notes on this day for the sum of two thousand seven hundred and ninety-seven dollars and fifty cents each, one due on the first day of December, 1895, and the other due on the first day of January, 1896, and the third note due on the first day of January, 1893, being for the sum of one thousand six hundred and fifty dollars; said first two notes bearing interest at the rate of ten per cent. per annum, from maturity until paid, and ten per cent. attorney's fees, if said note is placed in the hands of an attorney for collection after default has been made in the payment thereof. The third note being for interest owing by us to *W. H. Tribbette*, as evidenced by a deed of trust, recorded in the office of the chancery clerk of Washington county, in Book K, p. 498, of the land records thereof, to which reference is hereby made. It is further understood that of the amount evidenced by the first two notes herein named, the said *W. H. Tribbette* is to advance us, through the First National Bank of Greenville, Miss., the sum of

three thousand eight hundred and fifty-five dollars, as follows, to-wit:

"Up to April 1, 1895, eight hundred and fifty-five dollars; by May 1, five hundred dollars; by June 1, five hundred dollars; by July 1, five hundred dollars; by August 1, five hundred dollars; by September 1, five hundred dollars; by October 1, five hundred dollars; and the remainder of said loan, as evidenced by said two notes, is to be paid *T. M. Miller;* payment of judgment and costs, five hundred and seventy-seven dollars; Hanover National Bank deed of trust, five hundred and sixty-eight dollars and seventeen cents, which are debts charged against us, and which he releases by said payment."

The proof shows that it was on the faith of the foregoing statement and the trust deed that the garnishees undertook the business of the defendants, and received and made sales for them of the pledged cotton, the proceeds of which are in their hands—less the sums they have expended for the defendant's account.

The testimony of the garnishees is to the effect that the written proposition of the plaintiff was, that they (garnishees) should not advance to the defendants more than one-fourth of four thousand eight hundred and fifty dollars; and that on that basis the plaintiff and the garnishees were to prorate—that is to say, plaintiff was to receive seventy-five per cent. and the garnishees twenty-five per cent.—in case the proceeds of sale were insufficient to pay both of them.

The following is the result of the interrogation of one of the garnishees, viz.:

"Q. Now, this agreement here, a copy of which is attached to the petition—you saw that agreement?

"A. Yes, sir; I saw that agreement.

"Q. So, Tribbette agreed to prorate one-fourth of the proceeds of the cotton?

"A. Up to that time, and he was not to advance any more than the amount stipulated. In other words he was to prorate seventy-five per cent. and we twenty-five per cent.

"Q. Have you paid Tribbette seventy-five per cent.?

"A. More than that. We paid Mr. Tribbette on December 2 two thousand seven hundred and ninety-seven dollars and fifty cents—that is, we put it in his favor. On December 30 (we paid

him) two thousand five hundred and thirty-four dollars and twenty-four cents. On January 20, 1896 (we paid him) one thousand eight hundred and twenty-eight dollars and sixteen cents—making a total of seven thousand one hundred and fifty-seven dollars and two cents.

"Q. And the total cotton brought over thirteen thousand dollars?

"A. I can not tell what the cotton brought; but I will furnish you a statement.

* * * * * * * *

"Q. The cotton brought thirteen thousand nine hundred and three dollars and forty seven cents?

"A. I suppose that is right; and seven bales besides.

"Q. And the amount paid back?

"A. Was seven thousand one hundred and fifty-seven dollars and two cents.

"Q. And he agreed to prorate?

"A. On one-quarter.

"Q. He agreed not to advance any more than that?

"A. Well, the agreement speaks for itself—yes, sir.

"Q. There was no necessity of prorating, becanse you have been paid everything?

"A. We have not.

"Q. Twelve hundred and odd dollars?

"A. We have not been paid; they owe us one thousand four hundred and forty-eight dollars and twenty cents.

"Q. You would lose fourteen hundred and odd dollars. Now, have you figured out *how much Tribbette, the plaintiff in this case, would lose for the advances made by him, based upon this agreement?*

"A. *I don't think he would lose anything, because he has got seven thousand one hundred and fifty-seven dollars and two cents, and he did not advance any more than that. And besides he has got two mules and the corn and the cotton seed;* and we virtually paid him back seven thousand one hundred and fifty-seven dollars and two cents. That was all he was to advance.

"Q. He (Tribbette) has advanced, according to this besides the amount mentioned in this agreement—was not this agreement to advance four thousand eight hundred and fifty dollars besides, the amount by which you prorated in the proportion of three-fourths to one-fourth?

"A. Seven thousand two hundred and forty-five dollars was a that he was to advance.

"Q. Well, Tribbette was to advance —

"A. *Tribbette was to advance on what he only* claimed a privilege on four thousand eight hundred and fifty dollars, as against twelv hundred dollars which we were to advance."

This witness states further, that from the proceeds of the cotton *they honored drafts in favor of Tribbette to the amount of seven thou sand one hundred and fifty-seven dollars and two cents*, which leave the defendants owing them on the 14th of April, 1896, the sum o one thousand four hundred and forty-eight dollars and twenty cents while the balance due the plaintiff is only eighty-seven dollars an ninety-eight cents.

This witness concludes his testimony thus:

"Q. You made no prorate with Tribbette, why was it? Was because you considered (that) having paid him all that was calle for by the deed of trust, that there was no reason for a prorate?

."A. *We paid him in full.* We paid him more than we agreed t prorate."

Per contra the plaintiff's statement is, that the note sued on fo two thousand seven hundred and ninety-seven dollars and fifty cent has not been paid.

The following interrogation of this witness is worthy of considera tion, viz.:

"Q. Have you made any effort (in Mississippi) to collect th amount that is due you?

"A. On the land?

"Q. Yes sir.

"A. Only so far as collecting one thousand six hundred and fif dollar note. I took deed of trust instead of selling land.

"Q. You have a deed of trust on the land to secure the balanc due you?

"A. Yes, sir; the balance of one thousand six hundred and fif dollars," etc.

This witness explains the proposition which garnishees based the transactions with the defendants upon thus:

"The nature, terms and conditions of the prorate agreement were that I was to advance in cash, to make the crop of 1895, three thou sand eight hundred and fifty dollars (and) one thousand dollars (was

to be (advanced) on judgment and deed of trust, against notes held by Hanover National Bank and Miller, making four thousand eight hundred and fifty dollars, which was my limit in the way of advances to make the crop.

" H. & C. Newman (were) limited to one thousand two hundred dollars, making a total of six thousand and fifty dollars. If after paying the expenses of gathering, wrapping, ginning and marketing the crop, there was not enough left to pay the six thousand and fifty dollars, then we (plaintiff and H. & C. Newman) were to prorate on the basis of four thousand eight hundred and fifty dollars for me, and one thousand two hundred dollars for Newman," etc.

But while the plaintiff as a witness insists that the note sued on has never been paid, he does not deny the statement of the garnishees that they paid him in all seven thousand one hundred and fifty-seven dollars and fifty cents.

But, in corroboration of the parol testimony of the garnishees, they produced and filed in evidence exemplifications of their commercial books in response to the request of plaintiff's counsel, and they show the following entries, viz.:

1895, December 2, to W. H. Tribbette	$2,997 50
1895, December 31, to W. H. Tribbette	2,531 24
1896, January 20, to W. H. Tribbette	1,828 98
Total	$7,157 72

The foregoing amounts are almost identical with the items of the statement which constituted the basis of the garnishees' dealings with the defendants, and the dates of the purported payments exactly correspond with the maturities of the aforesaid notes. And the aggregate amount of said payments is identically the same as that given in the testimony of the garnishees.

These exemplifications from the books of the garnishees were not attacked or questioned in any way, notwithstanding plaintiff had the conclusion of the case. Indeed, the garnishee was introduced as a witness on the part of plaintiff; and as he was requested to make and produce same as a part of his answers as a witness, they may be properly treated as his evidence.

In addition to the foregoing observations a casual inspection of the aforesaid statement and the deed of trust disclose that the plaintiff only contracted to furnish the defendants supplies to the amount of three thousand eight hundred and fifty-five dollars, and that the

residue of the sum of five thousand five hundred and ninty-five dollars is made up of interest carried into the calculation as principal and two antecedent debts.

This sum is represented in the transaction by two notes, viz.:

One due December 1, 1895	$2,797 50
One due January 1, 1896	2,797 50
Total	$5,595 00

It is plain to be seen, then, that these two notes represented the entire transaction with reference to the crop advances for 1895—including the old debts, which are therein specified as being secured.

But the deed of trust includes and secures the additional sum of one thousand six hundred and fifty dollars, which is represented by a third note; though this debt is an old one, too, as the deed of trust fixes its date as January 1, 1893. The amount of this note, when added to the amount of the other two, as it is in the statement, aggregates the total sum of seven thousand two hundred and forty-five dollars, and the whole is secured by the trust deed; but the proof satisfies our minds that the garnishees have paid the plaintiff the *entire sum*, less a small amount, which is far less than his proportionate share of the loss which he and the garnishees sustained in the crop adventure.

Our conception of the evidence is entirely different from that of our learned brother of this District Court, and we therefore feel constrained to reverse his judgment and render one in favor of the garnishees.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the demands of the plaintiff in respect to the garnishees be rejected at his cost in both courts—the rights of the defendants, whatever they are, being fully reserved.

On Application for a Rehearing.

A re-examination of this case has confirmed our original conclusions, consequently a rehearing is refused.

But counsel for plaintiff has raised an entirely new issue in their application in regard to a certain sum of two thousand five hundred dollars of advances, which they insist has not been accounted for in the settlement.

In our opinion the settlement was complete; but, as the parties

reside in Mississippi, we will leave that matter open to further investigation.

In that respect the plaintiffs' rights are reserved in some appropriate proceedings.

Rehearing refused.

No. 12,516.

STATE OF LOUISIANA ET AL. VS. HENRY S. CROZIER. 50 245 / 107 413

50 245

In case, by the term of a criminal or a *quasi*-criminal statute, it is made the mandatory duty of the Attorney General to enjoin persons from violating its provisions, such injunction can not be suspended upon the defendant furnishing bond. That would be, in effect, granting to the defendant leave to continue its violation *pendente lite*. 118 233

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

M. J. Cunningham, Attorney General, for the State; *F. C. Zacharie* for the Commissioner of Agriculture, Plaintiffs, Appellants.

Walter H. Saunders, Saunders & Miller, for Defendants, Appellees.

Argued and submitted February 12, 1898.
Opinion handed down February 21, 1898.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. The grounds stated in appellees' motion are (1) that no appeal has been taken; (2) that even if an appeal has been taken, the order herein appealed from is not appealable.

As we consider this motion, on account of the exceptional character of the controversy, as really an answer to the appeal, we will consider same with the merits, as was done on the argument.

ON THE MERITS.

Briefly stated this appeal is one taken by the State of Louisiana and the Commissioner of Agriculture as plaintiffs from an interlocu-

tory judgment of the District Judge permitting the defendants to suspend their injunction on furnishing bond; and the test of the defendants' right to bond, and of the plaintiffs' right to appeal from an order allowing bond, is the character of the demand set up, or the irreparable character of the injury they apprehend—necessitating their injunction.

A fair synopsis of plaintiffs' petition for injunction is as follows:

That the injunction was grounded upon repeated alleged violations by the defendant of the penal provisions of Act 72 of 1894, prohibiting any person from manufacturing or selling commercial fertilizers in this State, and from selling such fertilizers *for use* in this State—"without complying with each and all the requirements thereof"—and a demand for a money judgment for the various penalties of the statute, aggregating the large sum of five hundred and eighty-eight thousand three hundred and fifty dollars.

The following allegation of the plaintiffs' petition fully sets out the gravamen of their complaint, viz.:

"Petitioners aver that Act No. 72 of 1894 is a criminal statute and enacted as a measure of public policy and public order, and that under Sec. 6 of said act it is made the duty of the Attorney General, when requested by the Commissioner of Agriculture, to enjoin any person, firm or corporation, resident or non-resident, from manufacturing or selling fertilizers in this State without complying with all the requirements of this act," etc.

On motion of defendant's counsel, the judge *a quo* granted an order allowing him to suspend the effect and operation of plaintiffs' injunction, upon his given bond in the sum of one thousand dollars.

Alleging themselves greatly aggrieved by said interlocutory order and averring same to be contrary to law, in that it will enable the defendant to continue to repeat his violation of a criminal statute they prayed for a suspensive appeal therefrom; and the court granted them an appeal and dispensed them from furnishing bond.

The purposes and objects of Act 72 of 1894, as stated in its title are "to protect and advance agriculture by regulating the sale and purity of commercial fertilizers, and the guarantee and conditions upon which they are to be sold, and by fixing the penalties incurred by violations of such conditions," etc.

The penalties affixed thereby against any one who shall transgress the provisions thereof, are to be found in Sec. 6; and it also

makes it the duty of the Attorney General, upon the request of the Commissioner of Agriculture to "enjoin any person * * * from manufacturing or selling fertilizers in this State, or selling fertilizers *for use* in this State, without complying with each and all the requirements of this act, without bond or advanced costs." Sec. 6, Act 72 of 1894.

One of the penalties prescribed by this act is thus denounced in that section of the act:

"Any person who shall counterfeit or use a counterfeit of the tag prescribed by this act, knowing same to be counterfeit, or who shall use them a second time, shall be guilty of a misdemeanor and on conviction," etc.

For the present purpose it will be unnecessary for us to further analyze the act, as we think it perfectly plain and apparent that *this particular injunction in* the enforcement of the mandatory provisions of a criminal or *quasi*-criminal law can not be suspended on bond.

The question presented is somewhat *sui generis*, as it rests upon the special provisions of particular law; but it is very similar to the one which was presented and decided by our predecessors in City of New Orleans vs. Becker, 31 An. 644, as will appear by the following extract from the opinion, viz.:

"On the 14th of March the city filed a petition in the same court, alleging that Becker was keeping a coffee-house with theatrical performances; that he had been conducting this business since January, 1879, and would continue to do so unless enjoined; that he refused to pay the license tax fixed by the city ordinance, and that his conduct not only deprives the city of a certain revenue, but seriously interferes with the police of the city, and, if permitted, will be productive of insubordination and unlawful resistance to the laws and ordinances of the city.

"That for the payment of the license tax the city has a privilege and a lien on the personal property of the defendant, with the right to seize and sell the same; and the additional right to enjoin the defendant from carrying on the business until the license tax shall have been paid.

"The prayer is for an injunction restraining the defendant from continuing to carry on the business of keeping a coffee-house with theatrical performances until he shall have paid the license tax; and for a judgment for the amount of the tax.

"The injunction was granted as prayed for; and on the next d
Becker took a rule on the city to show cause why it should not
dissolved on his giving bond as provided by the Code of Practi
Art. 307.

"On hearing, the court refused to grant the injunction prayed
by Becker; and, also, refused to dissolve on bond the injunct
granted to the city. Becker appealed from both these orders.

"We think the court did not err in refusing to grant the inju
tion as prayed for by Becker (stating the reasons of the court," a
citing the paragraph of the statute authorizing the city to obtain
injunction against a delinquent license payer); and then follo
this statement of the court, viz.:

"The right of the city is wholly incompatible with the right of
taxpayer to enjoin the city in the collection of the license tax,
from interfering with him in carrying on his business. His appli
tion for an injunction is the refusal to pay the license tax, and wo
authorize the city to demand the injunction to prevent the contin
ance of the business. The object of the law is to enable the city
compel the prompt payment of the license tax; and that obj
would be defeated if the taxpayer were allowed to take the init
tive, by enjoining the city, or to have the injunction granted to
city dissolved on bond.

"In either case he might by the necessary delays in the Distr
Court, and by appeal to this court, successfully resist the licen
tax for an entire year; and thus enjoy the privilege of carrying
his business in defiance of law, without complying with its requi
ments."

In our opinion that decision is quite applicable to the instant ca
though it is a much stronger one for the appellees.

On this appeal the merits are not in any manner drawn in questi
and hence we can not properly examine and now decide the quest
raised for the first time in briefs, whether the statute under cons
eration is or not constitutional.

With regard to the appellee's objection that the motion for app
does not actually make the plaintiffs in the suit parties to the appe
appears to our minds to be too strained and technical to require d
cussion.

In our opinion the interlocutory order from which this appeal
prosecuted was improvidently granted.

It is therefore ordered and decreed that the interlocutory order appealed from be annulled and reversed, and the plaintiff's injunction reinstated; and that the defendant and appellee be taxed with the costs of appeal.

No. 12,447.

A. J. FORSTALL VS. J. P. FUSSELL ET ALS.

50 249
50 257

In case a promissory note is executed without any consideration actually passing from maker to the payee, and as an accomodation to the payee, for the express purpose of enabling the latter to pledge same as collateral security for an anticipated indebtedness to a third person in pursuance of an agreement to that effect, same in the hands of the latter can be realized upon, against the maker to the extent of the secured indebtedness of the payee and pledgor and no further.

The forbearance of the creditor to institute suit against his principal debtor for the recovery of the amount due him is not such a prolongation of the terms granted to the principal debtor as will operate the discharge of a surety, in case he has not given his consent thereto, as the Code contemplates.

APPEAL from the Sixteenth Judicial District Court for the Parish of Washington. *Reid, J.*

Frank N. Butler and *Clay Elliott* for Plaintiff, Appellant.

Saunders & Miller for Defendants, Appellees.

Argued and submitted December 31, 1897.
Opinion handed down February 21, 1898.

The opinion of the court was delivered by

WATKINS, J. Plaintiff instituted suit and prayed for judgment against the several defendants *in solido* for the sum of ten thousand dollars with interest upon the following obligation, viz.:

"$10,000. FRANKLINTON, La., December 18, 1890.

"On the 15th of December, 1891, we jointly and severally promise to pay to the order of the Farmers' Union Commercial Association of Washington Parish, La., Limited, at the American National Bank,

New Orleans, La., the sum of ten thousand dollars, with interest at the rate of eight per cent. per annum from date until paid, for value received.

(Signed) "J. P. FUSSELL.
"A. J. JOHNSON.
"P. B. CARTER.
"W. C. BINFIELD.
"H. J. SIMMONS.
"W. P. CRAIN.
"W. L. SMITH.
"W. T. WILLIAMS.
"J. LEON POUNDS."

The averment of the petition is, that for a valuable consideration he acquired in pledge from the Farmers' Commercial Association of Washington Parish, Louisiana, Limited, the aforesaid note.

One of the defendants excepted that the petition disclosed no cause of action, and *lis pendens*—the latter referring to suit of same title at the time depending in the same court; and two other defendants also tender a plea of no cause of action.

The same three defendants—Fussell, Smith and Crain—fully reserving the benefit of their exceptions, filed an answer and averred that the vote sued on was given under the following circumstances, viz.:

That there was a corporation organized under the laws of the State, known as the Farmers' Union Commercial Association of *Louisiana*, Limited, and another corporation, likewise, organized under the name of Farmers' Union Commercial Association of *Washington Parish*, Louisiana, Limited, of which latter the defendant, J. F. Fussell, was president—the former being a State and the latter a parish organization.

That the defendant, W. L. Smith, as agent of the last named corporation, the payee of said note, opened a general store in the town of Franklinton, and made advances on terms of credit to the various members of said parish union—same consisting of family and plantation supplies. That on or about the 18th of February, 1891, said agent entered into an agreement with the plaintiff, whereby the latter agreed to extend him a credit of ten thousand dollars; and, as collateral security therefor, he delivered the note sued on, together with other notes, to the plaintiff. That the note sued on was signed

and delivered to said agent for the purpose of enabling him to procure the aforesaid credit with the plaintiff and obtain said advances, the defendants signing said notes, thereby becoming sureties of the payee for such advances as were made thereunder.

On this statement the said defendants in their answer allege that said note is without consideration as to them, they not being indebted to the payee thereof in any sum whatever, at the date said note was executed, or at this time. That said note was executed purely and simply for the accommodation of the payee, and that they signed it as sureties of said corporation, and that all of said facts were well known to the plaintiff at the time of and previous to said agreement, and during the pendency of the negotiations between him and said agent which led up to its execution, and which were superintended and conducted by T. A. Clayton, as manager of the State Association.

The defendant avers that, in the course of the dealings of the aforesaid payee with the plaintiff under said agreement, the latter advanced the sum of ten thousand six hundred and thirty-two dollars and four cents, on open account, between the 10th of September, 1891, and the 28d of April, 1892; and that during that period he had received the proceeds of two hundred and forty-one bales of cotton and other moneys, the whole of which aggregated the sum of nine thousand dollars and seventy-eight cents, leaving a balance due of one thousand six hundred and fifty-one dollars and twenty-six cents by said payee.

That under the law and the aforesaid agreement said credits should be imputed to the payee's credit on open account, secured by the note sued on as collateral, and same reduced to that balance.

They further aver that the debt of the payee of the aforesaid note on open account became due on the 1st of February, 1892, and the plaintiff, without the consent of defendants, as sureties of his debtor, prolonged the terms of payment granted it as principal, in fraud of their rights and to their great and irreparable injury—said extension of time for the payment thereof having been for a period of more than six months at one time, and for a greater length of time at another.

They aver that while professedly all of the signers of said note have been made parties defendant to this suit, yet, in reality, only the three of them who join in the answer have been cited by the

request of the plaintiff's counsel; and that the object of such a cou being pursued was to deprive them of their rights—that of divis and other rights against their co-sureties.

They aver that, at the date of the maturity of the debt, the afo said parish association, as payee, had abundant means to h paid the same, but that at this time it has not—it being "defunct insolvent"—hence they are discharged from all liability to plaintiff as sureties.

They pray for the rejection of the plaintiff's demands *in toto*.

The cause was tried by a jury, who found a verdict in favor of defendants, rejecting the demands of the plaintiff; and from judgment thereon pronounced the plaintiff prosecutes this appea

It appears from the record that the note sued on was pledged the plaintiff, as is alleged in his petition, "to guarantee the pro and faithful payment of the advances" he had contracted and agr to make to the payee thereof—said contract of pledge having b made and evidenced by an act bearing date 18th of February, 1 The act was introduced in evidence, and the exemplifications of plaintiff's commercial books were also produced and filed.

Many witnesses were introduced and interrogated in respect to dealings and transactions between the plaintiff and the Farm Union Commercial Association of *Washington Parish*, Louisiana, L ited; and each one of them makes a statement in reference ther

That association, or corporation, was, as its name implies, org ized in the interest of the farmers of that parish and surrounc country; and it established a general store at the the town of Fra linton therein, from which it was contemplated the farmers sh be supplied advances to enable them to cultivate and harvest t crops.

In order that this plan should be carried into operation, var members of the association entered into negotiations with the pl tiff, aided and assisted by the president of the State association, effected an agreement whereby he was to supply advances to parish association to the extent of ten thousand dollars.

That in order to secure the plaintiff in making said advances note sued on was executed by the persons whose names are the signed—and also another note of similar character which was si by other members of said association—in favor of the corporat and same was pledged to the plaintiff as a collateral security for

faithful payment of its indebtedness on open account to the plaintiff when the same should become due and payable.

The act of pledge recites that "for and in consideration of the sum of ten thousand dollars advanced by the commercial firm of A. J. Forstall to the undersigned, W. L. Smith, agent, of Franklinton, * * * and for the further consideration of services rendered and which may hereafter be rendered by the said A. J. Forstall, and for the purpose of securing him a proper compensation therefor:

"I hereby agree and obligate myself to ship and consign to him for sale at New Orleans, La., not less than eight hundred bales of cotton—said shipments and consignments to be made before the first of February, 1892, and in the event of my failure, or refusal to ship and consign to the said A. J. Forstall eight hundred bales of cotton as aforesaid and within the time specified, and as an additional compensation to him for services in selling the cotton consigned to him under this agreement and other services I bind myself to pay to A. J. Forstall the sum of one dollar per bale on each bale on the number deficient in my shipments, and which are required to make the said number of eight hundred bales."

This much of the act of pledge discloses the mutual agreement of the parties; the engagement of the plaintiff to make ten thousand dollars advances to the corporation as well as its covenant to secure the payment therefor, and also the contingent penalties it consented in his favor in case of either its failure or refusal to ship to plaintiff the full quantity of eight hundred bales of cotton.

Then follows the clause pledging to the plaintiff the note sued on, viz.:

"It is further agreed that in order to guarantee the *prompt and faithful payment of said advances*, the said W. L. Smith, agent, has delivered to said A. J. Forstall a promissory note for the said sum of ten thousand dollars, signed by J. F. Fussell and others, and endorsed by the Farmer's Union Commercial Association of Washing Parish, Louisiana, Limited, and the Farmer's Commercial Association of Louisiana, Limited, which is identified herewith, dated the 18th of December, 1890, and maturing on the 15th of November, 1891."

And it concludes thus:

"It is further agreed that the proceeds of the sale of all cotton sold by A. J. Forstall, for the account of the undersigned, shall be

appropriated by the said A. J. Forstall, either to the payment to the said sum of ten thousand dollars, advanced as aforesaid, or to any other indebtedness or liability of W. L. Smith, agent, to him which may hereafter arise in the course of their business."

Not one of the defendants were parties to the act of pledge, notwithstanding the fact that they admit that they executed said note for the purpose of enabling the association to employ it as a collateral security for its indebtedness thereafter to be contracted with the plaintiff; and that it was primarily an accommodation paper, and issued without any consideration.

The contention of the defendants, therefore, is that (1) in any event the plaintiff's right of recovery must be restricted to the balance of account it was intended to guarantee; (2) that plaintiff's recourse, by the terms of the contract of pledge, is restricted to the balance which is ascertained to be due for the *advances* the plaintiff made to the corporation, and can not be extended to the alleged damage the plaintiff has sustained on account of any breach of contract by the corporation in reference to shipments of cotton; nor to any commissions, salaries and expenses incident thereto.

To make the position of the defendant's counsel plain, we have extracted from their brief the following, viz.:

"If this is not so, we would have a consequence not in contemplation of any of the parties, and entirely beyond the agreement, in any view that may be taken. It will be observed that this note was delivered to secure only the money to be advanced, not any breach of contract in relation to cotton shipments, nor commissions, nor agents' salaries or expenses. Undoubtedly the corporation could have redeemed the paper by paying the sum of the advances, and it is equally undoubted that the accommodation makers, irrespective of notice of their character, could have reclaimed their paper on like terms. Yet, if plaintiff's theory is maintained, he can collect the entire face of the note, deduct the sum it was expressly delivered to secure, and then set off, as against the accommodation payee, any other demands he may have.

"Now, as a matter of fact, the plaintiff is attempting to use this paper to enforce payment of a claim which embraces one thousand and one dollars and ninety-one cents above the amount of advance it was made and accepted to guarantee, and which he pretends to have furnished. This sum being composed of commissions, travel-

ing expenses and salary of an agent (fifty dollars), and five hundred and eighty-two dollars on account of cotton not shipped and insurance money paid for some unknown purpose" (p. 3).

The portion of the act of pledge upon which they rely as sustaining their position is the following, viz.:

"It is further agreed that, in order to guarantee the prompt and punctual payment of said *advances*, the said W. L. Smith, agent, has delivered to said A. J. Forstall a promissory note for the sum of ten thousand dollars," etc.

We think it is apparent from the phraseology of the contract of pledge that the plaintiff obtained the note in pledge as a collateral security for the account of the corporation, in pursuance of an understanding and agreement of all the parties in interest.

The further contention of defendants is that after the maturity of the principal obligation—the note for ten thousand dollars—on the 15th of November, 1891, the plaintiff granted the corporation, their principal, an extension of time for its payment—the association having at the time of said maturity an abundance of assets, which it offered to surrender to the plaintiff, and which he declined to accept; and that during said delay the corporation became insolvent, and its assets perished.

An attentive examination of the evidence has satisfied our minds that this last ground of defence is not sustained by the evidence. It does not go to the extent of showing that the plaintiff granted to the corporation any specific delay, or additional term, for the payment of its indebtedness. It is only to the effect that plaintiff forebore to institute suit for the recovery of the amount due. He would have been at liberty to have sued at any time; and nothing is shown to have prevented the defendants from protecting themselves, notwithstanding the plaintiff's delay in bringing suit.

This case does not come within the rule this court announced in Insurance Company vs. Randall, 42 An. 260.

Nor does it come within the provisions of the Code, viz.:

"The prolongation of the terms granted to the principal debtor without the consent of the surety operates a discharge of the latter." R. C. C. 3063.

Our conclusion is that the record does not disclose a state of facts justifying the discharge of the defendants, but that on the contrary, they are bound by the terms of the agreement and the contract

of pledge. But, as sureties of the corporation, we think the entitled to have that agreement construed strictly in so far as it sha affect their rights, and placing upon it such a construction they ca only be held bound for the balance due the plaintiff for the advanc he made to the corporation and nothing else.

The stated account of the plaintiff against the corporation show a debit balance of four thousand one hundred and twenty-six dol lars and eighty-three cents on the 3d of February, 1893, after allow ing proper credits, but applying the rule just stated, we are opinion that this balance is subject to a further reduction in favor defendants as sureties of the corporation of one thousand and on dollars and ninety-one cents, thus leaving the sum of three thousan one hundred and twenty-four dollars and ninety-two cents fo which they are responsible *in solido* to the plaintiff.

It is therefore ordered and decreed that the verdict of the jur and the judgment thereon based be annulled and reversed; and is further ordered and decreed that the plaintiff do have and recov from the defendants *in solido* the sum of four thousand one hun dred and twenty-six dollars and thirty-eight cents, with eight pe cent. per annum interest from the 3d of February, 1893, subject to credit of one thousand and one dollars and ninety-one cents, as same date, and all costs of both courts.

No. 12,448.

A. J. FORSTALL VS. J. P. FUSSELL ET ALS.

ame as in A. J. Forstall vs. J. P Fussell *et als.*, No. 12,447, this day decided.

APPEAL from the Sixteenth Judicial District Court for the Paris of Washington. *Reid, J.*

Frank N. Butler and *Clay Elliott* for Plaintiff, Appellant.

Saunders & Miller for Defendants, Appellees.

Argued and submitted December 31, 1897.
Opinion handed down February 21, 1898.

The opinion of the court was delivered by

WATKINS, J. This suit is of precisely similar character to the one of same title bearing the No. 12,447, with the difference that the instant one is founded upon a promissory note for the sum of five thousand dollars, bearing date November 28, 1890, and payable to W. L. Smith, agent or bearer, on the 15th of November, 1891, and signed by J. P. Fussell—one of the parties defendant who was cited in the other case—and twenty-eight other defendants who were not parties thereto.

In all other respects, the issues in this cause are the same as those in suit No. 12,447; and the aforesaid note for five thousand dollars was pledged by the payee thereof as collateral security for the same indebtedness as that for which the ten thousand dollar note was pledged. Consequently the object of this suit is to obtain judgment *in solido* against the defendants in this suit for the same indebtedness.

The record and evidence in this case is the same substantially as that in suit No. 12,447; and the same briefs have been filed in this case by counsel on both sides as were filed in the suit No. 12,447.

Both the ten thousand dollar note and the five thousand dollar note figured in the former suit, which was entitled Forstall vs. The Farmers' Union Commercial Association of Washington Parish, Louisiana, Limited, 47 An. 105, to which some of the present defendants were made parties. The exception of misjoinder of defendants was therein made and sustained upon the theory that on the face of the papers the defendants were principals; and as the makers of the two different notes were not common, they could not be used in the same suit.

In that case the plaintiff alleged that the corporation was indebted to him in the sum of four thousand one hundred and twenty-six dollars and seventy-six cents, "as appears by the account annexed to the petition."

That is precisely the same showing as is made in this record.

Notwithstanding that case was dismissed by this court on the ground that on the face of the papers the aforesaid notes appeared to be independent obligations, it is perfectly competent and proper that upon an examination of the pleadings and evidence we should treat the present defendants as sureties and so decide.

For the reasons assigned in suit No. 12,447, we are of opinion that

like judgment should be herein rendered against the defendants to whom this case is at issue—in so far as the parties are differen

It is therefore ordered and decreed that the plaintiff and appella do have and recover from the defendants and appellees, the sum four thousand one hundred and twenty-six dollars and thirty-eig cents, with eight per cent. per annum interest from the 3d of Febr ary, 1898, subject to a credit of one thousand and one dollars a ninety-one cents as of same date, and all costs of both courts.

No. 12,612.

STATE EX REL. IMMANUEL PRESBYTERIAN CHURCH VS. OWEN RIED

The pendency of another suit between the same parties, for the same object, ar ing out of the same cause of action, will not abate the suit unless specia pleaded *in limine*.

The court will not supply the plea, although evidence was admitted witho objection.

Where the matter relates to property rights of religious societies, the controver is generally to be decided as other controversies between persons.

Mandamus will lie to compel an officer of a religious corporation to deliver recor to his successors, who are properly entitled to them.

The books and records being subject to inspection by those having an interest, t corporation is entitled to a prompt remedy to have them restored. C. P., Ar 681 and 892.

APPEAL from the Civil District Court for the Parish of Orlean *Monroe, J.*

Benjamin Rice Forman for Relator, Appellant.

J. H. Ferguson and *Edwin T. Merrick* for Defendant, Appellee.

Argued and submitted January 26, 1898.
Opinion handed down February 7, 1898.
Rehearing refused March 21, 1898.

The opinion of the court was delivered by

BREAUX, J. This was an appeal from a judgment of the Distric Court quashing the writ of provisional *mandamus* issued and refusin relator's application and dismissing its suit as in case of non-suit.

The relator was incorporated under the laws of this State.

It alleges that respondent, Riedy, was lately acting pastor of its church, and that while he was acting as pastor he took possession of its records and books consisting of—first, the minutes of the sessions of its ruling body in its ecclesiastical capacity; second, minutes of its board of trustees in its civil capacity; third, minutes of its church meetings; fourth, account book and ledger showing the accounts of the church. That he had been suspended by the presbytery from the exercise of his functions as minister of the gospel because he has wrongfully converted to his own use the charitable funds of the church, amounting to nearly eleven thousand dollars.

That he never was the legal custodian of the books and papers, and that he has been called upon to deliver them to those entitled to their possession; that the possession of those books and records is necessary for the proper conduct of the business and affairs of the church. The weight of the testimony sustains the allegations of plaintiff's petition as relates to the books and papers claimed.

Respondent excepted; that relator disclosed no cause of action, and pleaded a general denial. He specially denied that he converted property to his own use. He averred that he was the legal custodian of the records and books which are in his possession; having appealed to higher authority in the church from the order of suspension made by the presbytery.

He testified that the books and papers in his possession are necessary in his defence of the suits pending against him in the District Court. To sustain his appeal in the matter of jurisdiction the president of the Board of Trustees made oath that the value of the property, rights and credits of relator, the conduct and administration of which is, involved, exceed two thousand dollars.

Evidence of another suit being pending between the parties having been admitted in evidence without objection it was urged although defendant had interposed no written exception of *lis pendens* that that plea should be sustained.

We have not found it possible to agree with that position. *Lis pendens* is a special plea in a defence to a mandamus or in any other case. It has been decided that *lis pendens* should be specially pleaded. Bourguignon vs. Destrehan, 5 L. 116. The defence was not noticed for the same reason in Long vs. Long, 3 L. 108; "it was only in argument urged that there was another pending suit," and

the court held "that a plea should have been filed." It has b held that in order to be of any avail as a defence it must be filed *limine*. Weeks vs. Flower, 9 L. 386; White vs. Gleason, 15 An. 4

The absence of the plea is not supplied by evidence offered on trial of the merits.

Moreover we have not found of record the suit invoked in ar ment as *lis pendens*. There is, however, evidence before the co that there is suit pending against the relator in the Civil Dist Court.

Respondent informs us that the cause of action is the same in two actions, while the relator and appellant contends that the before the District Court filed in 1897 is not on the same cause action nor for the same object, and if it were that a withdrawal the demand for the books obviated all difficulty. We infer that t withdrawal was made in the case just stated.

The court has considered evidence received without objecti where it had bearing upon the merits of a question. We have found a decision holding that evidence thus admitted will g effect to *res judicata* or *lis pendens*, though not pleaded. It been repeatedly decided; it must be pleaded; it can not be suppl by the court.

This brings us to the question whether a *mandamus* can issue compel the respondent to perform certain duties stated in relato petition.

This court has decided that the provisions of the law of *manda* under our Code of Practice is more extensive than it is under common law. Hatch vs. N. O., 1 R. 470, 512. It follows if *mandam* is the proper remedy at common law, that it lies under our law.

"The rule is well settled," said Mr. High, in his "Extraordin Remedies," par. 306, "upon principle and authority, that *m damus* will lie to compel the surrender and delivery of corpor books and records to the officers properly entitled to them. A where the term of office has expired, either by removal or by la of time, and the officer refuses to surrender the corporate reco and documents to his successor duly elected and entitled to th custody and control, *mandamus* will go to compel the delivery."

Where the subject matter relates to the property rights of re ious societies, it is within the court's jurisdiction. Watson Jones, 13 Wall. 680.

In a recent case we held that *mandamus* will lie to compel the board of management of a corporation, in a proper case, to let a shareholder inspect its books. Boursette vs. Gas Co., 49 An. 1556. For the same reason it should go to one who, as treasurer or custodian of a religious corporation who have refused to deliver the corporate records, to compel them to surrender them to the proper officer.

These books being subject to inspection as stated, it is reasonable and proper that the corporation should have prompt remedy to have its books and other records restored to the proper officer.

It is ordered, adjudged and decreed that the judgment appealed from is annulled, reversed and avoided, and the respondent is ordered to deliver to relator or to the officers of the Immanuel Presbyterian Church the books of account that he kept as treasurer, the minutes of the Board of Trustees, and all other books and papers pertaining to the said church in his possession. Costs of both courts to be paid by defendant and appellee.

No. 12,726.

STATE OF LOUISIANA VS. JACK BRITTIN.

50 261
50 1308

The power to grant a change of venue is, in great part, confided to the District Court. His refusal to change the *venire* will not be reversed unless it is clearly shown that it was erroneous.

An objection to the manner of drawing a *venire* can not be successfully made by one under accusation, unless made on the first day of the week for which the *venire* was drawn.

A motion to annul and set aside the *venire* made by a defendant in one case can not be made available by another defendant in another case. State vs. Courtney, 28 An. 794; State vs. McCoy, 29 An. 593; State vs. Washington, 33 An. 897.

APPEAL from the Twenty-first Judicial District Court for the Parish of Jefferson. *Rost, J.*

M. J. Cunningham, Attorney General, and *Robert J. Perkins*, District Attorney, for Plaintiff, Appellee.

Wm. L. Thompson for Defendant, Appellant.

Argued and submitted January 29, 1898.
Opinion handed down February 21, 1898.

The opinion of the court was delivered by

BREAUX, J. An indictment for murder was returned against t defendant on the 9th of December, 1896. He was twice placed trial. At the first trial the jury failed to agree; the result of t second trial was a verdict of manslaughter. He was sentenced to service of six years in the State penitentiary. From the verdict a sentence he appeals.

In the District Court, on the tenth day of December, 1896, t accused moved for a change of venue.

In April following he withdrew his plea of "not guilty," which h been previously entered, and entered a motion to quash the indic ment on the ground that a judgment had been rendered in the ma ter of Waggner vs. Marrero, quashing and setting aside the enti jury *venire* for the term at which he had been indicted.

The refusal of the court to grant a change of venue gave rise to t first objection presented for our decision.

The accused in the motion alleged that there was a strong and vi lent prejudice against negroes in the parish in which he was indicte and that he being of that race would not obtain a fair and impart trial in that parish. The testimony of a number of witnesses w taken on the motion for a change of venue, and newspapers pu lished in the city of New Orleans were filed containing articles ca ing public attention to the lawless conduct of men in different loca ties. Witnesses testified that it had become common and was felt many places. We read the testimony with the closest attention could bring to bear.

We closed the transcript despite the deplorable acts shown to ha been committed, not convinced that there were not men enough the parish to select, in the manner pointed out by law, a jury th would give a fair trial to an accused colored man.

The first jury empaneled did not agree, and a mistrial was entere The second trial resulted in a verdict for manslaughter. A numb of the witnesses swore that a jury could be found that would return fair and impartial verdict.

The trial judge saw and heard these witnesses, and by his refu to change the venue made it manifest that he believed their testimon

We have not found that he erred. The matter of change of venue is largely addressed to the sound discretion of the trial court. It was not clearly shown that it was abused. State vs. Gonsoulin, 38 An. 459.

This court said, in State, vs. White, 30 An. 365: "As a general proposition it is true that a change of venue in a criminal cause is confided to the discretion of the District Judge exclusively, whose decision upon its propriety, rightfulness and necessity is final." Citing State vs. Bunger, 11 An. 607. There is no necessity in this case to give to the discretion of the trial judge so unlimited a scope.

In our judgment the application is within the general rule, and the ruling does not call for the interference of this court.

A prejudice extending as far as charged and sworn to by some of the witnesses, is negatived and rebutted by the testimony of other witnesses, by the verdict of one jury, and by the weight to which the finding of the trial judge is entitled.

This brings us to the second objection set forth in defendant's motion to quash the indictment, filed at a term subsequent to the term he was indicted—that is, April, 1897, a number of judicial days after the indictment against him had been returned.

The position was substantially that the ground for quashing the *venire* on the motion of the defendant in one case can be made available by another defendant in another case. The motion in Waggner vs. Marrero, to challenge and set aside the general *venire* of jurors was filed on the first day of the December term of 1896, on a number of grounds.

The court sustained the motion and declared the general *venire* null.

The accused through counsel contends that the true bill in his case should be quashed and set aside for reasons set forth in the judgment rendered annulling the general *venire*.

The reason for sustaining the motion to quash and annuling the general *venire* in the cited cases *supra* was that the jury commissioners did not meet at the clerk's office within the time and in the manner directed by Sec. 5 of the Act of 1896, and that these commissioners could not, as they did, legally at one and the same meeting select the general *venire* list and draw the panel for the jury term.

It remains for us to determine whether (the grand jury having been declared an illegal body in another case on a motion to set

aside the general *venire*) the true bill found against the defenda
is a nullity.

The statute provides "that all objections to the manner of selec
ing juries or to any defect or irregularity that can be pleaded again
any array or *venire* must be urged on the first day of the term, or
such objections shall be considered as waived, and shall not afte
ward be urged."

The defendant not having availed himself of the right to challen
the court is without authority to determine that the objection is n
waived. The statute is positive and clear that all defects or irregu
larities not raised on the first day of the term shall be consider
waived, and the decisions have always held that one in custody
against whom a prosecution is pending must file such a motion
due time. The defendant had the opportunity to challenge t
array.

The following excerpt is from Thompson and Merriam on Juri
Sec. 545. "This and other American courts uniformly held tha
where the right of challenge exists, one held in custody or to answ
before indictment can object to the panel or to the individual gra
jurors only by way of challenge."

Here we have seen the right to challenge exists, but it is limit
to a time stated and if not made within the time it is consider
waived.

A similar point was decided in State vs. Courtney, 28 An. 794. T
court held: the defendant should himself have made the objecti
at the proper time.

In State vs. Washington, 33 An. 897, the court said:

"But such objection urged only after plea and trial and on
motion for a new trial comes too late."

In our judgment effect must be given to the "statutory waiver
It is as out of season after the first day of the term as it is after t
verdict has been rendered; save in exceptional cases such as th
the accused was not under charge on the first day of the term, whi
was not the case here. The defendant was under accusation. The
is nothing in the statute which can be construed as embracing oth
than the one by whom the challenge to the array is interposed.
it were otherwise, although the challenger were to succeed in havi
the *venire* annulled on grounds entirely personal to himself oth
accused though silent, when they should have moved, would
included within the terms and effect of the annulling order.

Again:

If no one were to file a challenge to the array on the first day of the term, no objection could be urged on the ground of irregularity in drawing of the *venire*. But if one challenged the array and met with success, all would be equally relieved under the theory of defendant. The accused has not alleged that this cause was injuriously affeced by the irregularity complained of by a litigant in a civil suit on whose motion the *venire* was set aside. He based his motion to quash the indictment in his case exclusively on the fact that the *venire* had been declared null in a civil suit. In our judgment it devolved upon him to show in so far as he was concerned wherein there was any informality or irregularity in the drawing. It may happen that informalities are fatal to the *venire* out of which a jury is to be selected to hear and decide a cause in a civil suit and not fatal as relates to an indictment found by the grand jury selected from the *venire* annulled in the civil suit.

"So that irregularities therein unless plainly operating to the prejudice of the challenging party form no ground for challenging the array. Thompson on Trials, par. 34.

The objection which should be urged on the first day of the term is to the *formation*, drawing and summoning of the second jury.

For other defects the rule does not apply.

It has been held that the incompetency of one of the grand jurors vitiates the act of indictment, and the motion to quash will prevail after the first day of the term; it will not prevail to set aside the general *venire* after that day.

In the case here not only the motion was not made on the first day of the term, but the motion to quash the indictment on grounds before stated was made weeks after the indictment had been found and after the change of venue had been refused.

As we interpret the jurisprudence upon the subject it was entirely too late.

We did not find that the sections of the work of Mr. Bishop on Criminal Proceedings, to which our attention was invited, apply. He in those sections interprets the different statutory enactments in jurisdictions where challenges to the array are not limited to the first day of the term.

Under the common law, as we find it, the plea in abatement to the indictment was not allowed as a substitute to the challenge to the

array. Pars. 509, 510, Thompson and Merriam on Juries. E whether allowed or not, at common law it can not be of any ava as authority when filed too late, as here, in view of the statut requiring challenges to the array on grounds before stated, to filed on the first day of the term.

The verdict, sentence and judgment in this case are therefo affirmed.

No. 12,644.

STATE EX REL. CAPITOL CITY OIL MILLS COMPANY VS. HON. A. MONROE, JUDGE, AND BOLAND S. LEATHERS ET ALS.

The jurisprudence of the State has recognized the right of a plaintiff in injunct when the injunction taken out at his instance has been permitted to be bond by the defendant, and he has been refused a suspensive appeal from su order to bond, to test the correctness of the District Judge's ruling on t character and results of the act enjoined by calling into exercise in his beh the supervisory powers of the Supreme Court, under an application for *mandamus* to the judge to grant the appeal asked for. The position of the pa ties, and the scope of the issues presented to the court for decision under su circumstances, are discussed in Puckette vs. Hicks, 39 An. 901, State *ex* Violett vs. Judge, 46 An. 81, 82; State *ex rel.* Lehrman vs. Judge, 46 An. 163, *et*

For the purposes of a decision, as to whether the act prohibited was one su as would work plaintiff an irreparable injury, the allegations of the petiti for injunction are to be taken as true, with the limitation that this extends to a covers only allegations well pleaded, not to conclusions of law, nor matters mere evidence pleaded therein. An allegation that the act restrained, if p mitted, would occasion irreparable injury, is a mere inference and deducti from the acts and facts charged, the verity and soundness of which t Supreme Court can review. Crescent City Stock, etc., vs. Police, 32 An. 1 1195, 1196

The issue presented to the court (though in a different form) is substantia the same as that which it would have to pass on, had the suspensive appe asked for been granted, and had the appellee moved to dismiss the appeal the face of the papers, on the ground that it should not have been granted, it was from an interlocutory decree working no irreparable injury. Villava vs. Barthet, 30 An. 417.

ON APPLICATION for a Writ of *Mandamus*.

Farrar, Jonas, Kruttschnitt & Gurley for Relator.

Respondent Judge *pro se*.

Geo. W. Flynn for B. S. Leathers and Boss Oil Mills, Respondents.

Submitted on briefs November 10, 1897.
Opinion handed down December 13, 1897.
Rehearing refused February 21, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. Relators aver that in October, 1897, they instituted a suit in the Civil District Court for the parish of Orleans, in which they represented that they were engaged in the purchase of cotton seed and the manufacture of the same into oil, cake and other products, and had been so engaged for many years. That it had found it to be to the mutual interest of themselves and of the planters producing cotton seed and designing to sell the same to them that relators should furnish, at their own cost and expense, cotton seed sacks to such planters as were disposed to sell their cotton seed to relators, and that in the course of said business they had sent out a very large number of sacks through the country adjacent to the Mississippi river and its tributaries in the States of Louisiana and Mississippi, which were distributed to planters and delivered to them with the express understanding that they were to be used in shipping seed to relators only, or to be returned to them empty at the end of the season; that the said course of business had been adopted by themselves and other persons and corporations engaged in the purchase of cotton seed and the manufacture thereof into products for several years, and was practically universally pursued throughout the districts aforesaid; that Boland S. Leathers, the master of the steamboat Natchez, had for several years past been engaged as master and owner or part owner of steamboats in the business of a common carrier on the Mississippi and its tributaries, and in the pursuit of such business had been fully informed of the course of business pursued by relators and others as described, and with the agreements and understandings and agreements between relators and the planters, and that he, in the course of his business as a carrier, had repeatedly himself delivered sacks to planters for owners of oil mills, and was fully informed as to the manner in which the cotton-seed business was conducted; that said Leathers, with full

knowledge of the said course of business and relator's ownership of the cotton-seed sacks so delivered by them to the planters with whom they did business, and which sacks were identified by the name and brand of relators thereon, and well knowing that said sacks were delivered to said planters by relators solely for the limited purpose of being filled with seed to be sold to relators at market price or otherwise, to be returned to them empty, nevertheless purchased seed in sacks so belonging to relators so purchasing seed for his own account or for that of a cotton-seed mill leased and conducted by him, either alone or in association with others, under the name of the "Boss Oil Mill;" and that said Leathers had taken possession of a large number of sacks bearing relator's mark and to it belonging, and held the same in his possession and in that of the Boss Oil Mill, in the city of New Orleans; that relator had suffered damages through the conduct of said Leathers in the sum of five hundred dollars, being the value of the use of said sacks during the time that they had been in the possession of said Leathers and said Boss Oil Mill, being a fair and reasonable compensation for the rental and use of said sacks and for the deterioration of their value, and for the other damages set forth in their petition; that relator's trade and business which had been established by it through years of effort and careful attention would be diverted and relator irreparably injured unless said Leathers and said Boss Oil Mill should be enjoined as by relator prayed for from thereafter taking possession of any sacks belonging to relators and identified by their mark and brand.

That in and by said petition relators prayed among other things that upon its giving bond in an amount to be fixed by the court a writ of injunction should issue against said Leathers and said Boss Oil Mill, their agents, clerks, employees, assistants and officers, enjoining and restraining them and each of them from taking possession of any bags upon the banks of the Mississippi river or its tributaries in the States of Louisiana or Mississippi belonging to relators and identified by its mark and brand, which said marks and brand were alleged to be in the words and letters following, to-wit: "C. C. C. M. C., Baton Rouge," and that in and by the prayer of said petition relators further prayed for citation of said Leathers and of said Boss Oil Mill, and for judgment perpetuating said injunction, and for other relief as in said petition contained.

That said petition was duly verified by affidavit according to law, and that upon the same an order was duly entered ordering an injunction to issue in the premises as by relators prayed for; that said injunction duly issued and was duly served upon defendants; that defendant Leathers subsequently applied to Hon. Frank M. Monroe, judge of the Civil District Court, to whom said case had been allotted according to law for the dissolution of said injunction upon bond; that said judge upon said application rendered an *ex parte* order allowing said Leathers to bond said injunction. Relators aver that all said facts would appear by the record in that suit, which they declare they make part of their application, and aver would be presented at the hearing of the same.

Relators aver that they did seasonably thereafter apply to the Civil District Court for a suspensive appeal from said order, but that the Hon. Frank A. Monroe, to whom said application for an appeal was made, had wrongfully refused and declined to render an order of appeal in the premises, as would appear from the petition for an appeal duly filed in the cause with the refusal of the judge to grant the same endorsed upon the said petition in writing; that in applying for said appeal relators requested the judge to fix the amount of said bond therefor, as he was required by law to do and also to fix the return day for the same, and that relators were and are still ready to give such bond as may be fixed in the premises.

Relators aver that it appears from the face of the papers that the damages accruing from the dissolution of said injunction will be irreparable; that in addition to the pecuniary damages which (as would appear from affidavit of record) will largely exceed two thousand dollars, the damages to accrue from the failure to dissolve said injunction will be the entire breaking up of relators' business through the wrongful appropriation of its property by defendants, and that the amount of the injury to be suffered by relators through such wrongful appropriation of their property can not be estimated in dollars and cents, and no adequate relief exists save and except the said writ of injunction.

The premises considered relators pray that an alternative writ of *mandamus* issue, commanding said Frank A. Monroe, Judge of Division "C" of the Civil District Court to render an order upon the application of relators, granting relators a suspensive appeal from the order allowing Boland S. Leathers to bond said injunction and

requiring him to fix the amount of bond for said appeal and a retu
day for the same.

That after due proceedings said alternative writ be made absolu
and perpetual.

The District Judge for answer averred that "in his best judgmen
it appeared upon the face of the papers that the damage to th
relators which might result from the dissolution of the injunction o
bond, as set forth in relator's petition, could not in the nature
things be irreparable, but sounds in dollars and cents, and henc
under the jurisprudence as established by the Supreme Court, a su
pensive appeal does not lie from the order dissolving said injunctio
on bond."

OPINION.

On the 15th of October, 1897, the Boss Oil Mills and Boland
Leathers were upon the petition of the Capital City Oil Mill Com
pany and Louisiana corporation, doing business therein and havi
its domicile in the city of Baton Rouge, "enjoined, restrained an
prohibited from taking possession of any bags on the banks of th
Mississippi river or its tributaries in the State of Louisiana or Missi
sippi belonging to petitioners and identified by its mark and brand
viz.: C. C. C. M. C., Baton Rouge," and to remain enjoined, re
strained and prohibited until further orders of the Civil Distric
Court.

On the eighteenth of the month Borland S. Leathers, one of th
defendants in injunction, applied for and obtained an order from th
court dissolving the writ of injunction upon his furnishing bond an
security.

The order was granted upon the averment that the writs of injunc
tion worked an irreparable injury to defendants.

On the 28th of October relators applied for a suspensive appe
to the Supreme Court from the order to bond, alleging that it wa
an interlocutory order which caused them irreparable and pecuniar
damages exceeding two thousand dollars.

The District Judge refused to grant the appeal, assigning in writin
as his reason that the injunction was dissolved, as he believed, fro
the facts disclosed upon the face of the papers, that the dissolutio
would not work the plaintiff (relator herein) irreparable injury
that he was of the opinion that a suspensive appeal ought not to b
granted from the order.

Plaintiff in the suit then applied to the Supreme Court as relator for a mandate directing the District Judge to grant the suspensive appeal which he had refused.

Both the order granting the injunction and that authorizing its bonding were *ex parte*. If the act prohibited by an injunction be not such as might work an irreparable injury to the party at whose instance the injunction issued, the court is authorized at its discretion to dissolve the same on bond to be furnished by the party enjoined.

Article 307 of the Code of Practice conveys that power in unambiguous terms.

In equally unambiguous language, a right of appeal is granted by law (Code of Practice 566) "from all interlocutory judgments when such judgment may cause the party legally aggrieved thereby an irreparable injury."

The whole issue before us on this application is whether or not the conclusions of the District Judge, that the act prohibited by the injunction which issued in this case was not of a character to work an irreparable injury to the plaintiff at whose instance it was issued and therefore was subject to be dissolved on bond, were well founded or not. If they were, then his action in ordering the bonding of the injunction and in refusing to grant a suspensive appeal therefrom must stand as against relators' application.

While the right of the District Judge to order the dissolution of an injunction which he has issued is conditioned upon the fact that "the act prohibited by the injunction is not such as may work an irreparable injury to the plaintiff," the right of the plaintiff in injunction, whose injunction has been bonded, to appeal suspensively from the order granting the dissolution is conditioned upon the opposite fact that the act prohibited should be such as might work him an irreparable injury, and, therefore, one such as the court could not legally dissolve on bond after the injunction had been granted. The right is only an absolute right when that condition of things really exists. The District Court is necessarily called upon to decide primarily both upon the right of the defendant to have the injunction bonded, and that of the plaintiff in injunction, after the injunction should have been ordered to be dissolved on bond, to be granted a suspensive appeal from such order. A refusal to grant the suspensive appeal would be the logical outcome of an order to bond, for the

latter order would necessarily have had to be based upon con sions irreconcilable with a right to the appeal asked.

In view of the fact that the right to a suspensive appeal would absolute if plaintiff in injunction was correct in respect to the con quences of a continuance of the acts prohibited, the jurisp dence of the State has recognized his right to test the correctnes the judge's ruling on the character and results of the act enjoined calling into exercise in his behalf our supervisory powers under application for a *mandamus* to the judge to grant the appeal asked when refused.

The position of parties situated as are those before the court the scope of the issues presented to the court for its decision h been fully discussed in Puckette vs. Hicks, 39 An. 901; in State *rel.* Violett vs. Judge, 46 An. 81 and 82, and State *ex rel.* Lehman Judge, 46 An. 163 *et seq.*

In State *ex rel.* Violett, following out closely the views of court in the case of Puckette vs. Hicks, we said: "The qu tion is whether the judge was warranted and justified in refusal. On such an inquiry this court has necessarily to de mine whether the judge's discretion, which only extends leg to cases wherein the dissolution of the injunction would work irreparable injury to the plaintiff, has been leg applied or not. If we find it has not, we grant relief; oth wise relator takes nothing by his application to us. As been said several times by this court each case must stand or upon its own special state of facts. (White vs. Casanave, 14 An. Blanc vs. Murray, 36 An. 167.) For the purpose of our decisio take as true the allegations of fact contained in the petition injunction, confining ourselves to the restricted issue on the pl ings as to the correctness *vel non* of the judge's action in the ma of the refusal of the appeal, which carries with it the determ tion of the question whether the bonding of the particular would or would not work irreparable injury to the plaintiff. I could under any circumstances extend our inquiries touching injunction proper, the matter which we could consider w have to be very exceptional and radical in character. The w subject has been very fully discussed in State *ex rel.* Puckett Hicks, 39 An. 901, where a *mandamus* was asked by plainti injunction to compel the defendant judge to grant a suspensive ap

solving a preliminary injunction." We quoted from decision in that case, in which the court said that efore us the allegations of plaintiff's petition were far as the facts therein set forth are concerned; ot meant that the court was to be concluded by mere petition that the acts restrained will occasion irre- that such allegations were mere inferences and the acts and facts charged, the verity and sound- e court could review. Citing Crescent City vs. n. 1194, 1195 and 1196.

o examine the facts charged and the nature and injury which might be inflicted by the acts com- hus determine whether such injury might be irre- That it was difficult to lay down any precise rule as injury the quality of being irreparable, but that the e was that an injury, the damage from which is ture of pecuniary loss and could be fairly and fully pensation in money is a reparable injury for which a t amount and property secured would afford all Citing Crescent City vs. Police Jury, 32 An. 1194.

that the allegations of the petition for injunction s true for the purpose of a decision as to whether t was one such as would work plaintiff in injunction y must be taken with the limitation attached to the which is that it extends to and covers only allega- d, not to conclusions of law nor matters of mere l in the petition (Fertilizing Company vs. Wolff, surplusage.

s case at bar "examined the facts charged and the cter of the injury which might be inflicted by the of," which it is our duty to do as recognized in the nd State *ex rel.* Abraham vs. Judges, 45 An. 887, uso vs. Bartlet, 38 An. 417, and have reached hat the District Judge did not err in refusing sive appeal. Had he granted an appeal and had its reaching this court prayed for its dismissal the papers upon the ground that it should not d, inasmuch as it was from an interlocutory decree arable injury, we should have been forced to have

tion. The issue presently before us is substant
d have been presented to us under these hypot
ough presented in a different form. (Villavas
17.)

otton Oil Company vs. Leathers and Union Oil C
rs, 49 An., p.— , decided this day, in which
n no material respect from those in the pre
h the judges of the Civil District Court GRANTED
to the plaintiffs in injunction from their orders al
of the injunction, this court on motion of the ap
he appeals as having *been improvidently gra*
reached in those cases control the one at bar.
on made by the relator that defendant in injun
n to bond suggested to the court that a continu
would work TO HIM an irreparable injury, inste
he act prohibited by the injunction was not suc
rreparable injury TO THE PLAINTIFF, but we de
akes any material difference in the situation.
as ordered to be bonded an injunction which he
s, for the reason specially assigned by him th
PLAINTIFF an irreparable injury, and basing hi
on he has refused to grant a suspensive appeal
is the correctness of that conclusion with whic

alled on to express any opinion as to whether
issued in this case should have been granted or
elator would have been entitled to recover dam
plained of or not, or if so entitled what those
We go no further than to say, that granting
was properly issued and that damages were le
s damage or injury would not be an irrepa
s. Harper, 38 An. 496.)
opinion that we can not afford relator the relie

ons assigned, it is hereby ordered, adjudged
orders heretofore granted herein are set aside
l that relator's application for a writ of *mandam*
refused.

FILLER—I dissent.

No. 12,678.

C. LANE, WIFE, VS. JOHN A. BURSHA, HUSBAND.

her husband for a separation of bed and board, grounded
ent, the husband was summoned according to law to return to
domicile, and immediately complied with the order, where-
ft the house and went to reside with her father. The return
as evidently *bona fide*, and not colorable to put an end to the
en filed a supplemental petition averring cruel treatment and
by her husband. The court found these allegations to be not
d the real source of complaint to be differences between her
l gone to reside with their daughter and her husband. There
o suppose that the husband through his conduct intended to
gs and sensibilities of his wife. Her first duty was to her hus-
es between the husband and the wife's parents, in which the
he latter, furnish no ground for separation.

the Twenty-fourth Judicial District Court for the
Mary. *Allen, J.*

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l and *Carroll & Carroll* for Plaintiff, Appellant.

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r for Defendant, Appellee.

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bmitted December 31, 1897.
d down January 24, 1898.
ased February 21, 1898.

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the Court was delivered by

J. Plaintiff alleged in her petition her marriage to
894, and that of their marriage there was one child
ths of age. That her husband quit the matrimonial
n they had been established since then in the parish
still continued at the date of her petition to reside
hat he refused to return and live therein. That
ty of cruelty toward her as well as of outrages,
d outrages were of such a nature as to render their
nsupportable to her.
red to be separated from bed and board from him,
relieved of the bonds of matrimony existing be-
e prayed that she be given the provisional custody

of the infant child; that her husband be summoned in the man
required by law to return to their common domicile; that after
hearing and delays, and after due summons to her husband as pra
for, and after due proof of the charges made, that there be judgm
in her favor separating her from bed and board from her husb
and that defendant pay the costs of suit. That her husband, be
his marriage, acquired certain property, which she described in
petition, which had been increased in value by reason of impro
ments put thereon to the extent of twenty-four hundred doll
and that in the event of a judgment in her favor that she h
judgment for one-half the said sum, with legal interest from jud
demand.

By order of court plaintiff was authorized to stand in judgmen
the suit and given provisionally the custody of the child. Defe
ant was ordered to be summoned to return to the common matri
nial domicile in the manner required by law.

Defendant was (as ordered) summoned on the 16th Febru
1897, to return to the matrimonial domicile.

On the 2d of March defendant answered. He admitted his m
riage to the plaintiff. He averred that he had always acted and c
ducted himself toward his wife and child as a true and dev
father and husband; that he at no time ill treated or refused to s
port his family with all the necessaries of life; that his wife li
happily with him until the interference of her mother and fat
who prevailed upon her to leave and quit him unless he w
transfer to his wife and child all of his real estate, which he refu
to do and which refusal caused the present trouble.

That he at no time quit the marital dwelling, but, on the contr
his wife quit the same to live with her father and mother. That
was a carpenter by trade and had been and was still engaged the
about seven or eight miles from his home. That he had on numer
occasions requested his wife to come and live with him near his w
as it would be very inconvenient for him to go home daily. Tha
obedience to the order of the court he returned to the marital dw
ing, which he, however, had not quit, and upon his entering
same his wife and child deserted him and went to live with
father. He specially denied ever having done anything ill tow
his family and averred that he had at all times, and especially at
time of his return home under the summons of court, requested
wife to remain and live with him. He denied that he had c

ife and child or the matrimonial domicile, and aver-
followed the dictates of her mother and father. He
action be dismissed with costs.

a supplemental petition on the 11th of March, in
d that about a week before the filing of her original
band threatened to take her life; that he went into
his gun, and with said gun in his hands threatened
e, and was prevented by other persons standing
verred that he lived away from his home though
t, and always failed and refused to support his wife
it became necessary for her to do this herself, and
sick and weak the only means she had of doing so
and vegetables, which she was compelled to do by
bout the town of Patterson and vicinity; that this
on her physical strength and against the advice of
nt that the failure of her husband to support her and
her to do this. That he had, at all times, been neg-
omfort and had been indifferent and did nothing
ner; that she was weak and sickly, and that this was
uch a kind as to render their living togethes insup-
enewed the allegations of the original petition and
efore made.

rough his counsel, asked and obtained leave from
a plea of estoppel to the following effect:

plemental petition contained allegations contrary to
with the original petition. That plaintiff could not
ap by supplemental petition specific acts of cruelty
her original petition founded her action upon aban-

of of the defendant having returned to the matri-
as prayed for in the original petition and in obedience
f the court (abandonment being the ground upon
n was based), plaintiff could not be heard to prove
ruelty, as the return to the matrimonial domicile put
ld suit.

said plea should not prevail defendant pleaded the
He prayed that the demand under the supplemental
issed with costs.

Court rendered judgment decreeing that plaintiff's
sed and rejected at her costs and she appealed.

OPINION.

Plaintiff's action as originally brought was for a separation f bed and board based on abandonment—the judgment asked being evidently based upon the belief that the husband would re to comply with the summons served upon him to return to the m monial domicile which she alleged he had left. This expectation not realized, as the husband, upon having the summons serve him complied at once with the order. The wife herself immedi left the husband's home, going to that of her parents. The co taken by the defendant forced the plaintiff into a change of f for shortly after she filed a supplemental petition, grounding right to a separation upon alleged cruelty and seeking to utilize abandonment which had been set up, no longer as the substa basis of the action, but merely as "evidence" in support charge of cruelty.

We have examined the evidence with care, and find no err the judgment of the District Court. The facts of the case have been as fully developed as possibly they might have been, bu think the husband and wife are not near so far apart as the lat pleadings would indicate. What troubles have arisen seem to from the time that the wife's parents (after the burning of t own residence) took up their abode at that of their son-in- That condition of things is apt to engender differences betwee husband and the father and mother of the wife, and we think we warranted from a consideration of the whole evidence in the ca reaching the conclusion that his absence from his home was n due to these than to any indifference to his wife. We are of opinion that had the wife's parent's left the property, and had remained at home, relations between the spouses would long ago h been resumed, and this suit would not have been brought, and are strongly of the opinion that there exists to-day no valid re why the parties should remain apart. We find no evidenc cruelty by the husband to the wife. Her demand upon hi return to her is inconsistent with the existence at that time of well founded reason on her part for a separation, while his re under the summons indicates that he has not lost his affectio her. There is nothing in the record which would tend to show the return was merely colorable, in order to cut away the founds on which the suit rested. We think it was done *bona fide*.

It is claimed that the husband failed to support his wife and c

During the period that this neglect is charged to have occurred the parents were living on the husband's property, cultivating and (for some time at least) having complete control of it. We think it scarcely true for the father to say under such circumstances that the *onus* of support was entirely thrown upon him. He would very naturally and very properly contribute to the support of the daughter and child under such conditions. In any settlement to be made between the parties in the business relations which they are shown to have had together, it is more than possible that an item on this subject will figure. Outside of this, plaintiff was not without remedy. Though the laws of Louisiana do not authorize, as they do in some of the States, a direct action (independently of divorce proceedings) by the wife against her husband for maintenance, she is authorized, under proper conditions on his refusal to provide for herself and child, to purchase the necessaries of life for themselves on his credit.

It may be in the case at bar that the affection of the plaintiff for her parents is greater than that which she has for her husband; it may be that the husband in his relations and differences with them may have acted in a manner to have met with her disapprobation and censure, but the wife must bear in mind that in entering into the married state she took her husband for better or for worse and took upon herself an obligation by which she promised that forsaking all others she would cleave only unto him. We do not feel justified in awarding a separation between plaintiff and defendant by reason of troubles between the husband and the wife's parents. They are certainly much to be regretted, and, if possible, to be avoided, but we can not enter here into the merits of those collateral issues in order to see and determine which of the parties was to blame in the premises. We have no reason to suppose that any course of conduct which the husband adopted in his intercourse or dealings with his father and mother-in-law was done with a view of wounding the feelings or sensibilities of his wife.

With a young infant of only a few months old linking these people together, it is to be hoped that reflection and a sense of duty by each will cause them to resume their marital relations and that the parents of the wife will (as they should) give their assistance in bringing this about.

We conceive it to be our duty under the state of facts disclosed by this record to leave the way open to that end.

The judgment of the District Court is hereby affirmed.

50 280
52 891

50 280
04 415

50 280
18 81

No. 12,698.

MRS. ESTELLE J. SHIDET VS. JULES DREYFUSS COMPANY, LIMI
ET AL.

It is negligence to throw from the interior of a building the debris of carp
ters' work done therein upon a constantly traveled public sidewalk, an
leave it there throughout the night of Saturday, all Sunday and all Su
night, and the lessees of the building are responsible for personal inju
received by a passer upon the sidewalk falling over the same at night, t
being no light nor other warning, or notice given of the presence of
obstructions, and the night being dark.

Such an accident was one which might reasonably have been, and should h
been, anticipated and guarded against. The lessee had no right to tak
chances of the sidewalk being lighted up either by the moon or by the
tric lights of the city. Plaintiff had the right to be walking precisely w
she was; she was not bound to walk on the gutter's edge, or on the midd
the sidewalk, but had the right to assume and presume that the whole
was clear. Heckman vs. Evenson, 78 N. W. 480.

APPEAL from the First Judicial District Court for the Parish
Caddo. *Land, J.*

T. C. Barret, Thatcher & Welsh for Plaintiff, Appellee.

Leonard & Randolph for Defendant, Appellant.

Argued and submitted January 12, 1898.
Opinion handed down February 7, 1898.
Rehearing refused February 21, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff in this action sued the owners of a c
tain building in the city of Shreveport, described in her petition—
lessee of said building and a contractor who was engaged in de
certain work upon the front and in the interior of the same in se
for five thousand dollars damages for personal injuries received
her on the night of the 13th of September, 1896. A severance h
ing been granted the case was taken up and tried before a jury
against the lessees of the building, the Jules Dreyfuss Compa
Limited.

A verdict was rendered against the lessee for the sum of fift

s, for which amount the court gave judgment after
dant's motion for a new trial Defendant appealed.
eme Court plaintiff prayed for an increase in the
judgment.

ion she averred that on the night in question she was
npany with her nephew, Fred. Boise, and Mr. John
ne sidewalk of Market street, a public thoroughfare of
eveport, and alongside the said building, when she fell
boards or lumber on the sidewalk alongside of said
he cause of her said fall was tripping or stumbling
er which was on said sidewalk. That by her fall her
n between the knee and ankle. That there were no
nts placed at said pile of lumber which obstructed the
neither was there any warning or notice of any kind
tention of passers-by to said obstruction. That
lark and she used all due diligence and care in pursu-
ng said sidewalk, and did not see, nor did the said Boise
ert who accompanied her, and they likewise stum-
ver the same obstructions. That her said injury was
gross neglect of the owners of said buildings, the said
the said Jules Dreyfuss Company, Limited, putting
ns upon the said sidewalk, and in having no lanterns
ice or warning of any kind upon or near said obstruc-
that date she was employed as matron at the Charity
reveport at a salary of fifty dollars per month. That
of said injuries caused as aforesaid, and by said neg-
ffered great bodily pain and shock; that she was con-
d for many weeks and was still confined to her bed
nsequence of said injuries. That she had been dam-
egligence of said defendants, and without any lack of
ce on her part, in the sum of two hundred dollars, and
s in loss of time from her said employment, and in the
two hundred dollars for doctor's bills and medical
edicines, appliances, nursing, etc., all rendered nec-
r said injury, and in the further sum of forty-six hun-
r her great bodily suffering and pain.

fter pleading the general issue, specially denied that
d any injury through the fault or negligence of de-
averred that if any injury was sustained, which was

ugh the negligence of plaintiff and through no
efendant.

e walking on the sidewalk of one of the princi-
eport, was thrown to the ground and had her leg
ction which some one had placed on that sidewalk
e window of a building occupied as a store by the
npany, Limited. Just prior to the accident the
undergoing some repairs and changes under a
be Frank Denham with the Dreyfuss Company,
of the work covered alterations in the shelving
e store in which Dreyfuss Company were doing
le merchants. As the work progressed and after
parts of the old lumber of the shelving which
w pieces and the odds and ends and debris,
er be utilized, were removed through the window
spoken. Some of these were piled lengthwise
e of the sidewalk next the gutter; others along
eyfuss building, and some in an irregular pile
wall toward the middle of the sidewalk.

t with her injury, she, her grandson, about nine
ntleman friend were walking abreast of each
xt the wall, the grandson in the centre, and
r side. The hour at which the accident hap-
e been a little after 8 o'clock on the evening of
September, 1896. The moon had been up an
threw little if any light at the time upon the
as intervening buildings prevented its doing so.
port is provided with a system of electric lights
he public streets, but upon nights on which the
ghts are either not lighted at all or delayed in
d the usual hour. The store of the Dreyfuss
e of the corners of Market and Texas streets,
et there is a large hotel building known as the
e portion of that building forming the corner of
streets is occupied as a saloon by Dreyfuss &
ng the week days cause to be lighted at that corner
ovided and paid for by themselves separate and
ty lights. Plaintiff's demand for damages for the
received by her fall is contested mainly upon the

from an order dissolving a preliminary injunction." We quoted from a portion of the decision in that case, in which the court said that in the inquiry before us the allegations of plaintiff's petition were taken for true so far as the facts therein set forth are concerned; that by this was not meant that the court was to be concluded by mere allegations in the petition that the acts restrained will occasion irreparable injury; that such allegations were mere inferences and deductions from the acts and facts charged, the verity and soundness of which the court could review. Citing Crescent City vs. Police Jury, 32 An. 1194, 1195 and 1196.

That it had to examine the facts charged and the nature and character of the injury which might be inflicted by the acts complained of and thus determine whether such injury might be irreparable or not. That it was difficult to lay down any precise rule as to what gives an injury the quality of being irreparable, but that the general principie was that an injury, the damage from which is merely in the nature of pecuniary loss and could be fairly and fully repaired by compensation ir money is a reparable injury for which a bond of sufficient amount and property secured would afford all adequate relief. Citing Crescent City vs. Police Jury, 32 An. 1194.

The statement that the allegations of the petition for injunction are to be taken as true for the purpose of a decision as to whether the prohibited act was one such as would work plaintiff in injunction irreparable injury must be taken with the limitation attached to the rule announced, which is that it extends to and covers only allegations well pleaded, not to conclusions of law nor matters of mere evidence pleaded in the petition (Fertilizing Company vs. Wolff, 48 An. 631), nor surplusage.

We have in this case at bar "examined the facts charged and the nature and character of the injury which might be inflicted by the acts complained of," which it is our duty to do as recognized in the decisions cited, and State *ex rel.* Abraham vs. Judges, 45 An. 887, 888, and Villavaso vs. Bartlet, 38 An. 417, and have reached the conclusion that the District Judge did not err in refusing relator a suspensive appeal. Had he granted an appeal and had the appellee, on its reaching this court prayed for its dismissal on the face of the papers upon the ground that it should not have been granted, inasmuch as it was from an interlocutory decree working no irreparable injury, we should have been forced to have

ing the effect of the same extended to the sidewalk opposite the window of the Dreyfuss building (which latter fact is by no manner of means certain), that the accident occurred precisely in one of these periods of temporary darkness. The jury were doubtless familiar with the locality at which the accident occurred; the distances from point to point, as well as the relative situation of the windows of the Phœnix Hotel, those of the Dreyfuss & Caperton saloon, and those of the Dreyfuss Company building, opposite which the accident occurred. We do not think the "*Commercial light*" at the Dreyfuss & Caperton corner plays any part in the solution of the questions at issue in this case. The accident occurred on a Sunday, and that light was not made use of on that night. Had it been burning it is questionable whether with the intervening lumber piled along the outer edge of the sidewalk of the Dreyfuss Company building, and with the shadow from that light, which it is shown an intervening post would cast upon that sidewalk, the situation would have been materially changed. Be all this as it may, we do not think the evidence is in such a condition as to justify us in setting aside the verdict of the jury. It must be conceded that there was gross negligence in throwing the debris remaining from the work done in the Dreyfuss Company store upon a constantly traveled public sidewalk and leaving it there throughout the night of Saturday, all Sunday and all Sunday night. All the probabilities come in aid of the testimony adduced to the effect that the employees of the Dreyfuss Company placed the obstructions upon the sidewalk. The house was engaged in an active business, requiring for that purpose that the interior of the building should be cleared of the useless material lying upon the floors, and we think with the jury that the debris in question were swept upon the sidewalk by the porter of the house or by their office boy.

We think the result which happened was one which the Dreyfuss Company might reasonably have anticipated, and one which they should have anticipated. They had no right to take the chances of their sidewalk being lighted up either by the moon or by the electric lights of the city. The plaintiff had the right to be walking precisely where she was. She was not bound to walk on the gutter's edge or in the middle of the sidewalk, but had the right to assume and presume that the whole way was clear. Heckman vs. Evenson 78 N. W. 480.

Again:

If no one were to file a challenge to the array on the first day of the term, no objection could be urged on the ground of irregularity in drawing of the *venire*. But if one challenged the array and met with success, all would be equally relieved under the theory of defendant. The accused has not alleged that this cause was injuriously affeced by the irregularity complained of by a litigant in a civil suit on whose motion the *venire* was set aside. He based his motion to quash the indictment in his case exclusively on the fact that the *venire* had been declared null in a civil suit. In our judgment it devolved upon him to show in so far as he was concerned wherein there was any informality or irregularity in the drawing. It may happen that informalities are fatal to the *venire* out of which a jury is to be selected to bear and decide a cause in a civil suit and not fatal as relates to an indictment found by the grand jury selected from the *venire* annulled in the civil suit.

"So that irregularities therein unless plainly operating to the prejudice of the challenging party form no ground for challenging the array. Thompson on Trials, par. 34.

The objection which should be urged on the first day of the term is to the *formation*, drawing and summoning of the second jury.

For other defects the rule does not apply.

It has been held that the incompetency of one of the grand jurors vitiates the act of indictment, and the motion to quash will prevail after the first day of the term; it will not prevail to set aside the general *venire* after that day.

In the case here not only the motion was not made on the first day of the term, but the motion to quash the indictment on grounds before stated was made weeks after the indictment had been found and after the change of venue had been refused.

As we interpret the jurisprudence upon the subject it was entirely too late.

We did not find that the sections of the work of Mr. Bishop on Criminal Proceedings, to which our attention was invited, apply. He in those sections interprets the different statutory enactments in jurisdictions where challenges to the array are not limited to the first day of the term.

Under the common law, as we find it, the plea in abatement to the indictment was not allowed as a substitute to the challenge to the

Thomas O. Benton, City Attorney (*Hudson, Potts & Bernstein*, C Counsel), for Defendant, Appellant.

Argued and submitted January 14, 1898.
Opinion handed down February 7, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff asks judgment against the defenda for the sum of fourteen hundred and forty six dollars, with intere from the 10th of February, 1897.

The action is grounded upon the following allegations:

That the Legislature of the State by Act No. 81 of 1873 exempte all real and personal property situated and being in the corporat limits of the city of Monroe, and all persons, firms and corporatio within said city, from payment of all taxes and licenses to the pari of Ouachita from and after the first day of January, 1873. That order that the city of Monroe should bear a just and equitable pr portion of the burdens of local government, the Legislature of t State passed Act No. 57 of 1876, whereby the city of Monroe w required to pay to the parish of Ouachita one-fourth of certa expenses therein set forth. That since the passage of Act No. 57 1876 the city of Monroe had increased very extensively in proper and population, and in order that said city and its inhabitants shou bear the expenses of local government in proportion to the proper and population within the corporate limits of said city, the Legisl ture of the State passed Act No. 128 of 1896 so as to read as follow

"That hereafter the city of Monroe shall pay the parish Ouachita all expenses incurred in and arising from the detectio arrest, prosecution, trial, conviction, punishment and transport tion to prison of all persons accused of crimes, offences and misd meanors committed within the corporate limits of said city, provid that the sheriff and clerk and District Attorney and constable a justices of the peace shall collect their costs and fees in such criminal cases directly from the city of Monroe, and that s city shall further pay to the parish of Ouachita one-third of expenses incurred by the parish of Ouachita for the registration voters and conduct of elections, *per diem* and mileage of jurors, a issuing of jury certificates, boarding and lodging jurors in capi

Geo. W. Flynn for B. S. Leathers and Boss Oil Mills, Respondents.

Submitted on briefs November 10, 1897.
Opinion handed down December 13, 1897.
Rehearing refused February 21, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. Relators aver that in October, 1897, they instituted a suit in the Civil District Court for the parish of Orleans, in which they represented that they were engaged in the purchase of cotton seed and the manufacture of the same into oil, cake and other products, and had been so engaged for many years. That it had found it to be to the mutual interest of themselves and of the planters producing cotton seed and designing to sell the same to them that relators should furnish, at their own cost and expense, cotton seed sacks to such planters as were disposed to sell their cotton seed to relators, and that in the course of said business they had sent out a very large number of sacks through the country adjacent to the Mississippi river and its tributaries in the States of Louisiana and Mississippi, which were distributed to planters and delivered to them with the express understanding that they were to be used in shipping seed to relators only, or to be returned to them empty at the end of the season; that the said course of business had been adopted by themselves and other persons and corporations engaged in the purchase of cotton seed and the manufacture thereof into products for several years, and was practically universally pursued throughout the districts aforesaid; that Boland S. Leathers, the master of the steamboat Natchez, had for several years past been engaged as master and owner or part owner of steamboats in the business of a common carrier on the Mississippi and its tributaries, and in the pursuit of such business had been fully informed of the course of business pursued by relators and others as described, and with the agreements and understandings and agreements between relators and the planters, and that he, in the course of his business as a carrier, had repeatedly himself delivered sacks to planters for owners of oil mills, and was fully informed as to the manner in which the cotton-seed business was conducted; that said Leathers, with full

Jury of Ouachita, to-wit, the sum of five hundred and twenty do
lars and thirty-five cents.

Defendant specially denied that it was indebted in any manner
in any amount for the items of the account sued on which were n
provided for and set forth in the aforesaid Act No. 57 of 1876 as
part of the charter of the city of Monroe.

Defendant specially denied that it was bound in any manner
for any amount under the provisions of Act No. 128 of 1896 as
as it changes or amends the provisions of Act No. 57, the latter a
being an amendment to and forming a part of the original chart
of the city of Monroe. It averred that said Act No. 128 is unconst
tutional for the following reasons:

That it violates the twelfth paragraph of Art. 46 of the Constit
tution of 1879, which provides that "The General Assembly sh
not pass any local or special laws on the following specified object
creating corporations or amending, extending or explaining t
charters thereof: Provided, this shall not apply to the corporati
of the city of New Orleans or to the organization of Levee Distric
and Parishes."

Defendant averred that the act of 1876 was an amendment to t
eleventh section of Act No. 81 of 1878, amending the original cha
ter of the city of Monroe under Act 102 of 1871, and as such t
said Act No. 57 of 1876 was incorporated into and became a pa
of the original charter of Monroe as above set forth, and that t
Legislature was without power under the provisions of the Cons
tution of 1879 to amend, renew, extend or explain said charter. Th
even if Act No. 128 of 1896, on which plaintiff's claim was base
had not been violative of said paragraph of Art. 46 of the Constit
tion, even then, and in that case, the said act was not adopted
accordance with the provisions of Art. 48 of the Constitution; th
said act was never advertised in accordance with the provisions
said article as precedent to the passage of such a local act. Th
no notice "stating the substance of the contemplated law" was ev
published prior to the passage of said Act No. 128, and on a
account said act is unconstitutional.

Defendant averred that the *first section* of said *Act No. 128* is
conflict with *Arts. 119 and 121* of the Constitution, in so far as
orders the costs of the sheriff and clerk to be collected directly fro
the city of Monroe. That *Art. 119* fixes and establishes the com
pensation of the sheriffs of the several parishes of the State, a

That said petition was duly verified by affidavit according to law, and that upon the same an order was duly entered ordering an injunction to issue in the premises as by relators prayed for; that said injunction duly issued and was duly served upon defendants; that defendant Leathers subsequently applied to Hon. Frank M. Monroe, judge of the Civil District Court, to whom said case had been allotted according to law for the dissolution of said injunction upon bond; that said judge upon said application rendered an *ex parte* order allowing said Leathers to bond said injunction. Relators aver that all said facts would appear by the record in that suit, which they declare they make part of their application, and aver would be presented at the hearing of the same.

Relators aver that they did seasonably thereafter apply to the Civil District Court for a suspensive appeal from said order, but that the Hon. Frank A. Monroe, to whom said application for an appeal was made, had wrongfully refused and declined to render an order of appeal in the premises, as would appear from the petition for an appeal duly filed in the cause with the refusal of the judge to grant the same endorsed upon the said petition in writing; that in applying for said appeal relators requested the judge to fix the amount of said bond therefor, as he was required by law to do and also to fix the return day for the same, and that relators were and are still ready to give such bond as may be fixed in the premises.

Relators aver that it appears from the face of the papers that the damages accruing from the dissolution of said injunction will be irreparable; that in addition to the pecuniary damages which (as would appear from affidavit of record) will largely exceed two thousand dollars, the damages to accrue from the failure to dissolve said injunction will be the entire breaking up of relators' business through the wrongful appropriation of its property by defendants, and that the amount of the injury to be suffered by relators through such wrongful appropriation of their property can not be estimated in dollars and cents, and no adequate relief exists save and except the said writ of injunction.

The premises considered relators pray that an alternative writ of *mandamus* issue, commanding said Frank A. Monroe, Judge of Division "C" of the Civil District Court to render an order upon the application of relators, granting relators a suspensive appeal from the order allowing Boland S. Leathers to bond said injunction and

by law for the advertisement of judicial sales. The evidence of s notice having been published shall be exhibited in the Gen Assembly before such act shall be passed, and every such act s contain a recital that such notice has been given." As will be neither article alludes to the subjection of taxation.

If this court were vested with appellate jurisdiction in every in which the constitutionality of an act of the General Assembly at issue, independently of the amount of the matter in disp this appeal would be properly before us, but such is not the That issue of itself determines our jurisdiction only in c in which the constitutionality or legality of any tax, toll or im whatever, or of any fine, forfeiture or penalty imposed b municipal corporation shall be in contestation. Constitution, 81. We find no issue of that character involved in this app The act attacked might well be violative of both of the art of the Constitution and yet involve no question of taxation. truth it does not deal with that subject at all. It is true it imposes (and in so doing it may unconstitutionally impose) u the city of Monroe the payment of a certain class of expenses costs, and that its enforcement may (though not necessarily) by of result and consequence cause the city to increase the amoun taxes imposed by it upon its citizens, but the city in its corpo capacity is chargeable with and is charged with no taxes, and not ordered by the act to impose taxes upon its citizens. amounts it is directed to pay may well be paid from revenues of city derived from sources of income other than those of taxa The sources of revenue which the act itself directs to be place the disposal of the city may suffice of themselves to meet the ment of the claims. If the fact should be otherwise and should become necessary that taxation be ordered to meet the s the individual citizens who will be sought to be charged with t taxes will have ample opportunity to test the legality of the under which they were caused to be imposed. Act No. 128 of is too contingently, remotely and indirectly connected with the ject of taxation to make the attack which the city has made up in this case a matter appealable to this court under Art. 81 of Constitution.

This court being without jurisdiction *ratione materiæ* in premises, we are forced to dismiss the appeal. The appeal is he dismissed.

No. 12,550.

MUTUAL BUILDING AND HOMESTEAD ASSOCIATION VS. FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

1. The owner contracting with two partners for the erection of a building will not be deemed to discharge one of the contractors simply because they dissolve their partnership, and the owner makes one of the payments to the partners charged by the dissolution with the completion of the building contracts of the firm and authorized by the other partner to receive such payment. Novation is never presumed and the discharge of neither of the contractors can be inferred from the owner's action. Civil Code, Arts. 2185, 2186, 2190, 2192 *et seq.*
2. Nor will the consent of the owner in such case to the abandonment by one of the contractors be inferred, no such consent having been asked or granted and both contractors remaining bound to the owner.
3. The contract of suretyship will not be deemed avoided under the stipulation of notice to the sureties of any act of the building firm for whose performance of their contract the sureties bind themselves, because the sureties are not apprised of the dissolution of the building firm, the firm remaining bound after as before the dissolution for the fulfilment of their contract, and notice having been given of the subsequent abandonment by the firm of their contract work.

On Rehearing.—None of the rights of the defendant were injuriously affected by the acts of plaintiff, who was the obligee of a bond given to secure an obligation of contractors under a building contract.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

J. Zach. Spearing for Plaintiff, Appellant.

Purnell M. Milner (*Harry H. Hall*, of Counsel), for Defendant, Appellee.

Argued and submitted December 18, 1897.
Opinion handed down January 10, 1898.
Rehearing granted February 7, 1898.
Submitted on briefs March 7, 1898.
Opinion handed down March 21, 1898.

The opinion of the court was delivered by

MILLER, J. This suit was brought on the contract of defendants by which they bound themselves as sureties for the faithful performance of the engagement of Anderson & Allen to build a house for

the plaintiff. The petition in substance avers the failure of the tractors, Anderson & Allen, to complete the building; that plain had to finish it at an expense exceeding the price stipulated t paid the contractors; that laborers and furnishers of materia consequence of the default of the contractors have recorded against the building; that under defendants' suretyship they bound to pay the excess upon the contract price of plain expended to finish the building, are bound also to have the against the building canceled, and the petition claims judgr accordingly; the defence is, in effect, that the suretyship bec void because the plaintiff, with knowledge that the contractor the building had dissolved their partnership after they comme the building, failed to communicate that dissolution to defenda that after the dissolution plaintiffs made a payment to one of contractors who, under the agreement with his partner, was to c plete the building begun by both; that plaintiff assented to the tinuance of the work by one only of the contractors, and becaus plaintiff failed to record the building contract as required by the No. 180 of 1894. From the judgment against plaintiffs they pr cute this appeal.

The building contract was made on the 27th August, 1895. On 19th October in the progress of the work the third payment bec due to the contractors and on the demand of one of them, the exhibition of the agreement of dissolution with his par authorising plaintiff to pay the partner making the demand, made that payment; a day or two afterward plaintiffs were infor by their supervising architect that the contractor receiving the ment had left the city, that the workmen on the building were un and had quit work; thereupon there was some discussion betw plaintiff and the other contractor with reference to the comple of the building by him; in these discussions the agent of defend took part, but after a few days this effort to secure the comple of the building failed, and on the 25th October, as we rea record, defendants were notified in writing by the plaintiffs of abandonment of the work by the contractors, and plaintiffs dema that defendants under their suretyship should take charge of complete the building; defendants replied they had been discha of all liability and this suit followed.

The argument for the defendants insists there was a change b

contract with Anderson & Allen, by which defend- were discharged, and in this connection we have e authorities affirming the principle that any material act of the creditor of the surety's contract will ntitled as he is, to stand on the contract as he made uretyship, pp. 98 and 94. The application of this gument supposes is found in the fact that plaintiff ayment to Anderson & Allen after the dissolution of had become known to plaintiffs. On that dissolu- plaintiff and their payment to Anderson rest the ment that plaintiffs have varied the surety's con- ing Allen. The plaintiffs certainly are not responsi- ution of Allen & Anderson. The payment to Ander- n the plaintiffs were called on; there had been no erection of the building was then in progress. In llen, binding himself to finish all the firm's contracts, zed to collect money due the firm. Plaintiffs natur- dence of Anderson's authority to receive; that was ter consulting their counsel made the payment. In ntiffs were bound to pay, and we can not perceive nat was due, and could not have been withheld, the et their recourse on defendants as sureties of Ander- e knowledge of plaintiffs of the dissolution, and that und himself to finish all the work of the firm and the derson, did not imply that the plaintiffs discharged discharge was asked or granted; and if asked, we o infer from the ordinary modes of human action, have been refused. We find no basis in plaintiffs' n to base a discharge of Allen, and the law forbids f such discharge unless it clearly results from the parties. C. C., Arts. 2185, 2196, 2186, 2192 *et seq.* th partners remained bound to plaintiffs after as olution. Nor do we understand that Allen ever harge his sureties now insist was granted him, and reful consideration we are unable to deduce that dis- intercourse of the parties. The surety is discharged of the creditor, the subrogation to all his rights ipal for whom the surety is bound can not be trans- by subrogation. C. C., Art. 3061. In our view

all plaintiffs' rights against Allen are intact, and will pass to defe
ants when they pay the debt.

It is earnestly pressed on us that the sureties were discharge
the alleged non-compliance of plaintiffs of the stipulation in
defendants' contract requiring immediate notice to them of any
that might result in loss to defendants. The answer avers
plaintiffs failed and neglected to notify the defendants of the di
lution of the firm of Anderson & Allen; or of plaintiffs' acting on
dissolution or of their consent to the continuance of the wor
Anderson alone, or of the third payment to him and his re
for the payment. Of course, if there had been any consen
plaintiff to the continuance of the work alone by Anderson
the discharge of Allen, the effect of that discharge would n
unimportant the question of notice. The plaintiffs had no agenc
bringing about the dissolution or control over it. No consent on t
part was given or asked to the continuance of the work by An
son. All the plaintiffs did was to make the third payment to
which, in our view, they were bound to make, and the payment
ries no assent to that dissolution or continuance of the work
Anderson. The argument for the defendants in its other aspe
that the dissolution should have been notified on Saturday, the
October, when brought to plaintiffs' knowledge. On this branc
the case our attention has been called to the full cognizance o
the facts by defendants' general agent here, and to the part t
by him in the efforts to have the building completed by Ande
Again, it is contended that no possible harm could result to defe
ants, because they were not notified on Saturday, the 19th, or M
day, the 21st. In this connection the knowledge of their age
insisted upon and it is also urged that on the 25th October
attempts to secure the finishing of the building having fa
defendants had written notice of the condition accompanied with
demand they should take charge of and complete the building.
answer of defendants to all this, is that the knowledge of their
eral agent here on the spot is not their knowledge, and irrespe
of any other question they are entitled to stand on the letter of
contract of written notice to them. If we are to accept this vie
least plaintiffs are entitled to a fair construction of the stipulatio
to notice. They insist the contract placed no such duty on the
defendants' argument exacts. The contract does not define "d

lution " or specify any fact that is to be notified. The stipulation is notice of any fact that might cause loss to defendants. Allowance then is to be made in construing the stipulation of that appreciation the plaintiffs naturally might place on the dissolution under all the circumstance brought to their notice. With both the contractors bound, no release of either sought or given; the work still progressing and no default having occurred, plaintiffs might well suppose no loss to defendants was impending. Are they to lose their bond and defendants to go free of all liability, because under these circumstances defendants were not notified of the dissolution? It is quite certain plaintiffs themselves had no appreciation that the dissolution, confined in its effect to the partners, not freeing either from their obligation to plaintiffs or to defendants, menaced any loss to them or to defendants. The plaintiffs seem to have had the confidence when they made the third payment and after they consulted counsel that the work would be executed. After Anderson left the work and the effort to have it completed by Allen failed owing to his want of means, the defendants were notified in writing. It seems to us this was all that could with reason be expected of plaintiffs. We do not feel at liberty to construe this contract of suretyship so as to avoid it, upon that import the defendants insist should have been attached by plaintiffs to the notice of dissolution given them, when the fact thus made known under all the circumstances, neither impressed the plaintiffs or was of a character to impress them as requiring any notice to defendants. If this stipulation of written notice now invoked by defendants to avoid their contract is so worded as to leave the fact to be notified open to reasonable interpretation by plaintiffs, they are not, it seems to us, to forfeit their right on the bond, merely and only because they did not give immediate written notice of the dissolution, but contented themselves with written notice of the failure to complete the building by the contractors and the demand that defendants should take charge of it and fulfil their contract. We think the notice to defendants given by plaintiffs was timely and sufficient.

Another defence is that plaintiffs failed to record their building contract as required by the act of 1894, providing that the owner must require security from the contractor for payment of the laborers on the building and of the material men; reserving their right to record their bills and thus secure their privileges, and pro-

viding that the owner shall be responsible for all balances du workmen and material men if the contract is not recorded. deduction in defendants' brief seems to be that by the f to record the contract the defendants can not be subrogated t privileges on the building of the workmen and material men. building as we understand it belongs to plaintiffs. As against p tiffs' right to recover on their bond, we do not see how defen could urge any privileges acquired against the plaintiffs' prop If defendants paid any of the workmen or material men, the am might well be deemed payments *pro tanto* on the bond. We d perceive, however, the bearing of the failure to record the bui contract, on the issue of plaintiffs' right to recover the excess the contract price, the plaintiffs have paid to finish the buil The omission to record may have some pertinence to other q tions between these parties, we do not propose to dispose of i controversy.

We find no evidence in this record that the plaintiffs have any of the privileges that appear to have been recorded again building after Anderson abandoned the work. It may be tha owner not having paid the contractors by anticipation, is not l for any of the recorded claims, and it may be that the building i subject to any such privileges. We therefore find no basis on w the sureties can be held for any of the privilege claims, an recovery must be restricted to the amount claimed for finishin building.

It is therefore ordered and adjudged that the decision of the l court be annulled and reversed, that plaintiffs do have and rec from defendants one thousand and ninety-eight dollars and twe five cents with legal interest and costs, and as to the privi recorded against the property for which judgment is claimed i petition, that there be judgment of non-suit.

On Application for Rehearing.

Breaux, J. The appellant takes it for granted that the c assumed that it as surety was not discharged for the reason under the articles of the Code, no such discharge could be clai

That having thus assumed to determine the relations of the ties (exclusively with reference to the articles of the Code rel

court overlooked entirely the express contractual
he act of suretyship.

r a kindly denial to that suggestion.

interpreting the different articles of the Code, we
y that it was a question of subrogation. That upon
e bond was imposed the obligation to protect all
n order that upon payment of the bond by the
l become subrogated to all of the right plaintiff had
ncipals (the contractors) of the bonds. Had the
guard all of its right as payee of the bond, it
been in its power to transfer to the security upon
nt which the law provides a security should have
the principal obligation. There was no negligence
he part of plaintiff and no act done, if the articles of
lone be considered, which in the least impaired the
curities against the principals on the bond. But
pprehended by the defendant, overlook the stipula-
n the contract of suretyship between plaintiff and
agreement of the contractors, principals on the
nal to themselves, and the fact that one continued
nder the contract and the other chose to transfer to
as not an agreement in which the plaintiff was con-
ich it was in any respect a party. A few days after
etween these contractors, one of them applied for

ing been done satisfactorily, the amount was paid.
of these contractors had not been paid. They had
rivilege on the building. One of the conditions of
o secure the plaintiff against the claim of "sub-
rers, mechanics, workmen and furnishers."
to the contractor who remained (as the plaintiff's
y thought) to continue in good faith with the work of
de at the time agreed upon among all parties con-
ears that neither of those contractors were in good
as anxious as the other to abandon the contract and
ferent as the other about paying their employees and
object of the bond was to protect plaintiff from any
rt of the contractors to pay these very claims.
tions are not at this time disputed by the defendant.

contention, now, is limited to the contract itself as being m
reaching than the articles of the Code upon the subject, parti
y as to the necessity of notice of the dissolution of the asser
nership.

is clear in our judgment the contract provided the surety sho
notified in writing of any act which might involve a loss. Up
branch of the case we note that the contractors individually
nout suggesting a partnership signed the contract. The bo
, subsequently furnished, was signed individually, save that in
y of the bond the principals referred to themselves as
tners. When one of the partners came to collect the third ins
nt he produced in support of his right to collect, a copy of
ement dissolving the partnership authorizing him to col
unt due the partnership, which had been signed a few days p
is. The payment made by the plaintiff to the contractor
le to him as to one authorized, as he was, to receive payme
s payment did not have the effect of prejudicing the rights wh
defendant had. They remained unaffected; the amount was d
ew days after the plaintiff was notified, as required by the c
t of suretyship. It is not evident that the delay caused
or that the necessity of giving notice was such as to rende
erative on the part of the plaintiff to give immediate notice.
ears that everything was done in the utmost good faith until
that contractors abandoned the work.

Ve have seen that immediately after the final abandonment of
ding, the notice was given. We think there was a substan
npliance with the contract.

leretofore our decree granted compensation for the service
ntiff's attorney.

Ve have given this claim further attention and after some con
tion have concluded to reduce the amount of the fee.

ur decree established that plaintiff was entitled to five hund
ninefy-eight dollars plus counsel fee.

n view of this amount and the services rendered in the case,
k that the fee should be considerably less.

here was another question, that relating to other claims recor
nst the property, but not sufficiently proven on the trial to
a decree. The matter is argued by the plaintiff in the re

sel. We have found no reason on this score to
ously rendered opinion.
ordered, adjudged and decreed that the attorney's
owed be reduced to one hundred dollars.
lered and decreed, after this deduction and amend-
ior decree be reinstated.
retofore rendered, and the decree are made the
ee of the court, after deduction and amendment

No. 12,665.

ESTATE OF MRS. E. A. LITTELL.

ive of an aged and infirm lady, rendered her professional
ng through several years. He made no charge against her
was told by her she would compensate him. Shortly before
e into his hands five thousand dollars in cash. He says this
o his wife; but it appears to have been received by him, and
under his administration and control. Under the circum-
d by the evidence, *Held:* This was the compensation she
he remuneration he depended on, and he can not recover on
professional services presented or asserted for the first time

n the same succession). While the fact of knowledge of an
note he discounts is an accommodation note is no defence
for value, *bona fide*, before maturity, where such a note is
dal object, which is abandoned, and afterward, in fraud of the
tiated, and the endorsee knows or has reason to believe such
pation in its commission bars his recovery.
the more force to instruments non-negotiable in character,
gotiable, greater caution is required of the purchaser.

the Eleventh Judicial District Court for the Parish
ry. *Dupré, J.*

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is for Succession, Appellant.

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nd, Jr., and *E. B. Dubuisson* for Executors, Appel-

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nd, Jr., and *E. B. Dubuisson* for Dr. R. M. Littell,
llant.

and that he had relied upon her generosity for recompense and been fully recompensed.

The testimony establishes to our satisfaction this contenti the defence.

We are convinced that the opponent did not render his pr sional services under contract, either express or implied, and pended entirely on the beneficence of his patient and relative remuneration. Asked on cross-examination whether or not he ever notified the deceased or intimated to her that he intende charge for his services, he replied "no," and added that she told him she would compensate him for what he would do for She did not state in what manner she proposed to compensate whether in her will or otherwise, whether to him directly or to n bers of his family, and he seems to have been perfectly satisfi leave the compensation, and the manner of it, he was to recei her.

That she did compensate him is shown by the evidence. Sh before her death she made a donation of five thousand dolla money to him or to his wife. The amount was either hande rectly to opponent himself, or collected by him. He says this w donation to his wife. Whether to him or her, it was a manua delivered into his hands and a remunerative donation. C. C. 1525, 1539.

He and his family received other benefactions from her. paid part of the tuition of his children; his family lived for a w at her house, she became security for a large sum for him, sig the notes with him; and she had previously given to his wife thousand dollars with which to buy a house and lot.

The donations to opponent's wife, became, under our law, p phernal in character, it is true, but the husband in this case has administration and benefit of the same, and, besides, we are sati that the five thousand dollars given twenty days before Mrs. lard's death was the kind of compensation she had referenc when she told him she would compensate him, and that he at time expected.

Under the circumstances developed by the evidence in this c unlike those of Danenhauer vs. Succession of Brown, 48 An. 341, Succession of McNamara, 48 An. 46, and other cases cited in be of opponent, we do not think he is entitled to recover.

The case is controlled by the principle announced in Jacob vs. Ursuline Nuns, 2 M. 269, and Tilghman vs. Lewis, 8 La. 108. See also Keever on *Quasi* Contracts, p. 315 *et seq.*

OPPOSITION OF DR. VINCENT BOAGNI.

This opponent claims to be a creditor in the sum of two thousand dollars and interest, as the holder of two notes executed *in solido* by R. M. Littell and the deceased, which he alleges he acquired in good faith before maturity for a valuable consideration.

The executors declined to recognize the claim for the reason that so far as the deceased was concerned she had signed the notes merely as security for Dr. Littell; that opponent was well aware of this when he accepted it; that at the time he acquired the notes he had received along with them as collateral security certain assignments and transfers of the salary to become due to Dr. Littell as coroner and parish physician of the parish of St. Landry for the years 1894 and 1895; that he knew Dr. Littell had executed these assignments of his salary for the purpose of securing payment of the notes; that opponent collected the salary transfers in full, amounting to two thousand one hundred dollars, and instead of applying the proceeds to the extinguishment of the notes, he had diverted the same by and through the connivance of Jos. Bloch, who was the party through whom the negotiation was made, to the satisfaction of a debt due him by Bloch.

The trial judge believed the evidence established this defence and rejected the claim. He did not err.

There is a direct conflict between the testimony of Bloch and that of opponent. Bloch, while candidly admitting his fault and giving as a reason for his subsequent consent to opponent's proposition to divert the proceeds of the salary transfers to claims held by opponent against him that he was hard pressed financially, narrates the facts and circumstances under which he negotiated the two notes to opponent for Littell, and states that he transferred the salary assignments as collateral security, attaching the same to the notes. He testifies he informed opponent that Dr. Littell had executed the assignments for that purpose, though they had been made payable to Jos. Bloch or bearer; that the notes and the salary assignments bore the same date, and were received by him from Littell at the same time; and that he affected the negotiation with opponent as one trans-

action, placing the notes and salary transfers in his hands cont
poraneously, and taking opponent's receipt for the salary trans
which recited that he held the same as collateral for the notes.
further testifies that long subsequently, at opponent's suggestio
consented to the diversion of the salary assignments, as above
forth, and surrendered to opponent the receipts he had previ
given for the same; that before he did this he endeavored by di
tion of opponent to secure the consent of Dr. Littell and Mrs. Mi
to the diversion; and that failing in this, he and opponent agreed on
affected the diversion notwithstanding. It is shown that the deces
whose estate is sought to be made liable, knew nothing whatev
of these transactions beyond the signing of the notes at Dr. Litt
request. She was never asked to consent to the diversion, th
Littell was, and declined. Littell owed Bloch a sum of money,
being pressed by the latter for it, executed the two notes,
cured the signature of his relative, Mrs. Millard, (formerly
Littell) thereto, wrote out the salary assignments, handed the n
and assignments to Bloch, told him to negotiate the notes, with
salary transfers as collateral, pay himself what he (Littell) o
him, and apply the remainder to the taking up of a debt Li
owed the bank.

This is the way Bloch happened to be in possession of the n
and collaterals, and accounts for the interest he had in effecting
negotiation with opponent.

It is shown, besides, that Bloch owed opponent at the time,
that he left in his hands, out of the proceeds of the negotiatio
sum equal to the amount due him (Bloch) by Littell.

Opponent's version is that Bloch brought the notes to hi
negotiate; that to fortify them he offered the Littell transfer
salary; that he took the notes and transfers and gave his receipt
the latter; that he bought the two notes outright and has kept t
since as his property; and that he considered the salary transfer
collateral to secure the notes. Later on, he says, Bloch came to
and with the view of protecting some friends in New Orleans off
to return opponent the receipts the latter had given for the co
erals, stating that upon the giving up of the receipts there woul
"no evidence that this paper (meaning the salary transfers)
not belong to you outright," that "then you will be the owne
the Littell notes and the owner of the collaterals."

The "friends in New Orleans" Bloch desired to protect were the Schwartz Machinery Supply Company. This concern had, it seems, accepted a draft for him which had gone to protest and passed into the hands of opponent, who had directed his attorneys in New Orleans to institute suit on the same. The Supply Company appealed to Bloch to protect them by preventing suit. Hence, his second visit to opponent.

The latter states that Bloch's proposition "suited him very well" and he accepted it.

In other words, he and Bloch detached the salary transfers from their destination and designation as collaterals to the Littell notes and made them over to opponent in payment by novation of another debt due him by the Supply Company and Bloch.

Opponent states further that Bloch was apparently and to his knowledge "the absolute owner of the notes and transfers."

How he knew him to be "the absolute owner" beyond the presumption which sprang from his possession of the notes and the transfers (the latter being made payable to Bloch or bearer), he does not explain.

He insists he had at that time no knowledge that Bloch was not the owner, that he had acquired all the paper in good faith, that he was not aware the salary transfers were intended solely to secure payment of the notes, or that the notes were, as to Mrs. Mallard, mere accommodation paper.

Opponent is an interested witness testifying in his own behalf. Bloch is without interest in the suit, and while he appears in a bad light with regard to his participation in the scheme to divert the collaterals, equally so does the opponent. But if we should give to the testimony of the one as much credence as to that of the other, there are facts and circumstances appearing which turn strongly the preponderance of evidence in favor of that view of the case which frees the estate from liability.

If opponent did not know or have reason to believe Bloch was negotiating the notes for Littell and was not the owner of them, and the salary transfers himself, why was it he did not retain a larger part or even all of the proceeds in payment of what Bloch owed him? The latter was then largely indebted to him. Yet he retained only eight hundred dollars of the proceeds of the negotia-

tion on the debt, handing Bloch the remainder, one thousand doll
No explanation of this was attempted.

The opponent, who was the brother-in-law of the deceased,
knew she was possessed of large means, and hence, no collat
were necessary to secure her notes. But with Dr. Littell, w
circumstances were not so good, it was different. The notes b
signed first by him and then by the deceased, and being date
same day as were Littell's transfers of salary, and the whole tu
over to opponent at one and the same time, must be held as
veying notice to opponent, or at least putting him on his inqu
that the loan was for Littell's account, and his transfers of sa
intended to protect them and relieve his relative who had bec
his security. A significant admission, bearing on this, was mad
opponent. Having declared he considered Mrs. Millard's notes
paper, he said: "Yet I thought that as they came due Dr. L
could not pay them, and therefore I would have to ask Mrs. Mil
and my relations with her were such, and on account of her he
I did not wish to have to make a demand upon her." We a
with the trial judge that this conveys the idea that oppo
believed Dr. Littell would not be able to pay his notes when
matured, and he wanted and took the salary transfer from Litte
avoid demanding payment of his debt from his surety, Mrs. Mil

Again, opponent gives his case away when he testifies that B
told him at the time the agreement was made to take the collat
in satisfaction of the Supply Company's acceptance of Bloch's
and surrendered the receipts for the collaterals, "there is no
dence that this paper does not belong to you outright." This de
ation was sufficient to put any reasonable man on his guard, o
least, raise a strong suspicion in his mind that Bloch was wit
right to so divert the collaterals.

Other circumstances might be mentioned, but these suffice.

Dr. Boagni must be held as having had, at the least, reaso
believe Bloch was not the owner of the salary assignments, and
he held the same only to secure the notes of Dr. Littell and
Millard. He can not, therefore, be considered a *bona fide* purch
Shaw vs. R. R. Co., 101 U. S. 557.

There was more than a mere negligence on his part in not ma
inquiry as to the nature of Bloch's tenure of the transfers; ther
more than a mere reason for suspicion that he knew such inq

cte it did not suit him to have developed. There is
he knew Bloch had no right to make over to him
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belief even, on his part, of this, it falls very little,
knowledge and equally puts a party on his guard.

to make no further inquiry and simply took his

against a note that it was known by the endorsee
e an accommodation note, if he takes it for value,
maturity. But when such a note is given for a special
bandoned and afterward, in fraud of the maker, it
the endorsee knows, *or has reason to believe*, such
pation in its commission bars his recovery. Smith
Wend. 662; 7 An. 227.

ith all the more force to the transfers of salary
ell, which can not be viewed as negotiable instru-
g such, greater caution was required of the pur-
gard the case comes within the principles laid down
s and Notes, pp. 301 and 302.

OF BESSIE MILLARD, MARY E. BOAGNI, NELLIE
DOOLEY, JOHN B. BARBER AND ROSA BLACK-

mentioned were named in the will as legatees to
sand dollars each, and the two last mentioned as
e five hundred dollars each. It was directed in the
ese legacies be paid out of a certain fund loaned on
deceased by S. V. Dooley, subject to collection by

discloses that at the death of the testatrix there was
fund bequeathed to the legatees mentioned in the
the sum of seven thousand four hundred and forty-
eighty-five cents, and that of this amount the
llected five thousand eight hundred and forty-nine
y cents, which was in bank to their credit.

he amounts bequeathed to them are legacies under
, the persons named, or certain of them, demand

the immediate delivery of the sums given them out of the funds that were in Dooley's hands, or their proportionate share of the same.

The executors do not deny that the parties named are legatees under a particular title, and they interposed no objection to a judgment ordering their payment, but contended it should be an order to pay *in due course of administration* and not an order to pay *at once*.

They appeal from a judgment decreeing immediate payment.

From the brief filed on their behalf we make the following excerpt: "If this court should affirm the judgment of the lower court, rejecting the claim of Vincent Boagni and R. M. Littell, then there will be funds sufficient in the hands of the executors to pay the amounts allowed to complaining legatees, but the executors should not take upon themselves the risk which they should incur by a reversal on appeal of that judgment."

From this it appears that the executors have no reason to oppose the order for immediate payment of the legacies under consideration, at least as far as the particular fund in their hands will go, if, by the judgment of this court affirming that of the court below, the large claims of R. M. Littell and Vincent Boagni are not sustained as debts due by the succession.

The judgment of this court on the oppositions of Littell and Boagni removes the apprehensions of the executors and those claims are not recognized as debts against the estate.

We find no error in the judgment of the lower court as far as appealed from, and the same is affirmed.

MR. JUSTICE MILLER—I concur in the decree.

50	308
109	621
50	308
112	854
50	308
121	563

No. 12,683.

STATE OF LOUISIANA VS. JOSEPH T. TIMBERLAKE.

Where it appears that there is no reasonable certainty or probability of procuring the attendance of an absent witness at the next term of the court, the denial of a motion for continuance will not be disturbed.

Where an absent witness, subpœnaed for defence, had testified on preliminary examination to a certain state of facts and could not, if present at the trial, have testified to the averments of fact set up in the motion for continuance without impeaching his own previous testimony, it is proper to conclude

hat were the witness present his evidence would be substantially the same s that on the preliminary examination, and as this was strongly against the ccused, the latter was not prejudiced by his absence.

State was entitled to offer the testimony of the absent witness, taken at the reliminary examination, on proof that he had left the parish and that his whereabouts and residence were unknown.

nstify relief to the accused, isolated passages of the trial judge's charge to he jury, objected to, must amount to a positive misstatement of the law.

PPEAL from the Tenth Judicial District Court for the Parish of Rapides. *Hunter, J.*

. J. Cunningham, Attorney General, and *Phanor Breazeale*, Dis- Attorney, for Plaintiff, Appellee.

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obert P. Hunter for Defendant, Appellant.

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rgued and submitted January 15, 1898.
pinion handed down February 21, 1898.

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he opinion of the court was delivered by

LANCHARD, J. The accused was indicted for the murder of M. Baillio, a constable, convicted and the death sentence passed n him. He appeals, and his case is presented in five bills of eption taken to the rulings of the court on the trial below.

I.

n the day the prisoner was arraigned and pleaded to the indictment otion was filed on his behalf for a change of *venue*, which came for trial four days later and was overruled. Following the ial of the motion for change of *venue*, and on the same day, the was fixed for trial one week later. Immediately thereupon the endant filed an application, sworn to, for a subpœna for one J. Beaver, alleging him to be an important and material witness in behalf, who had been present when the killing occurred, and that was informed and believed him to be in the parish of Ouachita in service on the United States snagboat Wagner, lying at or r the town of Columbia on the Ouachita river in Louisiana.

he application then proceeded to state at length what he expected rove by the witness, the gist of which was that he (the accused)

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We find no error in the judgment of the lower court as f appealed from, and the same is affirmed.

MR. JUSTICE MILLER—I concur in the decree.

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the Tenth Judicial District Court for the Parish of
Hunter, J.

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am, Attorney General, and *Phanor Breazeale*, Dis-
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er for Defendant, Appellant.

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n then proceeded to state at length what he expected
witness, the gist of which was that he (the accused)

read to the jury. To this ruling the second bill of exceptions
taken.

The judge who presided at the preliminary examination,
before whom Beaver's testimony was then taken, was the
judge before whom the case was subsequently tried.

Before offering the deposition, the State proved by the de
clerk, who officiated at the preliminary examination and who t
down the testimony of Beaver, that the witness had first been
sworn, that the accused was present, that he cross-examined
witness, and that the whole deposition was fully and accura
taken down. This was sufficient as to its genuineness and of
character. It is not required that the witness should sign it.
1010; State vs. Allen, 37 An. 685.

On this showing the testimony was admissible on proof that
witness was absent and could not be found. State vs. Harvey
La. An. 105; State vs. Douglas, 34 La. An. 528.

This proof was furnished by the application made a week be
by the accused for a subpœna to issue to the witness in the pa
of Ouachita, by the sheriff's return on the subpœna, that he c
not be found in that parish and that his domicile was unknown,
by the application of the accused for the continuance of the cas
the ground of the absence of this witness.

On the authority of State vs. Granville, 34 La. An. 1088; State
Jordan, *Id.* 1219; State vs. Condier, 36 La. An. 291, and State
Allen, 37 La. An. 685, the prosecution would have been entitled t
troduce the deposition even if the defendant had not sought Be
as a witness, on proof that he had left the parish and that his wh
abouts and residence were unknown.

III AND IV.

The third and fourth bills of exception present objections to
charge of the judge relating to the law of manslaughter. In o
ruling the objections, and as part of his reasons for so doing,
judge annexes to the bills his entire charge to the jury, which
in writing.

The contention of the defence is, that in the portions of
charge excepted to, the court below holds the prisoner to the sta
ard of "a reasonable man."

After stating that a high degree of sudden, resentful feeling

not alone palliate an act of homicide and reduce the crime from murder to manslaughter, the language of the court was: "It is essential that the excited and angry condition of the party committing the act, entitling him to a milder consideration of the law, should be superinduced by some insult, provocation or injury which would instantly produce in the minds of ordinary men situated as the prisoner was, the highest degree of exasperation." Then with reference to the time sufficient for passion to subside and reason to resume its sway, it was said: "The law assigns no limits within which cooling time may be said to take place. Every case must depend upon its circumstances, but a time within which an ordinary man in like circumstances would have cooled may be said to be a reasonable time."

Considering the charge as to manslaughter as a whole, it must be held a correct exposition of the law. The selection of passages here and there for criticism and animadversion is not favored, and a verdict will not be disturbed on a merely inaccurate or incomplete instruction, as embodied in the sentences excepted to, when, from the entire charge on that branch of the law, a correct view and explanation of the subject is given.

To justify relief, the isolated passages brought to our attention must amount to a positive misstatement of the law. State vs. Ardoin, 49 An. 1145; State vs. Ferguson, 37 An. 51; State vs. Porter, 35 An. 1159.

It seems that counsel for the accused, insisting that the charge as to manslaughter was too restricted, asked a special charge in reference thereto and handed the judge Wharton's Criminal Law, requesting him to read Sec. 480 thereof to the jury, as embodying what he wished charged them concerning the law of manslaughter. The judge complied with this request and read the entire section to the jury, charging them that it was the law.

After this it does not lie in the mouth of the accused to complain that the charge as given was too narrow and restricted.

From that portion of the charge relating to self-defence is singled out this expression: "The law requires mastery over our fears as well as control over our passions." This is objected to on the ground that if the law requires "control over our passions," it virtually sets aside the doctrine of manslaughter.

The expression used is taken from Desty's Amer. Crim. Law, 28, pp. 383, 384.

The judge was instructing the jury as to the apprehension of er on part of the accused, and proceeded to explain, after using anguage quoted, that imaginary fears, without anything upon w o found them, can not serve as an excuse for taking human li

His charge as to this is entirely unobjectionable, and so far a xpression "control over our passions" is concerned, the la anslaughter, the killing of another in the heat of passion, was olently and accurately expounded to the jury in another part o harge.

V.

The fifth bill was taken to the refusal of the Court *a qua* to gr ew trial asked for on two grounds—first, that the verdict was rary to the law and evidence, and, second, that the jury was o wed by the large crowds in attendance at the trial, all of w ere opposed to the prisoner and some of whom applauded the rict Attorney when he concluded the argument for the State, th y influencing the jury to the prejudice of the accused.

Testimony was taken on this motion and is found in the rec he question presented is one of fact. The trial judge, in his ons for overruling the application for a new trial, declares that ccused had obtained a fair trial by an honest jury, influenced a y a desire to do their duty; that the nearest juror lived about fif iles from the county seat (Alexandria); and that he was sati one of the jury were influenced by any prejudice which may h risted in Alexandria. The evidence taken on the motion does atisfy us the judge erred in overruling it. Great reliance is pl y the law upon his discretion in such matters.

The manifestation of approval at the close of the argument for rosecution was inconsiderable, and was quickly and sternly rebu id suppressed by the judge, who then turned to the jury and dire em to disregard any and all marks of approval or disapproval, determine the case solely from the law and evidence.

The sentence and judgement appealed from stand affirmed.

No. 12,718.

A. BALDWIN & CO. VS. JOSEPH CAPPEL ET ALS.

bject of this action is to remove a cloud, a fictitious encumbrance, a simu-ted mortgage, appearing on the public records against certain real property anding in the name of an insolvent.

not an action directed against either the person or property of the insolvent, t a proceeding directed against the apparent encumbrance.

or more of the parties defendant being strangers to the insolvent proceedings nd without interest therein, plaintiffs can not be forced to litigate the ques-ons arising with him, or them, in the *concurso* or insolvent proceedings, but ay bring an independent action and make all persons in interest parties ereto, including the syndic of the insolvent estate.

PEAL from the Tenth Judicial District Court for the Parish of Avoyelles. *Cullom, J.*

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urillon & Son for Plaintiffs, Appellants.

. *J. Lafargue* and *Cappel & Cappel* for Defendants, Appellees.

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rgued and submitted February 11, 1898.
pinion handed down February 21, 1898.

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he opinion of the court was delivered by

LANCHARD, J. Plaintiffs, who are judgment creditors of Joseph ppel, caused execution to issue and seized a tract of land con-ning one hundred and sixty acres belonging to the defendant. The rtgage records disclosed a pre-existing conventional mortgage, ering the land seized, executed by Joseph Cappel in favor of lliam G. Cappel.

Representing this mortgage to be a pure simulation designed to tect the property from the pursuit of the creditors of the mort-gor and alleging injury to themselves thereby, plaintiffs brought s action to have the same adjudged void and of no effect and the cription thereof erased.

lleging that the mortgage notes, representing the pretended ebtedness, had been transferred by notarial act to J. Clifton Cap-, the son of Joseph Cappel, and that this transaction was likewise imulation and without consideration, they made Clifton Cappel a

party defendant, along with Joseph Chappel, the mortgagor, and William G. Cappel, the mortgagee. They also made A. M. Bordelon clerk of court and custodian of the mortgage records, a party to the suit, to the end of commanding the erasure of the mortgage by him.

Joseph Cappel appeared and excepted to the action on the ground that prior to its institution he had made a *cessio bonorum* for the benefit of his creditors, that the insolvent proceedings were then pending, and an order had been granted therein staying all process against his person and property. He represented that plaintiffs had filed an opposition to the cession, in that way had made themselves parties to it, and that the action now under consideration was in violation of the order staying proceedings against him. His position is that no suit in which he is a party defendant can be brought or prosecuted outside of the insolvent proceedings. He prayed the dismissal of the petition.

No appearance has, as yet, been made by the other three defendants.

There was judgment sustaining the exception and dismissing the entire action as in case of non-suit.

Plaintiffs appeal.

We think the dismissal erroneous.

The action is not one directed against either the person or property of the insolvent. R. S. 1790. Its purpose is to remove a cloud, a fictitious encumbrance appearing on the public records against certain real property standing in the name of the insolvent. It is a proceeding directed against this encumbrance.

While the insolvent is a party to the suit, he is not the only party defendant. There are two co-defendants, besides the clerk of the court. While J. Clifton Cappel, one of the defendants, appears on the *bilan* of the insolvency as a creditor, and may be considered a party to such proceedings, and while as to him, the exceptor and the clerk of the court, the questions presented in the pending action might be litigated within the insolvent proceedings, the other defendant, William G. Cappel, is not a party to the insolvent proceedings. Plaintiffs' cause of action is against him as well as against Joseph Cappel and J. Clifton Cappel. He was alike mortgagee and transferror of the mortgage notes to Clifton Cappel. Both the mortgage and transfer are attacked as simulations. He was, therefore, necessarily a party to the action.

Plaintiffs can not be forced to litigate these questions with him, a stranger to the insolvency, in the *concurso* or insolvency proceedings. He could bring an independent action against him, and to that action J. Clifton Cappel, the clerk of the court, and the insolvent, were not improperly made parties, with this exception, viz.: that the syndic of the insolvent estate should be substituted for the insolvent.

The action is not one seeking to take property from the insolvent estate, nor to recover a money judgment against the insolvent, nor to subject his person to any process.

It is alike to the interest of the attacking creditors, the other creditors of the insolvent, the insolvent himself and his syndic, to rid the real property of the encumbrance sought to be declared void.

The attacking creditors had seized the property before the cession was made, having a judicial mortgage resting thereon, primed only by the conventional mortgage denounced as a simulation.

The insolvent is without interest to throw obstacles in the way of freeing the property of this encumbrance. The most that he, or his syndic, could do was to appear and ask that the action be cumulated with the insolvent proceedings and transferred to be prosecuted there; and if William G. Cappel, that one of the defendants who is no party to the insolvency proceedings, object to such cumulation and transfer, litigate that question with him there and then.

But as the matter appears before us now, the court *a qua* has dismissed an action against three other defendants, as well as against the insolvent, on an exception filed by the latter, purely personal to him, or rather affecting him only.

Nor can the instant action be viewed as an attempt to classify mortgages standing against the property of the insolvent. That can only be done in the *concurso*. The utmost that may be alleged against it, on this line, is that it is a dispute between creditors; not, however, as to which shall take precedence over the other, but whether the mortgage asserted by one of them ever had, or has now, any existence whatever, to the determination of which question a third person, having no interest in, and a stranger to, the insolvent proceedings, is and must be a party.

If all parties to the present action were necessarily parties to the insolvent proceedings by being creditors of the insolvent, or otherwise, then we should say that the results sought herein should be

party defendant, along with Joseph Chappel, the mortgagor, William G. Cappel, the mortgagee. They also made A. M. Borde clerk of court and custodian of the mortgage records, a party to suit, to the end of commanding the erasure of the mortgage by h

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But as the matter appears before us now, the court *a qua* has dismissed an action against three other defendants, as well as against the insolvent, on an exception filed by the latter, purely personal to him, or rather affecting him only.

Nor can the instant action be viewed as an attempt to classify mortgages standing against the property of the insolvent. That can only be done in the *concurso*. The utmost that may be alleged against it, on this line, is that it is a dispute between creditors; not, however, as to which shall take precedence over the other, but whether the mortgage asserted by one of them ever had, or has now, any existence whatever, to the determination of which question a third person, having no interest in, and a stranger to, the insolvent proceedings, is and must be a party.

If all parties to the present action were necessarily parties to the insolvent proceedings by being creditors of the insolvent, or otherwise, then we should say that the results sought herein should be

litigated to a conclusion in the concurso through proper opposit
filed.

But plaintiffs' action being partly against a stranger, he
attack him in a direct suit, and if the syndic of the insolvent has
interest to prosecute, protect or defend in such action, he may ma
himself a party, or be made a party, thereto.

And it is no sufficient argument against the right to bring a dir
action against the stranger to say that, though a stranger to
insolvent proceedings, he might perhaps be made a party to
opposition filed therein having for its object the contestation of
questions raised in the direct action.

All the more is this true where, as in the instant case, the act
is not one, in its effects, bearing upon either the person or prope
of the insolvent.

It is therefore ordered, adjudged and decreed that the judgm
appealed from, dismissing plaintiffs' suit on exception filed, be
nulled, avoided and reversed, and it is now ordered that the exc
tion aforesaid be overruled, the suit reinstated and proceeded w
according to the views herein expressed, and the law costs of b
courts to be taxed against the defendant and appellee.

No. 12,717.

JOSEPH CAPPEL VS. HIS CREDITORS.

A creditor may oppose a fraudulent surrender any time from its first appear
in court down to within ten days next following the meeting of creditors.

The statute which declares that a creditor who proposes to charge fraud ag
his debtor, shall do so within the ten days next following the meetin
creditors, fixes only the limit of time *beyond which he may not do so.*

APPEAL from the Tenth Judicial District Court for the Parish
Avoyelles. *Cullom, J.*

A. J. Lafargue, Cappel & Cappel for Plaintiff, Appellee.

Couvillon & Son for A. Baldwin & Co., Defendants, Appellants.

Argued and submitted February 11, 1898.

Opinion handed down February 21, 1898.

e only question we can now pass upon is: Was the ruling of
ourt *a qua* on the exception of prematurity correct?
are constrained to hold it was not.

dwin & Co., judgment and seizing creditors, could present
opposition to the insolvent proceedings, to the proposed ces-
charging fraud and injury, immediately upon the filing of the
eeding. They did not have to wait until the meeting of cred-
was held, or until the *proces verbal* had been returned into
and then file it within ten days thereafter.

creditor may oppose a fraudulent surrender any time from its
appearance in court down to within ten days next following the
ing of creditors.

the instant case, the meeting of creditors was held on the 1st of
ember; on that day all the creditors who intended to participate,
cipated; on that day all the votes intended to be cast for accept-
of the cession and for syndic, were cast. That was the day the
sition was filed. It was timely, not premature. It was timely
o the appointment of syndic, for the creditors named that
al on that day.

e statute, which declares that a creditor who proposes to charge
d against the debtor shall do so within the ten days next follow-
he meeting of creditors, fixes only the limit of time beyond
h *he may not do so*. R. S. 1802; 46 An. 1176.

here is no direction that a creditor may not charge this fraud
r to the meeting of creditors, and no reason exists why a creditor,
good grounds for alleging fraud, must withhold such allegations
l the creditors shall have assembled in meeting. Creditors can
pass upon and decide questions of fraud at their meeting. Such
tions are for a jury. R. S. 1802 *et seq.*

nd because the creditors may, at their meeting, decide against
ptance of the surrender is no argument against the filing of
rges of fraud prior to the meeting. If, when the creditors meet,
refuse to accept the surrender, the opposition previously filed
ht, perhaps, prove unnecessary. But the possibility or contin-
cy of non-acceptance should not militate against the right of
itors to attack a fraudulent cession as soon as proceedings there-
are taken.

esides, it must be remembered that in the preliminary order
ch the judge makes *he accepts the cession* for the benefit of the

creditors. R. S. 1789. So that there is, from the very start, sion to oppose. 40 An. 95; 46 An. 1429.

The authorities cited in appellee's brief, as sustaining a view trary to that herein announced, do not sustain it. 40 An. 6 An. 1111, 1428; 42 An. 1054; 8 L. 128; 2 N. S. 57.

The extent to which those cases go is in their reference to t days in which opposition may be filed *to the proces verbal* meeting of creditors; ten days for filing opposition *to the proce of creditors.*

But charges of fraud against the debtor are independent meeting of creditors, and not affected by anything done or no there.

It is therefore ordered, adjudged and decreed that the jud appealed from, sustaining the exception of prematurity and di ing the opposition of A. Baldwin & Co., be annulled, avoide reversed, and it is now ordered that the exception aforesaid be ruled, and the opposition of Baldwin & Co. be reinstated and ceeded with according to law.

It is further ordered that all proceedings had and orders ta the matter of the insolvency of Joseph Cappel, to the prejudice Baldwin & Co., as opposing creditors, and which could not h have been taken had said opposition not been dismissed, are, as the same affects said opposition, set aside and vacated—co both courts to be taxed against the appellee.

No. 12,708.

STATE OF LOUISIANA VS. FELICIEN DARTEZ.

A bill of indictment having been returned against the accused, two days l was arraigned thereunder, and, without any reservation, pleaded not and elected to be tried by jury. Subsequently, on day fixed for trial, he motion to quash on the ground of error and irregularity in the organiza the Grand Jury.

Held: The motion to quash can not be entertained after a plea to the indi has been entered.

APPEAL from the Seventeenth Judicial District Court for the ish of Vermilion. *De Baillon, J.*

M. J. Cunningham, Attorney General, and *M. T. Gordy, Jr.*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

A. & Charles Fontelieu, Edwards & Green and *C. H. Mouton* for Defendant, Appellant.

Submitted on briefs January 29, 1898.
Opinion handed down February 7, 1898.
Rehearing refused March 7, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The accused was indicted for petit larceny, convicted and sentenced to two years at hard labor.

He appeals, and urges as error the refusal of the trial judge to quash the indictment on motion to that effect made.

The case is identical with that of State vs. Desire Hebert, Jr., and Laodice Landry, appealed at the same time from the same parish, being No. 12,710 on the docket of this court, and decided at the same sitting of this court. See 50 An. —.

The facts of the two cases are exactly similar, and the law governing them the same.

For the reasons assigned in the Hebert and Landry case, the judgment appealed from herein is affirmed.

No. 12,518.

H. & C. NEWMAN VS. BAER & LEVY—CRAWFORD, JENKINS & BOOTH ET ALS., INTERVENORS.

50 323
50 1241

50 323
109 524

50 323
123 703

ON MOTION TO DISMISS APPEAL.—Plaintiffs' debt and attachment were placed at issue by the averments of the interventions. This debt exceeded the amount necessary to give this court jurisdiction. Therefore, as regards the plaintiff the suit *and all of its incidents* are subject to an appeal here. It matters not that the sum claimed by intervenors is below the appealable amount.

ON THE MERITS.—An insolvent debtor can not give in payment to one creditor, to the prejudice of the other creditors, any other thing than the sum of money due.

No distinction is recognized between a voluntary conveyance of property in fraud of creditors and such an alienation disguised under the forms of judicial proceedings.

Any machination or contrivance by which a fraudulent preference is sou
given will be set aside and annulled.

Neither the law nor the courts are to be used as instruments to work
To attempt this is to aggravate the offending.

An attachment instigated by a debtor to give a favored creditor an advan
be declared void and of no effect as to complaining creditors, but ma
as between the fraudulent debtor and favored creditor.

Great weight given to opinion of trial judge, who saw and heard the wit
determining questions of fact tending to prove fraud.

APPEAL from the Second Judicial District Court for the P
Bienville. *Watkins, J.*

Percy Roberts & Boatner and *E. T. Lamkin* for Plaintiffs, App

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Dormon, Reynolds & Dormon, J. W. Holbert, L. K. Watkins
U. Richardson for Intervenors, Appellees.

Argued and submitted June 1, 1897.
Opinion handed down December 13, 1897.
Rehearing refused March 7, 1898.

The opinion of the court was delivered by

BLANCHARD, J. Plaintiffs sued for ten thousand four hund
ninety-one dollars and nineteen cents on open accounts and
Alleging the insolvency of defendants, and averring the st
grounds embodied in Secs. 4 and 5 of C. P. 240, they caused
ants' property and effects to be attached and garnishment pr
issue to a number of their debtors.

Defendants were merchants and owed various other cr
Crawford, Jenkins & Booth, claiming a debt of six hundr
seventy-eight dollars and ninety-three cents, intervened, co
the attachment, alleging the same to be fraudulent and co
intended to defeat the creditors of defendants and to aid th
in fraudulently disposing of and placing their property beyo
reach of their creditors. They denied that any indebtedness
on part of defendants to plaintiffs, and averred, in substan
the whole proceeding on part of plaintiffs was a fraudulent
the result of a collusive agreement between them and defend

Theirs was a revocatory action, set up by intervention, see

annul acts of their debtor in alleged collusion with others, done in fraud of their rights.

They prayed judgment setting aside and annulling the attachment, and decreeing the debt declared on to be fraudulent and fictitious.

These parties had previously, but subsequent to plaintiffs, in a separate suit in the same court, sued out writs of attachment against defendants, under which they had caused to be seized the same property previously seized by plaintiffs. They had prosecuted their suit to judgment, decreeing recovery of amount claimed and sustaining their attachment, with recognition of privilege as attaching creditors.

Eight other creditors of defendants, who had likewise first sued separately and attached the same property, filed similar interventions, making substantially the same allegations and asking decrees similar to that prayed for by Crawford, Jenkins & Booth.

The largest of the claims set up in the interventions was seven hundred and nineteen dollars and thirty cents; the smallest one hundred and ninety dollars and twenty-seven cents. They aggregated three thousand five hundred and twenty-two dollars and twenty-nine cents.

Plaintiffs answered the interventions, denying the fraud and conspiracy charged, declaring the good faith of their attachment and averring that the same was based on a valid indebtedness for the whole amount claimed.

Defendants answered the interventions denying the all egations of fraud, conspiracy and collusion.

They filed no answer to plaintiff's demaud, nor to the original suits of the intervenors.

There was judgment in plaintiffs favor against defendants for the amount sued for, sustaining their attachment, recognizing their privilege as attacking creditors and ordering the property seized to be sold to satisfy their demand, except in so far as the intervenors were concerned, who were, in the same decree, awarded judgment against plaintiffs, annulling and setting aside the attachment in so far as it affects the rights of the intervenors, and adjudging the latter to be paid by preference out of the proceeds of the attached property in the order of the levy of their respective writs.

The effect of this judgment is to settle first out of the proceeds of

the property the claims of the intervenors, and awarding to tiffs on their judgment the remainder.

The property attached was estimated in the sheriff's inven ten thousand one hundred and eighty-two dollars and eight cents.

Plaintiffs appeal, and in this court are met by motions to filed on behalf of each intervenor, on the ground that their tive judgments, ordering payment by preference out of the n the sheriff's hands are each below the appealable jurisdic this court

ON MOTION TO DISMISS.

The question presented by the motions must be consider tled adversely to the contention of intervenors.

Plaintiffs' debt and attachment were placed at issue by the ments of the interventions and thus constitute the matter i troversy. The amount claimed by plaintiffs at the institution suit imparts to it its character in relation to its susceptibility o the object of an appeal—that is to say, so far as regards the tiffs, all the *incidents* in the suit are subject to an appeal. H Lodwick, 8 La. 167; Lumber and Shingle Company vs. Hart, 1035; Picard & Weil vs. Wade, 30 An. 625; 31 An. 452; 24 A 21 An. 366; 2 An. 189.

The motion to dismiss is denied.

ON THE MERITS.

At the opening of the business season in the fall of 1896, d ants, Baer & Levy, found themselves insolvent.

The crops of the year in the section of country in which th business had failed and the prospect for collection of outst accounts was poor indeed. Realizing their situation and th inability to meet their obligations, they, for reasons unneces inquire into, made up their minds to favor H. & C. Newman, tiffs herein, who were their largest creditors. Accordingly, t their contrivance and at their dictation, H. B. Coyle, the ma clerk of the firm, wrote plaintiffs that he feared somethi "going crooked" in regard to the business, and advising t look after their interests. The pretence of this letter was was written by Coyle of his own motion and in the greatest

dence and secrecy, and because (to use his own language) "I owe this much to you." The facts are, as disclosed by the record, the idea of writing the letter originated with defendants, and Coyle would not have written it at all but for the instructions given him to do so.

On receipt of the letter plaintiffs dispatched David March, a trusted employee, to the scene of action, with directions to protect their interest. Within a few days the attachment was sued out. Before it was sued out he was in Monroe, where the senior member of the firm of defendants lived, and from there he went to the town of Bienville, where the business house of defendants was located.

At Bienville, the day before the attachment, he was closeted with the junior member of defendants' firm, who was in immediate charge of the business, and was given access to the books, from which he took a list of forty-two of the best customers of defendants—parties who owed them—and whom he caused to be garnisheed under the writ of attachment, which issued the next day, and under which the store was closed, and all the goods and property of defendants seized, including the books, accounts, notes and other papers of the firm. These books, notes, etc., were not in the store, but were at the residence of H. B. Coyle, who was instructed the day preceding the attachment by the junior member of defendants' firm, within the hearing and presence of David March, that when the sheriff came to attach the store, to look at the papers, and if they were sued out in the name of H. & C. Newman, then to deliver to him the notes and books, but if found to be in the name of any other creditor or creditors, not to turn them over. When the attachment was made the sheriff was accompanied by one of plaintiffs' attorneys, who directed him to seize the books, notes, etc., and told him they were at the residence of Coyle, thus showing the possession of knowledge by plaintiffs through their attorneys and agents, which could only have been derived from defendants or their employees. After seizing the stock of goods the sheriff repaired to the house of Coyle, accompanied by the latter, who there turned over to him the books, notes and other papers.

It is shown that the books had been buried in Coyle's garden by his cook, into whose custody they had been given. It is shown that for eight or ten days before the attachment it was known to defendants' employees and to mnny other persons in and around

Bienville that an attachment was imminent, and that the attac
creditors would be H. & C. Newman. Coyle knew of it two w
before and had obtained the information from defendants themsel
and it is further shown that in preparation for the attachm
defendants instructed Coyle to collect as much cotton and mone
possible and to close outstanding accounts by taking notes, w
were made payable some to A. Levy, one of defendants, other
Coyle himself, and others to the order of the makers and by t
endorsed. Also that the day prior to the attachment a settlem
was made with one of the debtors who owed a considerable sum
money, and who was perfectly solvent and responsible, by w
settlement, and as an inducement to make it, a discount of one
dred and fifty dollars was allowed. One item of this debtor's acc
was twelve dollars for the rent or hire of a horse belon
to defendants for the current year, on which a deduction of
dollars was made for the reason that *the horse was to be s*
before the year was out. In point of fact it was seized the next

Baer & Levy undoubtedly procured H. & C. Newman to at
them. A sifting of the voluminous evidence in the record l
inevitably to this conclusion.

It is impossible to escape the conviction that the purpose o
suit was, on one part, to give, and, on the other, to receive an u
advantage over the other creditors.

We might acquit plaintiffs themselves, on their testimony, of d
knowledge of this. They were away in New Orleans. But
agent, March, was on the ground with general instructions to ac
them and it is vain for him to deny connivance and collusion..

The abundant evidence of his complicity overwhelms his pro
as it does the denial of defendant Baer, whose testimony was t
under commission though residing within two hours by rail of
court house.

Defendant Levy did not go on the stand in the effort to excul
himself, or his firm, nor was he called to testify by plaintiffs th
within easy reach of the process of the court.

Plaintiffs can not escape the consequences of their agents' ac

It must be held that David March, representing them, conse
to the acts and doings of defendants in furtherance of their and
purpose to secure to plaintiffs an unfair advantage, and ultima
benefit defendants themselves by shielding the business from

pursuit of the other creditors, and, later, enabling them to handle it in the name of or through other parties.

The record teems with numerous other facts, incidents and circumstances that confirm this view, as well as show that defendants aided plaintiffs all through this litigation in the effort to repel the assault of intervenors.

This conduct of defendants, assented to by the representative of plaintiffs, who sought to turn it to their advantage and thereby secure the full settlement of their claim out of property which was the common pledge of all the creditors, was the doing of a thing reprobated by the law and may well form the subject of the revocatory action.

An insolvent debtor can not give in payment to one creditor to the prejudice of the others any other thing than the snm of money due. C. C. 2658; Taylor vs. Knox, 2 La. 16; Lovell vs. Payne, 30 An. 511.

The acts and doings of an insolvent debtor through which he seeks to give a fraudulent preference to one creditor over others are all the more to be reprobated when the machinery of the law is invoked to give the semblance of plausibility and propriety to such proceedings. Haas vs. Haas, 35 An. 885.

The law recognizes no distinction between a voluntary conveyance of property in fraud of creditors and such an alienation disguised under the forms of judicial proceedings.

It will annul and set aside any machination or contrivance by which this is sought to be done. C. C. 1969, 1970, 1983, 1984, 2658; Muse, Syndic, vs. Yarborough, 11 La. 530.

Neither the law nor the courts are to be used as instruments to work injustice. To attempt this is to aggravate the offending.

An attachment instigated by a debtor for the purpose of giving a favored creditor an advantage will be declared void and of no effect so far as other creditors are concerned who judicially complain of the same as a fraud on their rights. C. C. 1977.

Such attachment, however, will be maintained as between the fraudulent debtor and the favored creditor.

The conclusions of the court below in this case were the same as those herein announced.

In determining questions of fact tending to prove fraud, great weight is to be given to the opinion of the District Judge who saw

and heard the witnesses. Tatum vs. Collins, 43 An. 855; Com sion Co. vs. Bond & Williams, 44 An. 844.

Judgment affirmed.

NICHOLLS, C. J., takes no part, not being present at the argun

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No. 12,689.

STATE OF LOUISIANA vs. J. W. WIGGINS.

Not a fatal irregularity to wait until panel is completed before adminis oath to jurors, even though there be an adjournment over night, where accepted as jurors on the incomplete panel are kept in the custody sheriff and properly instructed not to speak of case, etc.

Signature of witness to his deposition, taken at preliminary examination b the judge, not required, nor that the testimony at such examination be down by the judge himself, if done under his supervision; nor is it nece that it be formally certified to by the judge, or clerk of court.

A witness can not be cross-examined as to a fact collateral and irrelevant issue merely for the purpose of contradicting him by other evidence should deny it, thereby to discredit his testimony.

A witness can not be contradicted without first laying a foundation theref calling his attention to the time, place and circumstances, as well as t parties to whom the alleged statement was made, and thus g ving hi opportunity of denying or explaining. And the doctrine holds good th the witness be absent or dead, and his previously taken deposition is of And it makes no difference that the contradictory statement was made the deposition was taken, or, if made before, was not known to the accus his counsel.

It is for the court, not the jury, to decide what is and is not admissible e dence, and to pass upon the sufficiency and effect of testimony offered t the foundation for the production and admission of testimony relating t merits of the case, taken at a previous trial, by a witness absent at the quent trial.

Before evidence of threats on part of deceased can be introduced, there mus showing of an overt act, or hostile demonstration.

An accused person not going on the stand as a witness is entitled to have the instructed that his declination of the privilege gives rise to no infe against him. And if he *goes* on the stand, the jury may properly be ch that in weighing his testimony they may take into account the fact of in in the result of the trial.

APPEAL from the Eighth Judicial District Court for the Paris Catahoula. *Dagg, J.*

M. J. Cunningham, Attorney General, and *D. N. Thompson*, Dis Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appelle

State vs. Wiggins.

John S. Boatner and *H. B. Taliaferro* for Defendant, Appellant.

Argued and submitted February 12, 1898.
Opinion handed down March 7, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The accused, indicted for murder, was convicted of manslaughter, and, from a sentence of twenty years at penal servitude, appeals.

Numerous bills of exception bring under review almost every ruling made by the court below in the progress of the trial.

Error is assigned to the admission of the testimony of one Joseph Briscar, a witness for the State, taken at the preliminary examination. Briscar was absent permanently from the State at the time of the final trial. This was first shown, and then his testimony at the preliminary examination offered. When this testimony was taken at the preliminary examination the accused was present with his counsel, and there was full opportunity for cross-examination.

Its offer at the trial was resisted on the grounds (1) that the testimony had not been reduced to writing, or taken down by the judge himself, sitting as a committing magistrate, but by another person; (2) that the deposition, or written testimony, was not properly authenticated, there being no certificate by the clerk, nor seal of the court attached.

The judge, in overruling the objections, annexed the deposition to the bill of exceptions. This deposition begins as follows: "The State of Louisiana vs. J. W. Wiggins. Preliminary examination held before the Hon. J. L. Dagg, Judge of the Eighth District Court, on November 16, 1896. The accused and his counsel, H. B. Taliaferro, and D. N. Thompson, District Attorney, being present. Joe Briscar, sworn for the State." Then follows his testimony, at the close of which is appended his signature and the jurat: "Sworn to and signed this 16th November, 1896. J. G. Taliaferro, clerk."

There was proof by the clerk of court at the trial, and before the deposition was received in evidence, that he had taken it down at the preliminary examination; that it was taken down in the presence of the judge, the accused and his counsel, under the direction and supervision of the judge, and that the witness had signed it in the

presence of all the parties, and his signature had at the time be attested by him (the clerk). This testimony of the clerk was object to by the accused on the ground that parol evidence was inadmissib to prove the verity of testimony taken at a preliminary examinatio or to prove anything beyond what is shown by the proceedin themselves, and error is assigned to the ruling of the judge admi ting it. The objection is without force. The witness was compete and the evidence legal.

On the showing made, which is really more than the law require the deposition of Briscar was properly admitted to be read to t jury. State vs. Allen, 37 La. An. 685.

The signature of the witness to the deposition is not required the statute (R. S. 1010) though attached in this case.

It is not essential that testimony at the preliminary examinatio of a person accused of crime should be taken down by the hand the judge himself. It suffices if it be done under his supervision a direction. Nor is it required to be formally certified to by the jud or clerk of court. State vs. Allen, 37 La. An. 685.

Error is assigned to the refusal of the court to permit the defen to propound this question to their witness, Crooks: "Do you not know whether Mr. Gillespie was drunk any time before t homicide within a period of two months." The purpose was to co tradict what Gillespie, a State witness, had said on cross-examin tion, to the effect that he had not taken a drink of wiskey for t months prior to the killing. The objection to this, that it was n competent to contradict the witness upon a matter not pertinent material to the issue, brought out by counsel for the accused on cro examination, was properly sustained.

It is well settled that a witness can not be cross-examined as any fact which is collateral and irrelevant to the issue merely f the purpose of contradicting him by other evidence if he shou deny it, thereby to discredit his testimony. 1 Greenleaf on Ev dence, Sec. 449; Hussey vs. State, 6 So. Rep. 425; 9 So. Rep. 44 19 So. Rep. 489; State vs. Spencer, 45 La. An. 1.

Error is assigned to the refusal to permit Boatner and Crooks, wi nesses for the defence, to testify that the State's witness, Brisca who was absent, but whose testimony taken at the preliminary exam ination had been offered and read to the jury, had made a contradi tory statement to that set forth in his deposition, in this, to-wi

that whereas he had testified he was in the room when the shot was fired which killed the deceased, he had said to or in the hearing of Boatner and Crooks that he was not in the room. Objection was made that the witness, Briscar, could not thus be contradicted without first laying a foundation therefor by calling his attention to the time, place and circumstances, as well as to the parties to whom such alleged statement was made, and thus giving the witness the opportunity of denying or explaining the same. It appears that neither the accused nor his counsel had been made aware of this conflicting statement of Briscar, alleged to have been uttered prior to the giving of his testimony at the preliminary examination, and this is strenuously urged in mitigation and avoidance of the effect of the failure to lay the foundation for discrediting him in the cross-examination at the preliminary trial.

This contention of the defence can not be sustained.

The authorities to the contrary are overwhelming.

The objection to this testimony, sustained by the court *a qua*, is well settled law. And the doctrine holds good though the witness be absent or dead. Starkie on Evi. 409, 410; Pruitt vs. State, 9 So. Rep. 406; Lowe vs. State, 5 So. Rep. 435; Sharp vs. Hicks (Ga.), 21 S. E. Rep. 208; Mattox vs. United States, 156 U. S. 237; A. and E. Ency. of Law, Vol. 29, pp. 787, 788; Stewart vs. State (Tex.), 26 S. W. Rep. 203; Knoblock's Crim. Dig. 437; State vs. Johnson, 35 La. An. 871: Ayres vs. Watson, 132 U. S. 394; Fletcher vs. Fletcher, 5 An. 406.

And the rule is not varied by the fact that the contradictory statement was made *after* the deposition was taken, *or, if made before, was not known to the accused or his counsel.* Ryan vs. People (Col.), 40 Pac. Rep. 777; Mattox vs. U. S., 156 U. S. 246.

No effort appears to have been made on part of the defence to obtain an examination of the witness Briscar in relation to his alleged contradictory statements, so as to bring the case within the rule of Fletcher vs. Henley, 13 La. An. 191.

Error is assigned to the refusal of the court to charge the jury that in the absence of any certificate of the clerk, or seal of the court to the deposition of the State's witness, Briscar, taken at the preliminary examination, and in the absence of any proof to the jury that the alleged deposition contained a true statement of the evidence of

the witness, the same should not be considered by the jury as le
evidence, but disregarded.

The ruling of the court was correct. Briscar's testimony was su
ciently authenticated and the showing ample that the deposition w
a true statement of his evidence at the preliminary trial.

It was properly admitted in evidence, and being in evidence t
jury could properly consider it. Nor was it essential that the e
dence of the witnesses, Taliaferro, Dosher and Spain, relati
exclusively to the question of the absence from the State of the w
ness Briscar, and to that of the proper taking down of his testimo
at the preliminary examination, with the purpose and view of layi
the foundation for the offering of the deposition, should have be
taken in the presence of the jury, or read to them. Such evide
had no relation whatever to the merits of the case; it simply esta
lished a predicate for the admission of Briscar's previous testimon
It is for the court, not the jury, to decide what is and is not adm
sible as evidence and to pass upon the sufficiency and effect of tes
mony offered to lay the foundation for the production and admissi
of testimony relating to the merits of the case, given at a pr
vious trial by a witness absent from the State at the subseque
trial. As the jury could not pass upon the testimony had it be
taken in their presence, the accused is without ground of compla
that it was taken out of their presence.

Besides, if this was proper matter of complaint and was prejudic
to defendant, he should have made objection at the time and pr
served his rights by a bill of exceptions.

This he did not do, but sought, long after the trial, to have t
minutes of court amended so as to show that the statements of t
witnesses named were made out of the presence of the jury; and
the refusal of the judge to do so, on the ground that it is not nece
sary for the minutes to contain a minute recital of all that tran
spires at the trial, takes a bill of exceptions. We do not fi
that the court erred in this, and the bill taken to the denial
motion to thus amend the minutes can not avail the accused, ev
though we should admit it as part of the transcript of the case, ha
ing been presented long after the case was docketed here.

Error is assigned to the ruling refusing to allow the accused to a
R. J. Lanier, a witness in his behalf, whether or not C. J. Hootse
who testified on behalf of the State, lives in open concubinage wi

a negro woman and has a family of children by her. The question and answer sought to be elicited were objected to on the ground that the proper foundation had not been laid for the introduction of such testimony; that the *general* character and reputation only of the witness could be inquired into; and that the question propounded was leading. These objections were well taken. 1 Greenleaf on Ev., Sec. 461; Wharton's Crim. Ev., Secs. 486, 487; Slidell, J., in State vs. Parker, 7 La. An. 89.

Error is assigned to the ruling not permitting the accused, while on the stand as a witness in his own behalf, to state that deceased threatened him personally a short time previous to the homicide.

The State objected upon the ground that the foundation for this had not been laid, no overt act, or hostile demonstration, having been shown. In his reasons for sustaining the objection, the judge says, among other things of the same purport, that: "All the facts established on the trial showed that there was no overt act, or hostile demonstration by the deceased, and, therefore, the foundation for the testimony offered had not been laid." It appears that all the testimony in the case, except that of the accused, negatived any act on part of the deceased in any way hostile or threatening.

Before evidence of threats on part of the deceased can be introduced there must be a showing of an overt act, or hostile demonstration. It rests with the trial judge to determine whether such showing has been sufficiently made as laying the foundation for the evidence, and his ruling in this regard will not be disturbed unless it appears that a just discretion has been abused.

Error is assigned to the charge of the judge in relation to the effect to be given by the jury to the evidence of the defendant. The accused had gone upon the stand as a witness in his own behalf. In the course of his charge the judge said: "While our statute permits parties accused of crime to testify in their own behalf, still the jurors are the judges of the credibility (creditableness) and weight of such testimony, and in determining such weight and creditability, the fact that such witnesses are interested in the result of the cause may be taken into account by the jury, and you may give the same such weight as you think it justly entitled to under all the circumstances of the case and in view of the interest of such witnesses."

It is urged that this language was improper and calculated to

impair the evidence of the accused in his own behalf with the

A careful consideration of the question here raised ends in a clusion adverse to the contention of defendant.

An accused person who does not go on the stand is entitl have the judge charge the jury that the fact that he declin avail himself of the privilege gives rise to no inference ag him. State vs. Walsh, 44 An. 1134; Wharton Crim. Ev., p. Act 29 of 1886.

So, too, if he goes on the stand as a witness the judge may ch the jury that in weighing his testimony they are entitled to into account the fact of interest in the result of the trial. Am Eng. Ency. of Law, Vol. 29, p. 677; Pruitt vs. State, 9 So. Rep. Reagan vs. United States, 157 U. S. 301; State vs. Tarter, 87 53; People vs. Resh (Mich.), 65 N. W. 99; State vs. Fiske, 63 C 388; Sackett's Instructions to Juries, Secs. 20, 21, p. 43.

Nor is such instruction prejudicial error because it singles ou accused from the other witnesses in the case. No other wi occupied the same position as did the accused, and the instruc therefore, does not apply to him a test of credibility which c have been applied to others. Doyle vs. People (Ill.), 35 N. E.

This was, in effect, charging one or more of the general rul evidence, viz.: That the motive or *bias* of a witness, his int in the outcome of the trial, may affect, more or less, his evid for credibility, and that the jury are the judges of the effect and v the weight and sufficiency, of the evidence addressed to them.

The statute (Act 29 of 1886) specifically requires the judg charge the jury that such testimony shall be weighed and consid according to the general rules of evidence. It was intende course, that the judge should not merely say to the jury, "You to weigh and consider the testimony of the accused according to general rules of evidence," but should explain to them what are particular general rules of evidence that are applicable to t mony given by an accused person. This is what the judge in instant case did. This court said in State vs. Walsh, *supra*, that " weight of the testimony (of the accused) is left to the ju Wharton, Crim. Ev., Secs. 434, 436, 439. If it is left to the jur is proper for the judge to tell them so.

The words "but all testimony shall be weighed and consid according to the general rules of evidence," in the concluding ch

of Sec. 2 of the act of 1886, have reference, clearly, *to all testimony* given by accused persons under the permission of the act.

The judge is to charge that all such evidence—*i. e.*, that given by defendants in criminal causes, "shall be weighed," etc. It was not necessary to use that language as to the testimony of *other witnesses* in a case, for it has always been the law that *their* evidence is to be weighed and considered by the general rules of evidence. This demonstrates that the lawmaker intended to apply the language used in the statute to the testimony of accused persons. It is with reference to accused persons only that Sec. 2 of the act speaks.

This disposes of the objections presented through bills of exception, and leaves only to be considered error assigned as appearing on the face of the record in this, to-wit: that nine of the jurors called on the first day of the trial were accepted after examination on their *voir dire;* that the regular *venire* being then exhausted *tales* jurors were ordered summoned to complete the panel; and that the court then adjourned until the next day without having first caused the nine persons accepted as jurors *to be sworn as such.*

It is urged that it was the duty of the court before adjournment and before anything else was done in the case, and without waiting to compiete the panel, to swear in the nine jurors.

It is shown by the record that before adjourning for the day, the nine persons accepted as jurors were put in charge of the sheriff and kept together in custody, the court first instructing them not to talk to each other, nor to permit any other person to talk with them about the case; that the next day the panel was completed by the selection and acceptance of three more jurors from the *tales* jurors summoned; and that, thereupon, the oath prescribed by law was administered to the jurors and the trial was proceeded with.

We have been referred to no requirement of statute and to no authority sustaining the contention of defendant, that what was done or not done, in the respect mentioned, and which is the common practice, is fatal irregularity, even if the same may be brought to our attention without a bill of exceptions seasonably taken thereto. Nor has a consideration of the point presented convinced us that error was therein committed to the prejudice of the accused, such as justifies the reversal of the verdict and sentence appealed from.

Judgment affirmed.

NICHOLLS, C. J., takes no part.

No. 12,685.

H. T. SIMON-GREGORY DRY GOODS COMPANY ET ALS. VS. H
NEWMAN ET ALS.

While fraud is never to be presumed, courts of justice "recognize the c
concealment in which it shrouds its devious practices, and the diffic
tracing it by direct proof."

Hence, they are warranted in giving due weight to all circumstances indica
existence, and when such circumstances and the reasonable inferences,
tions and conclusions to be drawn from facts proven are of a character t
conviction on the mind, they are justified in finding fraud.

APPEAL from the Second Judicial District Court for the Par
Bienville. *Watkins, J.*

Dorman, Reynolds & Dormán for Plaintiffs, Appellees.

E. T. Lamkin and *Percy Roberts & Boatner* for Defendants, A
lants.

Argued and submitted January 10, 1898.
Opinion handed down May 7, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The facts and issues of this case are ide
with those presented by the interventions in Suit No. 12,518 o
docket of this court, entitled H. & C. Newman vs. Baer & L
Crawford, Jenkins and Booth *et als.*, intervenors, decided
December, 1897, term.

This is a direct attack by certain creditors on the attachmen
out by H. & C. Newman against Baer & Levy in the case menti
which attachment was therein attacked by certain other cred
who made themselves parties by intervention.

Some additional testimony was, in this case, adduced on beh
the complaining creditors, which but serves to strengthen the
as presented in the earlier suit.

The conclusion arrived at in the first case, after a thorou
careful consideration, was that the judgment appealed from,
was in favor of the intervenors, was correct and should be aff

It was held, substantially, that a clear case had been made out of conspiracy, or fraudulent and collusive agreement and understanding, consummated between Baer & Levy and the agents of H. & C. Newman, the object and purpose of which was the attachment of all the property of the insolvent firm of Baer & Levy, and the garnishment of their best customers and debtors, for the twofold purpose (1) of securing payment of the Newman claim through an unfair and fraudulent preference over the other creditors, exerted under cover of one of the writs of the law; and (2) of shielding the property from the pursuit of the other creditors with the view, eventually, of enabling Baer & Levy to control and utilize and derive the benefit of the same through the use of either the name of H. & C. Newman, or that of some other person.

The case now at bar presents alike the duty and opportunity of a re-examination of the questions at issue and decided in the first case, and we rise from this re-examination with our convictions fortified as to the correctness and justice of the decree therein rendered.

Judicial records will be searched in vain for a case wherein the evidence discloses a more bold attempt to give, on the part of the debtor, and to derive, on part of a favored creditor, a fraudulent preference under the forms of the law. Nor can we call to mind a case in which the testimony exposes more thoroughly an effort on the part of an insolvent debtor to cover up and shield from his other creditors his property and assets, using for the purpose the name and claim of a conniving creditor, who, by means of the same transaction, is to obtain payment in full of the amount due him, while his less fortunate co-creditors are despoiled.

We do not deem it necessary, in this opinion, to review anew the entire evidence establishing the collusive and fraudulent agreement and action by which this was done.

Inviting reference to the opinion of the court in the first case, this opinion is intended as a supplement thereof.

As part of the fraudulent understanding between the representatives of the Newmans and Baer & Levy, it should be stated that the goods of the latter seized under the Newman attachment, and which were valued in the sheriff's inventory at seven thousand four hundred and twenty-seven dollars and sixty-five cents, were forced to sale at public auction (with the exception of a small lot) by the plaintiffs in that suit, on the allegation that they were of a perisha-

ble nature, and were sold in block and bought in by the agent o
Newmans for three thousand two hundred dollars. Baer &
assented or acquiesced in this sale *in globo*, which prevented
property from bringing anything like its true value, though a vi
ous protest against the sale in that way, and a demand tha
goods be sold in itemized lots, was made on behalf of the
creditors.

It was in the power of Baer & Levy to have demanded tha
effects seized be sold separately. C. P. 261, 676.

The grounds of attachment existing when the Newmans sue
their writ must be held sufficient as between Baer & Levy and
C. Newman, *for the reason* that Baer & Levy have not contested
same, and plaintiffs herein have no interest to set aside the att
ment except to the extent that it militates against their rights.
inasmuch as the said grounds of attachment were part and par
the collusive and fraudulent agreement and understanding bet
Baer & Levy and the agents of H. & C. Newman, it must be
that the same were *not* sufficient to sustain the attachment so f
the complaining creditors are concerned.

It is urged on behalf of H. & C. Newman that no weight or c
should be given to the testimony of H. B. Coyle, who was call
a witness for the complaining creditors.

Coyle was the managing clerk of Baer & Levy and had know
of the conspiracy concocted between them and the agents of H.
Newman, out of which was evolved the attachment complained

That part of the plan by which the stock of goods attached sh
after being bought in by H. & C. Newman, be turned over to
& Levy to be utilized for their benefit under cover of the nat
another—in the continuation of which business Coyle was
employed—had failed, no doubt through the attitude of the
creditors, who threatened to take and did take action to annu
attachment for fraud. Coyle was, therefore, out of the employ
of Baer & Levy, had no longer any connection with them, an
motive to conceal what he knew, or to keep back the truth in re
to the attachment and the fraudulent collusion which broug
about.

He had a claim for three hundred and twenty-five dollars for
hire, which rested as a privilege on the goods seized and primed
of the attaching creditors. He desired the Newmans to antic

the payment of this amount, pay it themselves and hold it against the stock of goods which they had bought in at the sheriff's sale, the proceeds of which, while nominally in the sheriff's hands, were really retained in their own hands by an arrangment made with the sheriff.

The evidence discloses that David March, agent of H. & C. Newman, arranged with I. Baer, a merchant at Monroe, and a friend and customer of the Newmans, to pay Coyle $100 on this claim, and Baer did pay him in money and merchandise $80 on it. Angered, no doubt, because of the delay in realizing on the remainder, and because of the dishonor of his draft on I. Baer for same, drawn by direction of A. Levy, of the firm of Baer & Levy, Coyle's relations with Baer & Levy and the Newmans ceased to be cordial, or, perhaps, friendly, and in this condition of mind he revealed in conversation enough to the attorneys for the complaining creditors to convince them he would prove a valuable witness for their side of the controversy. They determined, therefore, to subpœna him, but it would be some time before court would meet, and Coyle, it appears, had made arrangements to remove to Wills Point, Texas, and go into business there and would shortly leave the parish. To the request to remain within reach of the process of the court until April, when court would convene, he replied he could not, as he must do something to support his family and was going to Texas for the purpose. Whereupon an offer was made to him, on behalf of the complaining creditors, to compensate him for the time he would lose by remaining in the parish and subjecting himself to the process of the court as a witness in the case. It was several months before court would sit and the offer was to pay him three hundred dollars, part cash and the remainder by way of the cancellation of a small judgment held against him. He accepted this offer and agreed to remain in the parish and did so. He was subpœnaed and testified. The offer covered his remaining in the parish only. It was not predicated on the kind or character of evidence he was to give. He admits that prior to this offer he had proposed to the Newmans that if they would pay, or advance the amount due him for clerk hire he would be gone from the State, and would not be in the parish to testify when the case was called for trial, and Newman, it seems, had written him referring him to I. Baer, and stating that their agent, March, would instruct Baer to make "arrangements to suit." While part of the amount was paid by Baer, as we have seen,

definite "arrangements to suit," as to the balance due, were del
so long that meanwhile the agreement was consummated wit
complaining creditors to remain in the parish and appear
witness.

While the connection of Coyle with the transactions under re
his attitude toward the parties thereto, and his devious way
declarations in regard to his appearance or non-appearance
witness, can neither be endorsed nor commended, the trial judge
saw and heard him testify, and who knew him, believed the
ments he made on the witness stand, and so do we.

Besides, we find in the record abundant corroboration of mo
what he testified to.

It is insisted on behalf of defendants herein that the doc
announced in this and the preceding case of Newman vs. B
Levy is in conflict with the decisions of this court in the Ra
case, 45 La. An. 58, and the Claflin case, 47 La. An. 1447. We
otherwise. In those cases the evidence showed the grounds
which the attachments rested were not the result of combin
collusion and fraud between the attaching creditors and the de
but that the plaintiff's right to attach arose from acts of the d
with which neither the plaintiffs, their agents or represents
were in any manner connected.

This being so, it was held that the *consenting* attitude of the d
did not vitiate for fraud an attachment good upon other and
pendent and non-collusive grounds.

In the instant case we do not think the facts unconnected wit
Newmans, or their representatives, warranted an attach
March, the agent of Newman, gives as the ground for attach
the shipment by Baer & Levy of cotton to a party in Monroe
the firm was under pledge to ship all cotton to H. & C. Newma
was on this information that he sued out the writ, and he sa
acquired this knowledge *the day before* the attachment from Le
the firm of Baer & Levy, while in the store of the firm in the
of Bienville.

In the first place this shipment of cotton to Monroe was n
itself, sufficient grounds for attachment. Winter vs. Davis, 4
An. 260.

In the second place, what cotton Baer & Levy shipped to M
was consigned to I. Baer, the brother of L. Baer, of Baer &

I. Baer was not a cotton factor, or a dealer in cotton, but a retail merchant. He was the close friend of H. & C. Newman, a large customer of theirs, and represented them in business matters at Monroe, and is the same "I. Baer," who, shortly after the attachment, under instructions from the Newmans and their agent, March, paid H. B. Coyle part of the amount due Coyle for clerk hire while in the employment of Baer & Levy.

While fraud is never to be presumed, courts do "recognize the cunning concealment in which it shrouds its devious practices and the difficulty of tracing it by direct proof," and giving due weight to all circumstances surrounding the shipment of this cotton to I. Baer, and the facts bearing on the same disclosed by the record, the conviction can not be escaped that it was consigned to him by prearrangement between the parties, and that the said I. Baer, in all likelihood, accounted for it or its proceeds to the Newmans.

In the third place, the testimony shows the attachment had been arranged for before March ever went to Bienville to worm out of Levy the alleged secret of the shipment of cotton to Monroe. It appears that the attorneys had been engaged before he even arrived at Monroe, where he stopped before going to Bienville. One of them, who resided at Bienville, had been wired by the other, who lived at Monroe, to come to Monroe two or three days before the attachment was run, and he went. L. Baer, senior member of Baer & Levy, lived at Monroe and was there when the attorney arrived from Bienville and March arrived from New Orleans, and it can not be doubted that these parties, then and there, arranged definitely for the attachment, already determined on, and the going of March to Bienville the next day was really an unimportant step in the programme. As affording a glimpse at the hidden features of this visage of fraud, it might be mentioned that March, while at Bienville, had no conversation with H. B. Coyle. Yet he was sent to Bienville *to investigate* on the strength of Coyle's letter to his employers. He did not seek further information from the writer of the letter, though he was in the store of Baer & Levy while March was there. There is no need to state the inference to be drawn from this. It readily appears.

Counsel for the Newmans urge as grounds for the attachment that Baer & Levy were converting their property into cash and negotiable

assets with the view of placing the same beyond the reach of t creditors, or giving an unfair preference to some of them.

March, who, as Newman's agent, made the oath for attachm puts it on entirely different grounds, and well he might. After hav their clerk, Coyle, to virtually notify H. & C. Newman it was tim attach, Baer & Levy instructed Coyle to proceed to close up as m accounts as possible by notes, and the notes so taken w entrusted to Coyle's keeping and held for easy seizure under attachment. They were at once turned over to the sheriff w he seized for Newman, the latter's attorney telling him they wer Coyle's house and to go there and taken possession of them. taking of these notes, instead of furnishing Newman with l grounds to attach, must, in the view we take of the case, be cou ered part of the collusive understanding and agreement by which way was prepared for the attachment.

Taking the notes to turn over to Newman might have l grounds for other creditors to attach, but not for Newman, for w benefit they were taken and who actually received them through sheriff's seizure.

The justification of the attachments subsequently sued out by other creditors was the preference shown or attempted to be sh the Newmans.

Judgment affirmed.

No. 12,709.

STATE OF LOUISIANA VS. OVIDE MIQUEZ.

APPEAL from the Seventeenth Judicial District Court for Parish of Vermilion. *De Baillon, J.*

M. J. Cunningham, Attorney General, and *M. T. Gordy, Jr.*, trict Attorney (*P. A. Simmons, Jr.*, of Counsel), for Pla Appellee.

A. & Chas. Fontelieu for Defendant, Appellant

briefs January 29, 1898.
ed down February 7, 1898.
fused March 7, 1898.

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of the court was delivered by
. J. Defendant was prosecuted for burglary and
ted, and from a sentence of two years at penal servi-

of the refusal of the court *a qua* to quash the indict-
to that effect filed.
identical with that of the State vs. Dartez and
ebert and Landry, which were appeals contempora-
present one and from the same parish, being Nos.
10 on the docket of this court, opinions in which are
ith this one.
ons assigned in those cases, the judgment herein
s *affirmed.*

No. 12,848.

GEORGE F. SCHMINKE VS. HON. T. C. W. ELLIS, JUDGE.

ition to restrain proceedings claimed to be in violation of the
eal will not issue when the judgment from which the appeal is
ed.

TION for Writs of *Certiorari* and Prohibition.

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er, Jr., for Relator.

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n and *Harold W. Newman* for Respondents.

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briefs May 21, 1898.
ed down May 30, 1898.

The opinion of the court was delivered by

MILLER, J. Relator applies for the writs of *certiorari* and pro bition to restrain proceedings he claims to be in violation of his s pensive appeal, refusing a respite to respondent's firm, and appoi ing one of the firm liquidator.

In view of the fact that the litigation in which the suspens appeal was taken has been ended by the judgments in the suits Schminke & Newman vs. Their Creditors, and Edgar Newman George F. Schminke, decided to-day, it would serve no purpose issue the writs even if the relator had any claim to the relief sou

It is therefore ordered, adjudged and decreed that our for order on this application be set aside, and it is now ordered that re tor's application be denied at his costs.

No. 12,722.

CITY OF LAKE CHARLES ET ALS. VS. POLICE JURY OF CALCASIE PARISH ET AL.

The police jury in the exercise of the power of taxation with which it is clo under the Constitution and laws, met by the claim of a municipal corpora that part of the parish has been detached and added to the municipal cor ation, is not suspended in the exercise of the power of taxation by such c of the city, but may levy the parochial taxation and thus present for jud determination the conflicting pretensions of the city. Constitution, Arts 250 *et seq.*; Act 1892, No. 105; 47 An. 589.

The prescription of personal actions can not be applied to deprive a political poration of the function of taxation vested in it by the Constitution, and w the corporation can not surrender.

APPEAL from the Twelfth Judicial District Court for the Pa of Calcasieu. *Read, J.*

J. D. Cline, City Attorney (*Paul A. Sompayrac* of Counsel), Plaintiffs, Appellants.

A. P. Mitchell, District Attorney, *E. L. Wells* and *Williams & Su* for Defendants, Appellees.

Argued and submitted February 9, 1898.
Opinion handed down March 21, 1898.

The opinion of the court was delivered by

MILLER, J. The appeal is by the plaintiff from the judgment dismissing its suit to enjoin the defendants from collecting parish taxes within the territory claimed to have become part of the city of Lake Charles under appropriate proceedings for the annexation of such territory.

In 1884, proceedings were conducted under the Act No. 110 of 1880 for the extension of the limits of the city of Lake Charles so as to take in the territory within which the police jury now asserts the right to levy parish taxes. The annexation was deemed accomplished under the act of 1880. But this court reached the conclusion in 1895 that the act of 1882 conferred no warrant for the annexation of territory to the area of towns and cities. Police Jury vs. Shayot, 47 An. 589. Yet acting on the theory of the validity of the proceedings in 1884, the city of Lake Charles from and after that date seems to have levied taxes on the territory in controversy, extended streets through it, and exerted within the territory the functions of municipal government. In 1892, the Legislature enacted the statute to authorize the extension of the limits of cities and towns. Act No. 105, Session Acts, page 105. In 1894, proceedings were renewed by the City for the inclusion within its limits of the territory sought to be added in 1884, but it is charged by the police jury of the parish of Calcasieu, from which the territory is taken, that the proceedings under the act of 1892 are wholly void, because of non-observance of the requisites of the act. In this condition the police jury, in 1897, directed the assessment of parish taxes on all property in the area claimed to have been brought within the city limits by the annexation proceedings. Thereupon, the City instituted this suit to enjoin the police jury from causing to be assessed for taxation and from enforcing taxation on the property within that area.

The petition substantially charges that the parish authorities are seeking to collect taxes on property within the limits of Lake Charles, not subject to parochial taxation, and asks for an injunction against this alleged usurpation of authority by the police jury. Omitting exceptions unnecessary to be considered, the defence to

the suit is substantially, the invalidity of the proceedings by w
the City claims the addition to its limits; hence it is insisted, th
puted territory, part of the parish of Calcasieu, is now as it has
at all times, subject to the taxing power of the police jury, and
defences prevailed in the lower court.

The argument for the City insists that the act of 1892, autho
the extension of the limits of cities and towns, the presum
is in favor of the validity of the proceedings under that act
that the power of the City to exert jurisdiction within the ter
in controversy can not be collaterally attacked by the police ju
it seeks to do in this suit. The authorities cited in this conne
have had our consideration. Under the facts of this case we
reached the conclusion, the taxpayer can contest by injunctio
levy of taxes asserted or derived from proceedings to annex
tory to cities and towns. To that decision we refer. Dees vs.
of Lake Charles, just decided.

We have in this case, as plaintiff, the police jury of Calcas
portion of which is the territory claimed to have been add
Lake Charles. The police jury clothed by the Constitution and
with the power of taxation, in the exercise of that power is m
the injunction of Lake Charles, and the assertion that part o
parish has been withdrawn from the jurisdiction of the jury
added to the city by proceedings to which the jury was no p
and claimed to have been consummated under the act of
Can we hold that the jury is excluded from the power of tax
with which it is vested, merely because of this claim on the
of the city, or at least that the police jury must first resort to a
action to test the validity of the annexation proceedings on w
the City relies, or that the jury must seek the aid of a suit by
Attorney General to determine that question before the
can exert its functions. One phase to which the argument lea
that the citizen may be subjected to tax levies both by the City
by the jury. Of course, we do not not deal with that limited
current power of taxation that may be exerted both by city
parish within city limits, but with that taxation that must be e
sive in the city or parish. The same line of argument that u
takes to deny to the jury any right to question the power of the
to levy taxes equally applies to the citizen. He may be conde
to pay to the jury and when the conflicting right to tax is ass

by the City he is not to be allowed to call its rights in question. We put this consequence of maintaining the theory of the plaintiff's case merely as illustrative. We have considered the subject carefully, and have given the reasoning in the Dees case on which we found the conclusion that under the act of 1892 the citizen can question the validity of the annexation proceedings. We do not feel at liberty to apply a different rule to the police jury. We can not hold when the jury in the exercise of its powers encounters the claim of a city or town that part of the parish has been detached for all purposes of parochial taxation and brought within the limits of the City, that the parish must desist, accept the pretensions of the City, or invoke the other method of procedure the argument supposes to be necessary. At least, we hold no such procedure is necessary under the circumstances shown by the record of a municipal corporation claiming jurisdiction for years over the disputed territory with absolutely no law to sustain the claim, and when, as it seems to us, the attempt under the act of 1892 to accomplish the annexation treated the act as directing curative proceedings, though it had no such purpose. Instead of the preliminary petition required by the act, there is a petition signed by parties residing in the city as well as by those residing in the territory to be added, with no satisfactory proof that these last, *i. e.*, the number required, ever petitioned for the annexation, and instead of two elections separately held, there is, without the slightest warrant in the act, an election held of the electors of the city and of the electors of the territory sought to be annexed. As we read the record there is no adequate proof of a majority vote for the annexation, cast by the electors of the territory to be added; nor of the expression of the voters in the city, if indeed the method of voting admitted of any such proof. It seems to us that the contrast between the proceeding in 1884 and the requisites of the act of 1892 is too marked to admit the least sanction under that act to the attempt at annexation in 1894. In our view the city has failed to sustain its demand. The Act No. 110 of 1880 gave no authority for the asserted extension. The act of 1892 was on the statute book when the proceedings for the extension were concluded at the latter period, but as already indicated there was no compliance with the act.

The city has pleaded the prescription of ten years, and the closely connected defence of estoppel is pleaded, both defences founded on

the administration of the city over the disputed territory. W
not apply prescription to deprive a political corporation of g
mental functions incapable, in our view, of surrender. The
books and decisions of other States in which cases have
under statutes like ours recognize, under certain circumst
an estoppel of any question by the individual of the
ence of the municipal government under which he lives,
which he has been benefited. We reach the conclusion in De
Lake Charles there is no basis in that case for the estoppel
taxpayer, and in our examination we have given full weight
authorities cited by the city. We can not find the basis to hol
the police jury is estopped, or could by any act or conduct pr
itself from exerting its functions of government, that is to say
levying the taxes for the present and future, but we reser
express no opinion as to the right of the jury to assert at this
the power of taxation of property in the disputed territory th
has not exercised for some years.

We have given careful attention to this and that of Dees
the city. If we have not dealt specially with each phase
argument and authorities cited on behalf of the city, none th
the case, in all its aspects, has had our full consideration,
have deemed the decision controlled by the views expressed i
opinion. We are deeply sensible of the inconveniences tha
result, but find no escape from remitting the city to appropriat
ceedings for the annexation sought in 1884, without any law
and again attempting in 1894, without conforming to the req
exacted by the act of 1892. Our decision will at least car
compensating benefit of settling a question of embarrassment
parties in the past, and apt to cause trouble in the future,
adjusted in the mode open to the city of complying with the
1892.

It is therefore ordered, adjudged and decreed that the judgm
the lower court be affirmed with costs.

WATKINS, J., in a written opinion *dissents*.

No. 12,462.

50 351
112 1068
113 837

GEORGE W. TAYLOR VS. ALMANDA & BRO.

The court again affirms that the amount claimed by plaintiff is the test of jurisdiction of this court of the incidental demands. 11 La. R. 463; 8 La. 167.

The plaintiff suing on the commutative contract can recover for partial performance, but the measure of recovery is necessarily not the contract price, but the benefit the proof shows the defendant derived from the partial performance. 3 La. 1; 4 La. 465; 7 La. 134.

An attachment will not lie of funds brought within this jurisdiction of this court to pay the debt binding on the attaching creditor and which payment he seeks to defeat by his attachment.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

E. W. Huntington and *Edward Barrett* for Plaintiff, Appellant.

Lamar C. Quintero for Defendants and Appellees.

Wm. C. Dufour and *Geo. W. Moore* for A. G. Slangerup, Intervenor, Appellee.

Dart & Kernan for Thomas Killeen, Intervenor, Appellee.

Chas. J. Théard and *John Clegg* for Liquidators of the Bank of Commerce, Intervenors, Appellees.

John Dymond, Jr., for Barthelemy, Intervenor, Appellee.

Submitted on briefs December 3, 1897.
Opinion handed down December 28, 1897.
Rehearing refused April 4, 1898.

The opinion of the court was delivered by

MILLER, J. The appeal is by plaintiff from the judgment dismissing his suit and accompanying attachment for the amounts claimed to be due him on his contract to furnish defendants with a sugar mill and

appurtenances, and for extra or additional machinery he allege
obtained from him by defendants.

The contract made by W. R. Taylor, "agent," with defen
provides that the mill on the Rosehill plantation is purc
by them from Taylor; is by him to be shipped to defen
in Mexico, the price, ten thousand dollars, to be paid one-half
when the contract is signed, the residue in equal instalments, o
sixty days and the other when the mill is erected on defend
plantation, Taylor to provide the engineer for the erection o
mill, and defendants to furnish certain materials and fulfil
obligations incident to the putting up of the mill. The defen
supposed Taylor was the owner of the mill, but it transpired
ward he was not, but had an agreement to buy from the own
the plantation on which the mill was placed. The defendants
plained of delay, in executing the contract, and with greater r
as they conceived because on the faith of it they had paid
Taylor the greater portion of the ten thousand dollars. When de
ant learned not only Taylor was not the owner of the mill, but
ing an arrangement to buy it had not completed its purchase,
became alarmed, not only for their crop dependent on the
for which they had contracted, but apprehensive of the loss o
large amount of their money paid W. R. Taylor in advance o
delivery. Thereupon, defendants employed an attorney, bro
about a meeting of W. R. Taylor and the mill owner anxious to
but unwilling to deliver the mill without payment of the price
this action of defendants and their vigorous demand that the
owner should be paid at once by Taylor, and for the fulfilment
contract to ship the mill, resulted in his payment for the mill an
shipment to defendants late in the fall and more than ninety
after his contract. The mill appurtenances included in Taylor's
tract were to be made by the machinist employed by Taylor
defendants about the same time they ascertained the cause o
delay in delivering the mill, learned also that the machinist not
would not deliver the appurtenances without payment. Theret
after some discussion and an effort to obtain the appurtenances
defendants were compelled to give their notes to the machinis
the amount due by Taylor on his contract with the machinist.
all this action on the part of defendants in respect to the mil
machinery Taylor had bound himself to furnish, the property

finally shipped to defendants' plantation in Mexico. Defendants have provided the funds here to pay their notes, but Taylor through his agent in Mexico urging defendants to remit the funds for payment of the notes and informed as soon as it was made of the bank to which the money was sent, attached the funds when they reached here and thus seeks to defeat their application to pay the notes. This brought forward the note holders to resist his pretensions by their interventions in this case. They aver their right to the funds under the facts and the instructions to the bank accompanying the remittance, and they aver that W. R. Taylor and his principal are estopped from contesting the application of the remittance to pay the notes. The controversy thus presents the issues of the right of plaintiff to recover on his contract with defendants, and whether the plaintiff can attach the funds remitted under the circumstances shown by the record to pay the debt Taylor was bound to pay and for which defendants by his default had to provide.

The plaintiff in his petition charges defendants with the contract price, ten thousand dollars, and with items for alleged extras claimed to have been furnished defendants; he gives them credit for seven thousand two hundred dollars, paid by them and for the notes they gave, and sues for the residue, two thousand four hundred dollars, he alleges is due. The defendants deny the execution of the contract; allege there was no contract with plaintiff, that he is merely interposed by the real party to the contract, W. R. Taylor; there is the averment of losses sustained by defendants by the non-execution of the contract on which plaintiff sues, and the defendants reconvening claim heavy damages. The note holders in their interventions allege the circumstances under which defendants issued their notes and remitted the funds for their payment, aver their right to the funds and that plaintiff is estopped by his conduct from levying on the funds under his attachment.

There is a motion to dismiss plaintiff's appeal, and in support of this dismissal it is urged the amount involved is below the jurisdictional limit of this court. The motion overlooks the amount claimed by plaintiff in excess of two thousand dollars, which carries jurisdiction of the incidental demands. Buckner & Robinson vs. Baker, 11 La. 462; Hart vs. Lodwick, 8 La. 167; Colt vs. O'Callaghan, 2 An. 189; Guion vs. Brown, 6 An. 112.

A great portion of the voluminous testimony put into this record

is devoted to the propositions that defendants had no contract
plaintiff, but dealt with W. R. Taylor, and that neither owned
mill stipulated by the contract. All this testimony and the discu
on these points may be laid out of view. One may contra
his own name for another, who may sue to enforce it. Defend
are without interest to inquire into the relations between pla
and W. R. Taylor, which it is claimed accounts for the contra
Taylor's name, described as "agent." It is enough for defend
that, whether sued by Taylor or his alleged principal, they
deprived of no defence. The fact that at the date of the con
Taylor did not own the mill, had agreed to buy it for a price
than the defendants were to pay, can exert no influence on
main issue whether he executed his contract to deliver the mi
defendants.

The plaintiff who sues to enforce the commutative contract
show performance. Taylor's obligation was to deliver, *i. e.*, shi
mill and appurtenances. Defendants were to pay part cash and
residue in sixty days, and the final payment when the mill
erected. It is claimed by plaintiff there was no default becaus
mill had to be taken down and prepared for shipment on the p
tation. That it seems to us furnishes no answer to Taylor's e
omission to pay for the mill he had bound himself to furnish
defendants' action compelled that payment by him; nor is it les
pressive on this branch of the case that in the long interval fro
date of the contract to the compelled payment, the mill o
refusing delivery without payment, was under the impressio
delay in paying him was owing to defendants' failure in their
ments to Taylor, when in point of fact he had received a sum
defendant in excess of the requirement of their contract. Obta
their money on the faith of his contract, and not paying a doll
the mill until their action brought forward the mill owner, and
strained payment to him, exposed defendants not only to the ri
serious injury to their crop dependent on the mill, but to the lo
their money in his hands, and to serious annoyance and tro
All this we must consider in connection with the issue he tende
the faithful execution of his contract. He stands in a still mor
favorable attitude in respect to the mill appurtenances. All h
toward executing that part of his contract was to employ the
chinist. He says he paid him, but in this he is directly contrad

by the testimony of the machinist, if we do not err in our appreciation of that testimony. It is quite certain Taylor never obtained the machinery, nor made the slightest effort to get it. It is equally certain the machinist would not deliver without payment, and defendants had to give their notes afterward, providing money for the payment, to get the machinery included in his contract and indispensable to the mill. In his account he credits defendants with the notes, not at all consistent with his attempt to seize their money forwarded to pay the notes. But the credit is not the equivalent of performance of his contract. In our opinion the plaintiff fails on the issue of performance of his contract.

Our attention has been directed to the line of authorities that entitles the plaintiff to some recovery when he shows partial performance of the commutative contract. Our jurisprudence on the subject is defined. When there is a partial performance the recovery is not the contract price, but is measured by the benefit of the part performance. Loreau vs. Declouet, 8 La. 1; Etie vs. Sparks, 4 La. 465; Dyer vs. Seals, 7 La. 134. If it is claimed that the shipment of the mill, brought about by defendants' efforts to avert the serious consequences with which defendants were menaced by the course of W. R. Taylor, is part performance, we are confronted by the fact that defendants have paid out on the contract seven thousand two hundred and thirty-seven dollars, and that their notes are extant for one thousand seven hundred and seventy-five dollars for the machinery. This view omits all consideration of trouble and expense of defendants, well calculated to grow out of the course of W. R. Taylor in reference to this contract. We fail to find in the record the basis of benefit derived by defendant, on which we can adjudge defendants liable over and above the amounts paid and that for which they have become liable by reason of the contract.

The conventional demand of the defendants is not pressed. The demand of plaintiff for machinery beyond that embraced in his contract is not exhibited by the testimony, not at least with the certainty on which we can have any judgment. It appears that in an effort to adjust the claim for this extra machinery it was proposed to award five hundred dollars for that claim. It does not appear that defendants assented to it, and plaintiff does not claim the award. In our view on this part of the case there should be a judgment of non-suit.

To maintain the attachment of the funds levied on in this c
is urged the note holders for whom defendants made the remi
acquired no right to the funds merely by the remittance.
vs. Cockburn, 4 N. S. 667; Oliver vs. Lake, 3 An. 78; Hill, M
& Co. vs. Simpson, 8 An. 45. Our conclusion that plaintiff
demand against defendants renders unimportant the discuss
his right to attach the funds under the circumstance of the
tance; but it is not inappropriate to say the applicability
funds to pay the notes and the exclusion of any interference
plaintiff's attachment rests on grounds beyond the scope
authorities that maintain the creditors' right to attach un
owner of the property has lost control. The notes were given
machinist to pay the debt that should have been paid by Tayl
the money is remitted to pay the notes. Of this he was well
and has treated the notes as payment of the debt he owed th
chinist by giving defendants credit for the notes. His attac
in effect seeks to defeat the payment of his own debt, the pr
for which was made with full knowledge and of the benefit of
he has availed by the credit he gives. Again, if his attac
prevailed, his attachment as a breach of duty to plaintiffs wo
attended with the serious consequence of leaving them lia
their notes. Still less can an attachment be maintained
who has contributed to bring the funds within that jurisdict
influencing the owner to send here for a purpose the attac
would completely defeat.

It is therefore ordered, adjudged and decreed that as to
tiff's demand in his supplemental petition for "extra" or add
machinery there be judgment of non-suit, and in all other re
the judgment of the lower court be affirmed with costs.

No. 12,648.

ABBOT L. DEES VS. CITY OF LAKE CHARLES.

50 356
50 349
50 350

60 355
105 67

The citizen sued for taxes by a municipal corporation claiming power
taxes on the territory embracing his property under the proceedings b
the territory is alleged to have been annexed to such city may resist
lection of the taxes by injunction when there is no law to autho
asserted proceeding or when at a later period the requisite law is enac

the record shows no substantial compliance with the statute in the proceedings on which the corporation relies. Act No. 110 of 1850; 47 An. 589; Act No. 105 of 1892.

APPEAL from the Third Justice Court for the Parish of Calcasieu. *J. A. Kinder, J.*

Randall H. Odom for Plaintiff, Appellee.

Jerry D. Cline, City Attorney, for Defendant, Appellant.

Argued and submitted December 15, 1897.
Opinion handed down March 21, 1898.

The opinion of the court was delivered by

MILLER, J. The defendant appeals from the judgment maintaining the injunction obtained by the plaintiff, restraining the collection of taxes on his property assessed by defendant.

The ground of plaintiff's suit is that the limits of the city of Lake Charles are fixed by the charter of the city granted in 1867; that his property is beyond those limits; that the corporate authorities have illegally levied taxes on plaintiff's property under color of certain proceedings for the extension of the city limits, and these proceedings are attacked as affording no warrant for the levy of the taxes sought to be enjoined. The defendant excepted to the suit on the ground that since its institution the taxes had been paid by a citizen, and hence, there was no longer any subject of controversy; it is also claimed the plaintiff is estopped from contesting the annexation because of benefits derived by him from the City as extended, and the defence insists that the city limits have been extended so as to embrace his property, and that these proceedings can not be assailed by him in this form of controversy.

If the plaintiff had a cause of action against the city, it seems to us his suit is not to be dismissed because a third party without the consent or knowledge of the plaintiff pays the tax, the collection of which plaintiff enjoins. We think the motion to dismiss, on this ground, was properly overruled.

An examination of the testimony on the defence of estoppel,

does not impress us as exhibiting any satisfactory ground which estoppels from conduct are usually derived. The pl was a minor in 1894. As we gather he voted at a municipal tion in 1895, hardly sufficient to conclude him, and if our appr tion of the testimony is correct, the ward in which he lived was posed in part of the domain of the original city. We are se there are cases in which the individual may be estopped from testing a tax or contribution for some special benefit he ha rived. We find in the record no basis of that nature to hold tiff liable for the tax he resists. The asserted advantage he in mon with others is supposed to have derived by the inclusion property within the city lim.ts is insufficient, to hold him b These exceptional cases in which the citizen may be bound for ticular benefits conferred on his property are, of course, not the scope of this opinion or decree.

It is urged that a municipal corporation claiming to have enl its territory in accordance with law, is protected from coll attack upon the corporate capacity it asserts. The propositi are called on to affirm, varied in form, is that notwithstandi conditions prescribed by law for extending the limits of town cities, there can be no denial by the taxpayer or citizen of the porate capacity, when the municipal corporation urges its de against him based on the extended jurisdiction claimed by the poration, but conferred upon it only on the conditions exact the statute. The extension of the limits of towns and cities in not only the interests of the citizen, but political consequen importance. Such extensions diminish the territorial jurisdicti parishes placed by the organic law under the control of the jury. Constitution, Arts. 249, 250, *et seq.* The boundaries of pa can not be changed except in the mode pointed out by the law on the argument advanced in this case the territory of the p must be deemed to be curtailed whenever any municipal cor tion, within its limits points to the law authorizing the exte of corporate limits on certain well defined conditions, avers compliance with the statute. If the municipal corpor is on the parish line, the same line of argument would tain that the boundaries of contiguous parishes must be acc as altered, whenever the municipal corporation avers an tension of its limits into an adjoining parish and holds up

act of 1892, whether or not complied with. On this theory, too, we are asked to affirm that the citizen, without his consent, is to be transferred from the parochial jurisdiction with which it may be he s entirely content, to another jurisdiction, that is of the municipal corporation, and its mere claim of absorption of the territory in which the dissenting citizen resides, is to close his mouth and silence his objection that the asserted extension of the city limits is utterly destitute of legal sanction. Changes of territorial jurisdiction, directed by the Legislature, whether by the creation of municipal corporations, or of parish lines or other changes in the distribution of territory between the old and new organizations, often carry results deemed burdensome to the citizen; but he must submit to the legislative disposition of a subject deemed political in its character. See Cooley, Constitutional Limitations, p. 500; Layton vs. Monroe, 50 An. —, not reported. Our Constitution has restricted even the power of the Legislature on this subject (Art. 250). But the argument pressed on us is substantially that the changed jurisdiction of the domicile of the citizen with different instrumentalities of local government, of varied, and it may be increased taxation of his property and similar consequences incident to transferring the citizen without his consent from one to another jurisdiction, are all to be forced on him whenever the municipal corporation advances the claim of extended jurisdiction and asserts compliance with the law permitting no such extension, unless the conditions are observed it so explicitly exacts. Compliance with these conditions in the interest of the public as well as of the citizen, he is not to be permitted to question. The claim of the *de facto* corporation and the existence of the statute is to stand in place of performance of all the conditions of the statute. With full appreciation of the scope of the legal principle the basis of the exclusion of collateral attack on asserted charters, we can not give it the application contended for by the City. In our opinion such an interpretation would go far to render nugatory the act of 1892 in respect to the conditions it enacts for the extension of cities and towns. There would be no protection for citizens or parishes invoking the statute against unfounded claims of extended limits by cities and towns. We affirmed at this term the right of the citizen to arrest illegal proceedings of a city council for the enlargement of city limits. Layton vs. Monroe, 50 An. In The

Police Jury vs. Lake Charles, decided to-day, we recognize the
of the parish to assert its jurisdiction of the territory in contro
in this suit without the necessity of first seeking the aid of the A
ney General in a direct suit brought by him. With the most c
consideration, our conclusion is that the plaintiff is not exc
from his right of action to protect himself against taxes claim
be levied without warrant of law.

We have considered the proceedings by which the enlargem
the lands of Lake Charles is claimed to have been effected.
extension, attempted first in 1884, was abortive, because ther
no law to authorize it. We adhere to the conclusion that th
No. 110 of 1880, authorizing the amendment of city charters, af
no warrant for the addition to Lake Charles sought to be a
plished in 1884. The Act No. 105 of 1892 carefully prescribe
mode of enlarging the territory of cities or towns. The prelim
step is the petition to be signed by one-third of the owners of
erty within the territory contiguous to the city, proposed to be a
The petition in this case came from residents of the city, *i.* e
original city as well as of that territory proposed to be adde
which seems to have been treated as part of the city. As mig
expected, the petition, not as contemplated by law, from c
exclusively in the proposed addition, but indiscriminately sign
residents of the original city or as claimed to be extended,
make it difficult to ascertain whether it contained the sign
required by law. The plaintiff claims the proof not only f
show the requisite signatures, but affirmatively shows that the
scribed signatures were not obtained. An examination o
testimony fails to satisfy us this requisite was complied
Upon that all subsequent action under the statute dep
Layton vs. Monroe. Without observing the first re
the later proceedings exhibited a wider departure from the s
By its terms successive elections are to be held to ascerta
sense of the people in reference to the proposed extension, o
the electors in the territory proposed to be added, the other
electors in the city to which the addition is to be made
one election was held, and that by the electors of the city, the
tion treated as part of it, before, under the law, it could becom
of the city. At an election thus held, while it appears a ma
vote was cast, it must be accepted as difficult to show

majority of those residing in the proposed addition was obtained for the extension. Nor do we find any satisfactory testimony that such majority was obtained. It seems to us without more, there was no compliance with the act of 1892, least of all a substantial compliance. There seems to have been the idea that the proccedings in 1894 were curatives, or in the nature of a ratification of the proceedings in 1884. At the election, such as it was, the amendments to the charter of the city, as claimed to be extended, was submitted, not the single issue of extension to be voted on separately at two successive elections. Manifestly, the act of 1892 had not the least retroactive effect, nor was it curative.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed, with costs.

MR. JUSTICE WATKINS—For the reasons assigned by me in the case of The City of Lake Charles *et als.* vs. The Police Jury of Calcasieu Parish *et al.*, No. 12,722, just decided, I dissent in this case.

No. 12,661.

BAYNE & ONORATO VS. ANGELO CUSIMANO, DOING BUSINESS UNDER THE NAME OF G. GRANDE & CO.

ON MOTION TO DISMISS APPEAL.

Motion was made to dismiss the appeal on the ground that the order dismissing the writ of attachment was interlocutory and did not work irreparable injury. That the appeal should not be heard prior to an appeal on the merits of the cause.

Held: The judgment was in nature final enough to sustain an appeal, and that an appeal may be taken from an interlocutory order which dissolves an attachment and releases plaintiff's grasp on the property attached.

Unquestionably plaintiff has the right to be heard on appeal in matter of the decree dissolving the attachment.

The only question is prematurity, *vel non;* there being a necessity, if the attachment issued properly, of preserving a right exposed to loss, the appeal is not premature.

ON THE MERITS.

Question presented: Can an individual member of a copartnership become surety on an attachment bond executed by his firm as principal? Is he such surety as the law contemplates on a bond of that character?

Held: He is not competent as surety.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

Hughes & Favrot for Plaintiffs, Appellants.

E. A. O'Sullivan and *E. Howard McCaleb, Jr.*, for Defendant, A
lee.

Submitted on motion to dismiss November 29, 1897.
Opinion handed down December 13, 1897.
Argued and submitted on the merits March 10, 1898.
Opinion handed down March 21, 1898.

The opinion of the court was delivered by

ON MOTION TO DISMISS THE APPEAL.

BREAUX, J. After the trial on a rule to dissolve the w
attachment which had been issued, a judgment was rendere
solving the writ of attachment.

A suspensive appeal was taken to this court from the judgm
the District Court.

In this court the defendant and appellee moved to dism
the ground that no appeal lies from an interlocutory order di
ing the writ of attachment, and that the interlocutory orde
solving the attachment does not cause plaintiffs any irrep
injury.

On the trial of the rule the facts upon which the plaintiffs
to sustain their attachment were made to appear in evidence.

On the other hand, the defendant contended against the p
of plaintiff in attachment and introduced his evidence.

The suit in so far as relates to the attachment was tried u
merits and the rights involved in the controversy were deter
adversely to the plaintiff.

The merits of the cause were not placed at issue; the rul
was a preliminary proceeding in the case and the judgment
rule was interlocutory; nevertheless the decision may have in
a right of as great importance as any which can possibly be in
on the final decision.

The judgment dissolving an attachment, placed at issue
was, may be considered, in some respects, at least, as in the

of a final decree. The issues had been as related to the attachment passed upon by the District Court. The judgment did not have the effect of dismissing the personal action, yet it brought to a close and terminated the possibility of recovering anything on the property which had been attached. Moreover, if the plaintiff were to gain his suit for the amount he claims, there would be no object in appealing from the judgment in his favor in the personal action. He would have the right to appeal from the judgment, dissolving the writ of attachment, although nothing done since the date of the judgment, could add to the finality of the judgment dissolving the attachment.

In an early case this court held that an appeal lies from a discharge of a garnishee in an attachment case. The facts may not be quite similar between the case before us and the case to which we refer; the principle is in the main the same. Laverty vs. Anderson, 4 M. 606. In Hyde *et al.* vs. Jenkins, 6 La. 427, it was held that an interlocutory judgment which releases the property from attachment may be appealed from.

Upon another ground it strikes us the appeal should be sustained.

The property attached was released, and it is held by a third person, by whom it was bonded as being his own. His right as owner can not be questioned on the trial before the District Court in the present condition of the case, even if he be not the owner. The judgment dissolving the attachment is binding on all concerned until it be reversed on appeal, if reversible.

If a plaintiff in attachment has any right at all he should have the right to hold the property attached (or its equivalent in case it has been bonded) until the decision of the case. Here the property was released and the bond canceled by the effect of the decision dissolving the attachment.

A similar question, in our view, was decided in Laverty vs. Anderson, 4 M. 606. The court held that the order discharging the garnishee was so far final that an appeal lies.

A similar view was announced in Hyde vs. Jenkins, 6 La. 427.

In view of the foregoing we think the appeal should be heard, and the motion to dismiss refused.

It is ordered and adjudged that the motion to dismiss the appeal filed in this case be refused.

ON THE MERITS.

BLANCHARD, J. Plaintiffs brought suit against defendant, acc panied by attachment and garnishment proceedings.

Defendant took a rule to dissolve the attachment on sev grounds, among them that the attachment bond is illegal, insuffic and not such as the law requires, and that the surety thereon i such as the law contemplates.

From a judgment dissolving the attachment plaintiffs appeal.

The attachment bond is signed by Bayne & Onorato, as princi and by T. L. Bayne as surety.

The "T. L. Bayne" who signs as surety is one of the partne the firm of Bayne & Onorato.

The question presented is: Can an individual member of a co nership become surety on an attachment bond executed by his as principal? Is he such security as the law contemplates on a of that character?

It is shown that the firm name was signed to the bond by Ono the junior member, while Bayne, the senior, signed it as sure his individual capacity.

Because Onorato, and not Bayne, signed the name of the fir the bond as principal, can make no difference.

If Bayne, individually, were legally competent as surety, he w be so even though he himself had already signed the firm nam principal.

It is claimed that Bayne & Onorato are an ordinary, and n commercial, partnership, and from this it is contended that as partner is bound only for his share of the obligation of his bond, is to say, for one-half thereof, nothing prevents one of the part from becoming surety for his copartner to the extent of the la liability on the bond.

While, from the testimony found in the record touching the acter of the business done by the firm, we are by no means sati this partnership is to be classed merely as an *ordinary* one, i appreciation of the question under consideration it makes no d ence whether the obligation of the partners on the attachment be solidary, or each for his share only.

Bayne & Onorato—the two as one principal, whether viewe

ordinary or commercial partners—are required by law to give as surety on their attachment bond "one good and solvent person." While it is true, in a sense, that a partnership is a legal entity, distinct from the individual members, comprising it, there can be no doubt that its several members, as well as the partnership itself, must be viewed as principals on an attachment bond signed in the firm name for the purpose of taking out an attachment at the suit of the firm.

And the extent of the individual liability of its members for the obligations of the partnership does not affect this.

Mr. Bayne, then, is a *principal* in the attachment obligation. He is bound on the bond in that character. How can he be both principal and surety at one and the same time in the same obligation and for the same liability?

In this connection the view that would make of this partnership a *third person* in its relationship to the individual members thereof is a mistaken one.

If we admit that Bayne & Onorato are an ordinary partnership, and that Bayne's liability on the bond is that of ordinary partner only, would the case be different? Conceding that he is a competent surety for the part of the obligation for which Onorato is bound, then we would have a surety for one-half of the bond only. There is no surety as to Bayne's part, and the bond would not meet the requirement of the statute, which stipulates that it must be for a sum equal to that which the creditor claims. This means, of course, that the suretyship of the bond must cover the whole amount for which the bond calls. If it be given for only one-half, the bond fails to measure up to the legal standard.

The very definition of suretyship is that it is an accessory promise by which a person binds himself for *another* already bound. C. C. 3035.

What *other* has bound himself for Bayne on this attachment bond? What suretyship has he for the obligation of the bond, whether the whole of it or part of it, resting upon him as principal? None whatever.

We hold, therefore, that Bayne, one of the partners in the creditor firm suing out the attachment, is to be viewed as a principal in the attachment bond, and, being such, could not become surety on the

same bond. As he was the only security, the bond is not suc
the law contemplates and the attachment was rightfully dissolve

Judgment affirmed.

BREAUX, J., dissenting.

No. 12,663.

MRS. BETTIE ALLEN VS. LOUISIANA NATIONAL BANK.

Mandamus will not lie for the purpose of compelling a bank to pay out o
funds of a succession deposited with it, a check drawn by two executors,
there is a third executor protesting against the payment.

While it may be true, as a general proposition, that either one of the exec
may perform any *act* of administration without the concurrence of the
two, it does not follow that two of the executors can check out of bank
cession funds against the protest of third executor.

APPEAL from the Civil District Court for the Parish of Orle
Théard, J.

J. F. Pierson for Plaintiff, Appellant.

Branch K. Miller for Defendant, Appellee.

Argued and submitted March 11, 1898.

Opinion handed down March 21, 1898.

The opinion of the court was delivered by

WATKINS, J. This is a proceeding by *mandamus* to coerce
respondent to pay over the sum of nine thousand and twenty-
dollars and twenty-two cents out of the funds and moneys of
succession of R. H. Allen, on deposit therewith, upon a certain c
or draft mentioned and described in the petition of the relatrix

In the lower court there was a judgment dismissing the preli
ary writ and the plaintiff's suit, "without prejudice to her righ
another action before a court of competent jurisdiction," and
that judgment the relatrix prosecutes this appeal.

The respondent appeared and filed an exception and answer, which are of the following tenor, viz.:

That as a matter of fact, and as averred in the petition, Ogden Smith, one of the executors of R. H. Allen, deceased, is a necessary party defendant to this suit, and in respect to said executor the respondent pleads the exception of non-joinder, and prays that the suit be dismissed.

In the alternative that the exception be overruled, it pleads the general issue, and further answering, avers that on the 26th of October, 1894, the relators, Mrs. Bettie Allen, executrix, and W. F. Collins, co-executor of the last will and testament of R. H. Allen, deceased, conjointly with Ogden Smith, another co-executor thereof, opened an account with respondent bank. That antecedent to and at the time of the opening of the aforesaid account, the two co-executors aforesaid had furnished Mrs. Bettie Allen, executrix, with a power of attorney, by the terms of which she was given full power to draw all checks against said account, but that subsequently, on the 12th of November, 1895, respondent was duly notified by the co-executors Ogden Smith, that it must not honor or thereafter pay any check drawn against funds in its possession belonging to the succession of R. H. Allen, unless same were signed by him. That on the 14th of November, 1895, the respondent bank was notified in writing by the said Ogden Smith, co-executor, that he had revoked and recalled the aforesaid power of attorney, and that he had given notice of its revocation by publications made in the daily newspapers of New Orleans.

It further avers that on the 9th of July, 1897, it was again notified by Ogden Smith, co-executor, not to pay any checks drawn against the estate of R. H. Allen unless same were signed by him in his capacity of co-executor, as well as by the executrix and his co-executor, Collins.

It avers further that on account of said notifications it has refused and did decline and refuse to pay a check for nine thousand and twenty-four dollars and thirty-two cents, which is described in the petition of the relatrix, by reason of the absence of the signature of said Ogden Smith, executor, from said check; and that in its opinion, it had no right or power to honor a check as the one presented was signed, even if the aforesaid power of attorney had not been revoked and said notices had not been received; but as said power of attorney had been revoked and said notifications had been

received, it was not authorized to honor and could not legally check against the funds of the succession of R. H. Allen in i tody and on deposit in its possession and for its account, not the signatures of the executrix and the two co-executors.

In other words, that no part of said succession funds co lawfully checked out of the respondent bank "except up check or order of all three of the said succession representati

It further answers and says that it is ready and willing to p check drawn against said succession funds that is signed by al of the necessary parties.

That it is a mere stakeholder, without interest in the re this suit, or in the fund deposited in its vault, and entruste care, except to see to it that proper and legal vouchers are fu when payment or disbursements are made thereof.

The check in question is of the following form, to-wit:

"$9,024.22 NEW ORLEANS, La., July 7,

"Pay to the order of Bettie Allen, nine thousand and t four dollars and twenty-two cents, and charge to the accoun estate of R. H. Allen.

"To the Louisiana National Bank, New Orleans, La.

"(Signed) W. F. COLLINS, *Executor.*

"MRS. BETTIE ALLEN, *Execu*

The testimony shows that on the 8th of July, 1897, the da sequent to the execution of the aforesaid check, and bef presentation to the respondent, same was presented to Ogden executor, for his signature, and it was refused; and that the said check, as above written, was presented to the bank f ment, and it was refused.

It further appears, that upon presentation of the aforesai to the respondent, its vice president advised with its attorn said that it would not, in his opinion, be safe, in honoring the as it was presented for payment—particularly in view of the cation that Ogden Smith, executor, had given it previously.

The statement made by one witness was that "the bank money on deposit to pay this check; and the only reason fo ing to pay it was his advice that it would not be a proper an cient discharge from liability, and would expose responden liability of having to pay it a second time. The only que whether or not the check is drawn in such a way as to make

atory upon the bank to pay it; and its only wish is to be placed in a safe position."

The foregoing averments of the answer, and the extracts we have made from the testimony, will serve all the necessary purposes of the scope we propose to give the present opinion. It is our opinion that under the facts and circumstances detailed, the respondent bank was not bound to pay the check as presented, because Ogden Smith, co-executor, had not affixed his name thereto.

The transaction is one totally disconnected from the succession of R. H. Allen, which is being administered in the probate court of Lafourche; and, consequently, while it may be true, as a general proposition, that either one of these joint executors may perform an act of administration within the jurisdiction of the court administering same, it by no means follows that one, or two of them can draw the succession funds out of bank against the positive protest of the third executor—those funds being within a jurisdiction different from that of the succession.

The bank is a stakeholder, residing in this city and subject to the jurisdiction of this court *pro hac vice*. The bank makes no question of the competency of the Civil District Court to deal with the question at issue and to determine it. Indeed, we do think it could not raise such an issue, and is clearly without interest to do so.

But the fund being within the territorial jurisdiction of said court, it is competent to pass upon the issue raised; that is to say, whether or not the respondent bank should disburse the funds on deposit for the account of the succession of R. H. Allen on a check signed by only two of the three executors.

Finding that it should not, what is the proper decree to be rendered in the premises?

We are of opinion that the judgment should be reversed, and the cause remanded for the purpose of enabling the relatrix to cite Ogden Smith, executor, into the Civil District Court for the purpose of subjecting him to the judgment of the same upon the issues thus joined.

We note the fact that after the evidence was all in the respondent bank tendered and offered to file an amended and supplemental answer in which new issues were raised necessitating the introduction of additional testimony. That same being objected to by the counsel for relatrix as coming too late, and the objection having

been sustained, the respondent's counsel reserved a bill of excep to the ruling of the court.

There can be no doubt of the correctness of the judge's r for had he ruled differently, the order of proceedings would been completely reversed, and the introduction of testimony the new issues raised would have been begun anew.

It is therefore ordered, adjudged and decreed that the judg appealed from be annulled and reversed, and it is now ordered decreed that the cause be remanded and reinstated, so as to e the plaintiff to cite Ogden Smith, executor, as a party defendant that thereafter same be proceeded with according to law and views herein expressed.

It is finally ordered and decreed that all costs be deducted the funds in controversy, except those appertaining to Ogden S executor, and that with respect thereto same await the judg and final disposition of the suit.

No. 12,727.

A. A. VOINCHÉ VS. JEAN ARCADE BROUILLETTE.

A creditor of a succession, or an heir, or the creditor of an heir, who has ob a judgment against the heir, his debtor, and who has had his interes heir seized, may compel an administrator of the succession to file an a showing what funds he has on hand.

While the interest of the heir is under seizure, the creditor who, by rule, c the administrator to account, does not thereby injuriously affect any rights of his debtor or of the succession of which the debtor is an heir.

An action to compel an accounting by an administrator of the successio has never filed an account, although property has been sold, cash re and a number of years have elapsed since the succession was opened no good ground for complaint.

APPEAL from the Tenth Judicial District Court for the Par Avoyelles. *Cullom, J.*

A. V. Coco for Plaintiff, Appellant.

Couvillon & Son for Defendant, Appellee.

Argued and submitted February 11, 1898.
Opinion handed down February 21, 1898.

The opinion of the court was delivered by

BREAUX, J. This was a rule taken by the creditor of an heir on the administrator of a succession to compel him to file an account of his administration.

It appears that the creditor obtained a judgment against the heir. Under this judgment he had seized the interest of the heir in the succession, and after seizure claimed, in virtue of the seizure, a right to compel the administrator to account.

The administrator interposed an exception to the rule of no cause of action. On this exception the rule was dismissed with costs.

The case is before us on the appeal of plaintiff from the judgment of dismissal.

Under the statute a creditor or other person interested may file a rule or motion to ascertain whether an administrator has any funds.

The plaintiff grants that a creditor of the succession or an heir has the right to compel the administrator to render an account upon motion or rule. But he contends that a seizing creditor has no such right prior to the advertisement and sale of the property seized; that his only right is to continue with the seizure to a sale and realize on his claim, as a seizing creditor, from the proceeds of the sale. To any one having an interest is given the right to rule an administrator to an account. This, in our view, manifestly includes the creditor who has caused the seizure to be effected. As a creditor he has the right to compel an accounting to make certain how much or how little he may be sold under his seizure. The judgment and seizure secured to him, as relates to the succession, a standing in court, and a right of which he can not be divested during the time that the property seized is *in gremio legis*. The indebted heir is without power to interfere. No good reason suggests itself why, during that time, the creditor should not be permitted to have fixed the amount coming to the heir, his debtor, as the heir might have done had his interest as an heir not been seized.

The plaintiff is not in a position to champion any right the heir may have. We did not, in the course of our discussion, discover that the heir can possibly be made to lose, in case of his payment of

his indebtedness, after the seizure of his interest. He retai
property or right, only made the more definite by the action
on the rule or motion to compel the administrator to account.

It will be in time to decline to entertain such a rule to com
accounting when it will become apparent, in any case, th
creditor is harassing the legal representative and needlessly c
costs to be incurred. We have discovered nothing of the kin
We are informed by the record that the administrator quali
February, 1894; that he had property sold, had funds on ha
has never rendered an account. In view of these facts it b
proper for him to account.

In Succession of Tureaud vs. Gex, 21 An. 258, the right of a
itor to be paid his judgment against one of the heirs was en
The creditor was an opponent and his right to proceed thus to
an amount due his debtor was specially recognized. If the c
of an heir can proceed by way of opposition to recover the a
of his judgment, *a fortiori* he should have the right to com
administrator to account to the end that he may ascertain the
of the right held by the sheriff, under his seizure for his, the
itor's, account.

In Smith & McKenna vs. Charles, 27 An. 504, also, the cl
the creditor was recognized "as one having an interest" in
of the settlement of the succession of which his debtor was
the heirs.

We do not think that we should stop half way; this court
heretofore decided that "any creditor or other person intere
take in the creditor of the heir (C. C. 1151); this, in our
includes the creditor's right to compel the administrator to
an account. Lastly: The proceedings by rule to compel the a
istrator to account has the law's sanction. Succession of Tow
37 An. 114.

It is therefore ordered, adjudged and decreed that the jud
appealed from be annulled, avoided and reversed; that the c
remanded for further proceedings; that it be reinstated
docket of the court *a qua*, and the issues tried in accordance w
views above expressed.

It is ordered that the defendant and appellee pay the costs
courts.

No. 12,758.

50 373
50 465

STATE OF LOUISIANA VS. GASTON HEARSEY.

Our statutes prescribe a penalty for "assault with *intent* to commit rape," but none for "assault with *attempt* to commit rape."

A verdict, therefore, returned for "assault with *attempt* to commit rape," on an indictment for rape, and a sentence, based thereon, of fifteen years at hard labor under Act 59 of 1896, prescribing a penalty of not exceeding twenty years for assault with *intent* to commit rape. can not be sustained.

APPEAL from the Fifteenth Judicial District Court for the Parish of East Baton Rouge. *Brunot, J.*

M. J. Cunningham, Attorney General, *H. N. Sherburne*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

T. Jones Cross and *L. D. Beale* (*Jos. E. Generelly* of Counsel) for Defendant, Appellant.

Argued and submitted March 12, 1898.

Opinion handed down March 21, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The accused was indicted for rape. His trial resulted in the following verdict:

"Guilty of assault with attempt to commit rape."

From a sentence of fifteen years at hard labor he appeals.

His case is presented in a half dozen bills of exception, averring errors in the course of the trial below.

We do not find it necessary to pass upon all the questions raised. One suffices.

Before sentence was pronounced, a motion in arrest of judgment was filed on the ground that the verdict as returned is not responsive to the indictment, and finds the accused guilty of an offence not defined or denounced by the law, and for which no penalty is prescribed by statute,

The court erred in denying this motion.

The indictment charged the prisoner with violently and feloniously assaulting the prosecurix and ravishing and carnally knowing her.

The testimony justifying the same, the jury might have found him guilty of rape, or of assault with *intent* to commit rape.

There are crimes denounced by statute and for which penalti prescribed. R. S. 787, 792; Act 59 of 1896.

But there is no such specific offence as "assault with *atte* commit rape," and even if such verdict could, under the ter Sec. 1053 of the Revised Statutes, be returned on a prosecuti rape, where is the law which prescribes the penalty?

The section of the law cited does declare that if a person be ch with a crime and on his prosecution therefor it does not appea be actually completed the offence, but it does appear that h *attempt* to commit the same, the jury must acquit him of the o charged, but find him guilty of *the attempt*.

"And thereupon," continues the statute, "such person sh liable to be punished in the same manner as if he had been con upon an indictment for attempting to commit the particular or misdemeanor charged in the indictment."

That is to say, if there were a statute prescribing a penal *assaulting with attempt to commit rape*, then, under the law quote accused person having been tried for rape, the trial judge could passed upon him the sentence of the law. But where no law specifying a penalty for assault with attempt to commit ra sentence on such finding can be passed. It were idle, therefo this jury to find the accused, tried for rape, guilty of an atte commit rape and seek to justify the verdict under the terms of 1053, when that statute does not prescribe a penalty for the of and none exists elsewhere in the law.

It may be true, as contended on behalf of the State, th language of the law referred to authorizes a verdict *of atte commit* the crime charged in the indictment to have been comm

But the statute is imperfect and incomplete in not stating a pe for the offence of "attempt" to commit rape, and as no other s ekes it out in this particular, it follows that the verdict and sen appealed from are without warrant of law. See State vs. Fost La. An. 857; State vs. Burden, 38 La. 357.

The sentence in this case is based upon Act 59 of 1896, amends and re-enacts Sec. 792 of the Revised Statutes. Th prescribes that: "whosoever shall assault another by wilfully s ing at him, or with intent to commit murder, rape, or robbery, on conviction thereof, be imprisoned at hard labor not more twenty years."

The crime here, it will be noted, for which the penalty up to twenty years is prescribed, is assault with *intent* to commit murder, rape, or robbery. Not assault with *attempt* to commit those crimes.

It may be that the jury, in the instant case, intended to find the prisoner guilty of assault with *intent* to commit rape. But that was not the language used and we can not assume it. Nor is it suggested in argument or brief that such was their intention.

In charging an assault with intent to commit rape, the use of the word "intention" instead of "intent" is not fatal; but it is otherwise as to the use of "attempt." A. & E. Ency. of Law, Vol. 19, pp. 957, 958; State vs. Oliver, 38 La. An. 632.

On an indictment for rape, a verdict finding the accused not guilty of the crime charged, but "guilty of an attempt to commit rape," will not support a conviction for "an assault with intent to commit rape." A. & E. Ency. of Law, Vol. 19, p. 968, note.

For the reasons assigned, it is ordered, adjudged and decreed that the verdict and sentence appealed from be annulled, avoided and reversed, and that the case be remanded to be proceed with according to law.

BREAUX, J., in a written opinion dissents.

No. 12,419.

CHARLES ADOLPH SCHMIDT ET ALS. VS. JOHN HERBERTH.

The sale by heirs of their right in a succession is free from the action in rescission for lesion; if such a sale is in character aleatory, in that the value of the right sold depends upon the duration or continuance of the usufruct.

APPEAL from the Civil District Court for the Parish of Orleans, *Rightor, J.*

Henry Chiapella and *Joseph Brewer* for Plaintiffs, Appellants.

Dart & Kernan for Defendant, Appellee.

Argued and submitted March 11, 1898.

Opinion handed down March 21, 1898.

The opinion of the court was delivered by

BREAUX, J. This was a suit by plaintiffs to set aside, on the g of lesion an act signed by plaintiffs, transferring to the defe all their rights in the succession of Catherine Augusta Herbert Burger, his late wife, who was the aunt of plaintiffs and wh inherited the right thus sold; by representation of their late m (the mother from whom plaintiffs inherited was one of the s of the late Catherine Augusta Herberth). The other sister late Catherine Augusta Herberth, Mrs. Suhling, inherited an undi half of the succession. She also sold her interest to the defe for a price similar in amount—*i. e.*, one thousand dollars. Mrs. ling was not a party to the suit.

Mrs. Catherine Augusta Herberth, late wife of the defen died intestate in 1892, leaving no children, and no forced The property was all community, and subject to the usufruct survivor in community—*i. e.*, the defendant was usufructuary the property.

The act specially described, as property transferred, four of real estate and forty-five shares of the capital stock of the ayette Fire Insurance Company of New Orleans of the par va fifty dollars each. The act sets forth that the vendors were inclined to wait for the close of the usufruct and on that accoun offered for sale their interest in the estate; that in selling they the usufruct into consideration and in consequence agreed to s the price in full settlement and extinguishment of all their cl right and inheritance in the premises.

Plaintiffs have abandoned all claims to the shares of stock Lafayette Insurance Company.

Plaintiffs now insist that the amount received by them i an equivalent for their interest in the succession of their dec aunt, which they now value at more than $3500. Their pe recites at some length the nature of the right they claim. Pla complain and aver that they received the price under the repr tation that it was a fair equivalent for their right of inheritance

There was no allegation made of fraud, trickery or artifice o sort.

To plaintiffs' demand the defendant interposed the plea cause of action. This exception was maintained by the Di Court and plaintiffs' suit was dismissed.

From the judgment of dismissal plaintiffs prosecute this appeal. The record discloses that the usufructuary rights of the defendant were given consideration to, at the time of the sale. It was referred to in the deed as the cause or motive which prompted the plaintiffs to sell.

The value of all property subject to usufruct is lessened and disturbed during the continuance of the right. The date that the owner will enter into possession and enjoy the ownership is uncertain. It gives to the right a character of hazard. The value depended in this case upon the marriage or death of the usufructuary. Prior to one or the other: marriage or death of the usufructuary, plaintiffs' title would have been imperfect and not one usually much valued in commerce. The uncertainty of the duration of the usufruct gives rise to the aleatory condition which the plaintiffs in their sale did not separate from the price, but included it as constituting one of the chief motives in selling; thereby making the right sold one aleatory in character beyond question. The plaintiffs themselves have impressed in effect "aleatory" upon the sale of the right.

In Parker vs. Talbot, 37 An. 23, the vendor had reserved the usufruct of the property sold during her lifetime; the court held that the right reserved gave to the sale the character of an aleatory contract. The aleatory contract defined in our Code being a contract more particularly known under the civil law, we consulted civil law authority other than ours upon the subject.

We translate: The property was burdened with a right of usufruct of uncertain duration. The contract was an aleatory contract. Gabriel vs. Ligouzat, Vol. (Dalloz), 30th January, 1866, p. 172.

The value of the property sold depended upon the date of the death of the usufructuary; the contract was aleatory. Fuzier-Hermann, Vol. 2, p. 333.

There can be no question of lesion, says Laurent in his work *Droit Civil*, Vol. 10, p. 526, in an aleatory contract provided there was no fraud.

Here the charge is not fraud, but a general averment that the sale was "completed under the representation and belief" that the price was equal to the value of the right.

This court has frequently accepted assistance from the Court of Cassation and from illustrious French jurists in construing and applying the articles of our Code analogous to those of the Code Napoleon.

The allegation that "imposition" had been resorted to; said the in Russell vs. Springs, 10 L. 427, does not include within its the action in which downright fraud is charged in matter of as lesion. They ("imposition" and "fraud") were treated as arate and distinct causes of action in the just cited decision. enough to state that not only "no fraud" was here alleged, bo the "representation" set up by other counsel than those who r sented plaintiff on appeal, is so vague that it did not amoun charge even of "imposition" traceable to the defendant; a "imposition" to which a "particular" meaning is given in th cases.

We are not informed by the record that the sale was not al because of the extreme old age of the purchaser, or for some reason rendering it evident that the chances of the loss or g the sale were inconsiderable and of no importance whatever, a pared with the value of the property. In our judgment, unle action is manifestly within the exceptions last suggested it is w cause. The general rule is that there is no ground to rescind tract of sale when it is aleatory in character, such as we take sale here was.

When the price or the period of entry into possession and ment of the property are uncertain it is exceedingly diffic determine that there was no lesion. Merlin Droits Succession, p. 427, Sec. 7.

This is the view of all the authorities we have examined up subject. The very exceptional cases, such as suggested by Ma Vol. 6, p. 313, did not arise here.

It is therefore ordered, adjudged and decreed that the jud appealed from be and the same is affirmed.

No. 12,607.

WILLIAM G. VINCENT VS. BENJAMIN FRELICH.

One of the buildings leased (not both) was rendered temporarily uninhabi the fire. To restore the building temporarily uninhabitable, repairs w essary, and not reconstruction.

The building could have been put in condition for use in seventeen da defendants after the fire remained in possession more than that nu

days. Those who held the premises under the defendants and for their benefit, objected to the work of repairing, and prevented the possibility of repairing the building within the time stated.

While the lessor ought to make, during the continuanee of the lease, all the repairs which may accidentally become necessary, the tenant should not interpose obstacles to the work of repairing.

Partial destruction remediable by repairs and which do not require reconstruction, will not give good grounds to dissolve the lease.

The judgment of those who are skilled in matter of building and the repair of building as to what constitutes reconstruction, and what constitutes repairs of a building, is entitled to great weight.

Where the lessee has property to store immediately after a fire the offer to him by the lessor of a store room as an accommodation is not ground to rescind; nor does it necessarily manifest a desire to put an end to the lease. The annulment of leases is not favored, where the lessor is not at fault. 21 An. 23; 6 An. 379.

Where lessees abandon the premises, the lessor may, for the purpose of minimizing the loss, offer "to let" the property. Such acts will not cancel the lease. 6 An. 74.

The petition and the document annexed are construed together, and error in the petition as to interest was amended by reference to the contract of lease annexed. 15 L. 116; 5 An. 575.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

E. Evariste Moise for Plaintiff, Appellee.

F. L. Richardson (*Rogers & Dodds* of Counsel) for Defendant, Appellant.

Argued and submitted December 4, 1897.
Opinion handed down January 24, 1898.
Rehearing refused April 4, 1898.

The opinion of the court was delivered by

BREAUX, J. This was an action for rental.

The lease was entered into for five years, beginning May, 1893.

The rental was one hundred and fifty dollars a month. Two four-story brick stores, Nos. 226 and 228 Decatur, of this city, was the property leased. They were connected by open arches in the dividing wall; one could step or move goods from one building to the other; they were fitted up for defendant's plant.

A fire on September 5, 1896, damaged one of the buildings l
also the plant of the lessees. They were manufacturers of
clothing, and the buildings had been fitted up for the par
business in which the defendants were engaged.

Immediately after the fire, the tenants surrendered posses
the insurance companies in which they were insured, for adju
of the loss and settlement. They held possession until the
September, and during their possession they refused to perm
builder employed by the landlord to enter the building to
thereon as he had contracted. After the insurance adjuste
completed the adjustment of the loss of the tenants, the
resumed their possession, and retained it a few days.

The contract of lease between the plaintiff and defendant
tains the usual clauses of leases, save the following, which w
inserted in the contract: "Should the property be destroyed b
or should the lessee be deprived of the use of said premises by
other unfortunate event, not due to any fault or neglect on
part, then the lessee shall be entitled to a credit for the une
time of the lease;" and the following: "No repairs shall be
the lessee except such as may be needed to the roof or flo
rendered necessary by fire or other casualty, not occasioned
lessees fault or negligence."

Returning to the matter of the extent of the injury done
building, the testimony shows that one of the roofs, that on
ing 228, was destroyed by the fire, and part of the building; a
statement given shows that the injury (in addition to the de
tion of the roof) was to the upper floors, stairway and water-c
which were in the building 228.

The building adjoining, 226, was not as badly damaged.
builder, by whom the injury, after the fire, was carefully exa
to whose testimony much weight is given by all parties to th
testified that the defendants could have continued the operati
their plant after the damage, had they chosen so to do, until th
of his contract.

The plaintiff immediately after the fire offered another build
the defendants to store away their property, until the repair
made. He also after they had refused to continue their
placed a notice "to let" on the buildings.

It also appeared that the defendants desired to lessen the

of their business; that they became the lessees of a seventy-five dollars a month one-building place, instead of plaintiff's one hundred and fifty dollars a month two-building place; that defendants did not make the least inquiry of the builder, who was anxiously awaiting to begin the work of repairing. It is also in evidence that such was the condition of defendant's factory after the fire that it would not have been possible for them to resume operations in twice the number of days needed for the repair of the buildings.

These are the prominent facts.

From an adverse judgment the defendants prosecute this appeal.

The damages to the building rendered them, in their unrestored condition, unfit for the purpose for which they were leased. One of the buildings, however, was only in a small degree damaged.

Experienced mechanics, who had carefully examined the leased property, were decidedly of the opinion that the less-damaged building could have been occupied by the tenant while the building badly damaged was being repaired.

The builder and contractor, who had bound himself to make needful repairs on these buildings in seventeen days, testified that he had examined the property thoroughly, to see how much the repairs would cost. That the work required consisted of repairs and not of reconstruction; that the defendants might, while he was at work in one of the buildings, have occupied the other; that such moving is a little inconvenient, but that it is done frequently. The testimony of this witness is corroborated by another builder and contractor. They had the experience rendering them competent to judge the extent of the damage, and the amount it was worth, and the time it would take; they also are presumed to have a practical knowledge of the difference between repairs and reconstruction. Their evidence in a case such as the one before us for determination should evidently have more weight than that of the merchant or manufacturer of clothing, however skilful he may be in his business.

The question involved is more particularly within the domain of the architect than of the jurisconsult. Baudry-Lacantinerie, Vol. 3, p. 409.

The following we translate from Laurent, Vol. 25, p. 121:

"The ordinary carpenter," said Laurent, "would have taught Troplong that his notion of repairs is not correct, and that no one

has ever thought of releasing a lessor from making the repa
mentions."

From another section of the work of the same commentat
translate: The *facts* in each case almost always give rise to d
sion (*Ib.*, par. 41).

From Dalloz we glean: It is for the court as a matter of fac
not strictly of law, to determine whether it is a matter of " r
struction " and not of repairs, after having heard a report of e
builders. If the repairs require only a short delay within whic
possible to make them, and the proprietor offers to the t
another house temporarily, the lessee has no ground of action t
solve (par. 181, Vol. 30, p. 307).

Here defendant's witness, Richard, corroborated by Mass,
the only witnesses in the case who had practical knowledge of
ing. They testified that the work consisted of " repairs," an
" reconstruction."

A building, as we understand, is repaired " after it has been
aged;" it is reconstructed after it has been demolished as a
or in part.

The cost of repairing in the case here was much less tha
value of the whole building.

Marcadé, Vol. 6, p. 450, thus expresses his views under s
articles of the Code to ours: When the fire of heaven or any
unforeseen cause of destruction strike a building, three thing
possible:

It may be completely destroyed, it may be destroyed in part
may be only damaged. Without question every demolishmen
destruction, and if a violent blast of wind causes the fall of a
ney, it might be said that there is a partial destruction of the
the chimney being destroyed; but this reasoning is not exact
when, as in the case supposed by M. Troplong, a gust of wind t
down the chimney, tears out the Persian blinds or shatters the
dows, or when unusually heavy snow weighs down the roof,
not be said that for that reason the building is destroyed, ev
part, but that it was damaged, and that the work to be do
relates to the whole building will not constitute a reconstruction
partial, but exclusively a repair.

Damage to a building, different from partial destruction, gi
neither the lessor or the lessee the right to terminate the leas

The following is in point:

Even in a case important enough to give to the lessee the right of complaining, it may not be sufficiently important to sustain a demand for a dissolution of the lease. The lessee has a right of action to the extent only that he is subjected to a substantial loss; to the extent only that the injury renders the building not fit for the use for which it was leased. Dalloz, Vol. 30, par.

We pass from a brief review of the French authorities to a consideration of the decisions of this court cited by the defendant's counsel:

In Higgins vs. Wilner, 26 An. 544, the facts were not stated at any length in the decision. We had recourse to the record of the case, in the clerk's office, and found that one of the buildings leased had been entirely destroyed by fire, also scaffolding necessary to the tenant's business. New constructions were needed to restore the premises to the condition in which they were prior to the fire. Said the court in that case: "The thing leased was destroyed in part," alluding, as we infer to the building and other property destroyed, as part of all the property leased. Here it is different, no building was entirely destroyed by the flames.

The *dictum* of the court in Penn vs. Kearney, 21 An. 21, can have no weight here. The lease was not canceled and the lessee was held bound despite the vigorous claim set up by him that he had been discharged because of destruction by fire.

It is true that in Meyer vs. Henderson, 49 An. —, the lease was annulled. The facts in that case were that the injury to the building leased by plaintiffs from defendants made it entirely unfit for the purposes for which it was leased. "It was a wreck," said the court, "it was not habitable, it was unfit for the storage of goods and merchandise, and it took months to restore it to what it was."

In Coleman vs. Haight, 14 An. 564, another case cited for defendants, the question related to the rental and the lease involved in the discussion was not annulled. In fact, there was no claim set up for the annulment of the lease.

The facts upon which the case here turns, is that the work consisted of repairs; that the tenants continued in their occupancy after the fire more days than it would have taken to make the repairs; that during their occupancy, hinderances were interposed to prevent lessor from making needful repairs. The continued occupancy by the defendants, as a matter of necessity perhaps, did not render less

prominent the reality that they did remain quite a length of t
the building more than actually required for the removal o
property from the leased premises.

The authorities we have consulted (we have consulted q
number) are not inclined to countenance the dissolution of
when the lessor is not at fault. Dussenau vs. Generis, 6 A
Penn vs. Kearney, 21 An. 23.

We are not impressed by the theory advanced on the
defendants of abandonment of the lease by the lessor because
offer made by him to the defendants, of a building to stor
property during the time required to make needful repairs
purpose, as we seize the offer, was to lessen as much as possi
inconvenience to which the tenant had been put by the fire.

With reference to the sign "to let" put up by plaintiff
front of the building, we do not conclude that it had the m
and effect contended for by the defendants; the plaintiff testifi
his purpose was to minimize the damages—we have no rea
conclude that such was not the case. The plaintiff at all
opposed all indications of defendants' intention to leave the
isee. In letters to and also in conversation with them, he de
that they should remain; that they had no cause to dissol
lease. Putting up a sign "to let" was not good ground o
under the circumstances; had he gone further and leased
tenants, it would not have destroyed his recourse against his t
if the purpose was to allow for the rent collected. Hold
Tanner, 6 An. 74.

In the answer to the appeal the appellant asks that the jud
be amended so as to increase the interest allowed from five t
per cent. on the principal allowed by the judgment. W
informed that it was an oversight. The contract of lease stip
eight per cent. was annexed to the petition and shows the a
due as interest and renders it manifest that there was error as
in preparing the petition. Similar differences arising from
have been amended by reference to the document annex
and forming part of the petition. Brumfield vs. Morty,
116; Smith vs. Nash, 5 An. 575.

It is ordered, adjudged and decreed that the judgment ap
from be and it is amended, by increasing the interest allowe
five to eight per cent. As amended the judgment is a
at appellee's costs.

No. 12,679.

R. BELTRAN VS. E. D. LECHE.

A mortgagee takes out executory process. The mortgagor enjoins on the ground of outstanding title to part of the property in a third person. The third person appears and by authentic act disclaims title, and the act is duly recorded.

This act is held not to be a donation and not subject to the provisions of law relating to such dispositions, nor to the implied conditions the law attaches to the same.

It is what it purports to be, a disclaimer of apparent title, and estops the maker and those claiming under and through him.

The cause of complaint being removed the injunction falls.

APPEAL from the Twentieth Judicial District Court for the Parish of St. James. *Guion, J.*

Robert G. Dugué for Plaintiff, Appellee.

Sims & Lambremont for Defendant, Appellant.

Argued and submitted December 30, 1897.
Opinion handed down January 10, 1898.
Rehearing refused February 21, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The plaintiff, R. Beltran, in January, 1894, by authentic act sold and conveyed to defendant, Leche, certain lands in the parish of St. James cultivated as a sugar plantation, and an additional tract of 251 22-100 acres of swamp land near the plantation. Following the description of the lands sold is the statement that it is the same property acquired by the vendor from David August and Paul Gauthreaux in February, 1892.

Fifteen thousand dollars is mentioned as the consideration of the sale, of which three thousand dollars was cash, and for the remainder, six notes were executed by the purchaser, each for two thousand dollars, the first maturing January 2, 1896, and one each subsequent January thereafter. A special mortgage and vendor's privilege was retained to secure payment of the notes.

The first two notes to mature were not paid, whereupon plaintiff

sued out executory process in foreclosure of the mortgag
privilege.

The sale of the property was enjoined by defendant on the g
of a deficiency in the quantity of land conveyed to him.

He claimed that the consideration of the sale had failed
extent of the 251 22-100 acres of swamp land, and that plainti
no title thereto at the date of the transfer to him. He
a diminution of price and other appropriate relief.

The deficiency was represented to be due to the fact that W
H. Aymar claimed to own and to be in possession of the
lands mentioned.

Defendant in the injunction proceedings (plaintiff in the o
suit) met this by a general denial, and annexed to his answ
authentic act, executed by Aymar, in which he expressly disc
any right, title or interest in the lands which are describe
referred to as the subject of the injunction suit herein. It is
by Aymar that his object and purpose in executing the ac
remove any and all doubts as to the validity of the title to the
conveyed by Beltran to Leche, and that he renounced in fa
Leche and Beltran, their heirs and assigns forever, whatever
title or interest he then or theretofore had in the same.

It was shown that this act had been duly recorded in bo
conveyance and mortgage records of the parish of St. James
that no mortgages or other incumbrances affecting the land w
record in the parish in the name of Aymar, and that there we
outstanding antagonistic alienations of it, or any part of it, b

On this exhibit judgment was rendered dissolving the inju
and ordering the sheriff to proceed with the execution of th
of seizure and sale, but condemning the defendant (Beltran)
the costs incurred since the filing of the petition for injunctio

Plaintiff in injunction appeals, and defendant, appellee, a
amendment of the judgment, rejecting and dismissing outrig
injunction proceedings.

It is claimed on behalf of the former that the documentar
dence offered by him on the trial shows a perfect outstandin
in Aymar to the two hundred and fifty-one and twenty-tw
hundredth acres of swamp land referred to, and because of thi
evicted therefrom and entitled to a diminution of price t
extent of the value thereof.

And it is urged that Aymar's disclaimer or renunciation of title is not a valid or legal alienation of property sufficient to protect plaintiff; that it is an attempted *gratuitous* disposition, not binding on the community of *acquets and gains* existing between Aymar and his wife; that it is liable to be attached by creditors and subject to the eventual reserved rights of his children *as forced heirs*.

It is further contended that the document is not a sale, because without consideration, and if not *a donation*, is nothing.

On behalf of defendant in injunction it is insisted that Aymar is bound by his act of disclaimer, and that he and his heirs are completely estopped thereby from ever hereafter asserting any interest in the lands.

We are of opinion that the provisions of law in regard to gratuitous dispositions of property, donations *inter vivos* and the like, are not to be applied to the facts of this case.

The tract of land in dispute appears to have been included in the description of lands conveyed to Beltran in 1892. He conveyed it, with other lands, to Leche. The latter, failing to pay the price, is proceeded against under the mortgage reserved. He resists the proceedings on the ground that Aymar has a title of record to part of the property. Aymar appears and disclaims title and the act of disclaimer is placed of record.

Thereafter the buyer can no longer claim to be "disquieted in his possession."

By procuring the act of disclaimer and renunciation "the seller has restored him to quiet possession, or caused the disturbance to cease," in the language of C. C. 2557. His complaint fell when Aymar repudiates the suggestion of the title in himself. Thereafter "a perfect outstanding title to a third person" (34 An. 1202) could not be shown to exist.

The act executed by Aymar was not a donation *inter vivos*, and, therefore, not subject to the provisions of law relating to such dispositions, nor to the implied conditions the law attaches to the same.

It is what it purports to be, a public declaration by the alleged owner that the property is not his; that he has no interest in or right to it. It is a disclaimer of apparent title, and estops him and those claiming under and through him.

Even if it were a donation, we think, under the facts govern-

ing the case at bar, the contingencies suggested by cou
appellant, such as forced heirs of Aymar, accepting under
of inventory, bringing an action of reduction or to reve
property in excess of the disposable portion, the possible c
the community, the liability of attack by creditors, and the
too remote to justify interference with this creditor, who s
enforce his special mortgage and vendor's privilege on prope
possession of which is in the defendant buyer under a title w
had deliberately *accepted*.

It is unlike an action to compel acceptance of title, as in
vs. Rousseel, 41 An. 474.

Here the buyer has not the same liberty to refuse paymen
price, or resist sale of the mortgaged property, as he might
refuse title tendered him under an agreement to purchase.

It is not shown that Aymar is insolvent. C. C. 1517.

There is here no "present state of admitted insolvency," a
Tessier case, p. 478.

The only danger which the plaintiff in injunction professed
—outstanding title in Aymar—having been removed, he has n
to complain of the judgment from which he has appealed.

Nor do we think defendant in injunction should complain
judgment, which awards against him the costs incurred since
ing of the petition for injunction.

It was the injunction which brought about the disclaime
Aymar, and thus removed the cause of plaintiff's complaint
just, therefore, that that portion of the costs of this litigation
be borne by defendant.

For the reasons assigned the judgment appealed from is a

No. 12,594.

STATE EX REL. E. F. PERILLOUX VS. W. O. WILDER, MAGI

A sentence imposing a fine for violation of a municipal ordinance was
be appealed from, alleging the illegality and unconstitutionality of t
It appearing that the judgment in question has been acquiesced in an
imposed paid without qualification or protest, the writ of *mandamus* t
the granting of the appeal is denied.

ON APPLICATION for Writs of *Mandamus* and *Certiorari*.

State ex rel. Perilloux vs. Magistrate.

H. L. Garland, Jr., for Relator.

Respondent *in propria persona* (*Stifft & Madison* of Counsel).

Submitted on briefs December 16, 1897.
Opinion handed down January 10, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The complaint is that relator is denied the right of appeal, and the writ of *mandamus* is invoked to compel the granting of the same.

It appears that in May, 1897, the relator was charged before the mayor's court of the town of Slidell, parish of St. Tammany, with the violation of a municipal ordinance prohibiting any one from conducting the business of retail liquor dealer without having previously obtained a license.

On the trial he excepted to the power and jurisdiction of the court upon various grounds, among others that the ordinance in question is illegal and unconstitutional, and that Act No. 8 of 1896, authorizing municipal corporations to impose fines and imprisonment for non-payment of licenses as aforesaid, is unconstitutional.

His exceptions being overruled, he answered admitting the offence charged. Whereupon he was adjudged guilty and fined twenty-five dollars or ten days in the town jail.

A month later he applied to this court for writs of *certiorari* and prohibition against the enforcement of the sentence. A rule *nisi* issued, but on hearing was discharged on the ground that the mayor's court having jurisdiction, and there being an adequate remedy by appeal from its judgment, the writs applied for would not lie. 49 An. 1211.

Some time later relator filed an application in the mayor's court for an appeal to this court from the judgment imposing the sentence aforesaid. The mayor refused to grant the appeal, and thereupon relator filed the application for *mandamus* under consideration, averring that he has denied by appropriate pleas the legality and constitutionality of the fine imposed.

The respondent mayor, for cause why the writ should not be

granted, returns and shows that on the trial aforesaid before hi
relator, after his exceptions were overruled, filed an answer a
ting the acts complained of and for which he was arrested, wh
upon, after due trial, he was found guilty, sentenced to the pe
hereinbefore mentioned, and that the fine and costs were paid
the accused released from custody.

He, therefore, pleads that the relator having been convicted,
tenced, the decree satisfied and the prisoner discharged, no c
exists for the writ sought.

Relator does not seek in any way to traverse this return. Ind
we have been favored with no statement, or brief, on his b
other than his petition for the writ.

It thus appears that the judgment from which an appeal is so
has been acquiesced in, and the fine imposed paid without quali
tion or protest.

Under such circumstances the law denies the right of appeal
P. 567; State *ex rel.* Lamarque vs. Recorder, 39 An. 328; Colvi
Woodward, 40 An. 629.

It is therefore decreed that the peremptory writ of *mandamu*
refused, and that the preliminary orders herein granted be dischs
at relator's costs.

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No. 12,631.

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UNION OIL COMPANY VS. BOLAND S. LEATHERS ET AL.

Appeal dismissed for reasons assigned in Oil Company vs. Leathers, just de

APPEAL from the Civil District Court for the Parish of Orl
King, J.

Edwin T. Merrick for Plaintiff, Appellant.

Geo. W. Flynn for Defendants, Appellees.

Submitted on briefs November 15, 1897.
Opinion handed down December 13, 1897.
Rehearing refused February 21, 1898.

The opinion of the court was delivered by

BREAUX, J. The plaintiff prosecutes this appeal from an order of the District Court dissolving the writ of injunction sued out by plaintiff on bond fixed by the court.

In this court the defendants moved to dismiss the appeal on a number of grounds chiefly.

That the injury apprehended by the plaintiff was not susceptible of adequate compensation in damages.

For reasons assigned in the case just decided, of the Southern Cotton Oil Company vs. Leathers *et al.*, the appeal is dismissed. The facts are the same in this and in the cited case.

No. 12,562.

W. B. DANIEL VS. HIS CREDITORS.

A syndic's sale of real estate discharges only those incumbrances which the insolvent placed upon it, and not those by which it was burdened at the time he purchased it.

The vendee of mortgaged property is at liberty to make a sale thereof to a stranger who consents to assume the payment of the mortgaged indebtedness as part of the purchase price, notwithstanding the original act contains the pact *de non alienando;* but to constitute such an assumption an abandonment of the right of the mortgagee thereunder he must either have intervened in the act and made a formal renunciation thereof, or performed some other act of equivalent import.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

E. Erariste Moise for John J. Storck, Plaintiff in Rule, Appellee.

Rice & Montgomery for Mrs. Caroline W. Bellsnyder, Defendant in Rule, Appellant.

Dinkelspiel & Hart for Joseph Oury, Syndic, Defendant in Rule, Appellee.

Argued and submitted December 3, 1897.
Opinion handed down December 28, 1897.
Rehearing refused February 21, 1898.

The opinion of the court was delivered by

WATKINS, J. Mrs. Carrie B. Bellsnyder prosecutes this appeal from a final judgment which made absolute a rule which had been sued out by John J. H. Storck against the syndic of the general creditors of Daniel and the appellant as the holder of a note having a vendor's lien and mortgage, on property which the syndic had sold, to compel them to show cause why the inscriptions of mortgages and privileges operating against a said property should not be canceled and erased—the plaintiff in rule having purchased said property at a public sale made by the syndic, his claim is, that the mortgages and liens should be transferred to the proceeds of sale and a clear and unincumbered title made to him.

The syndic, in answer to the rule, averred that he had declined to execute such an act of sale as said purchaser demanded for the reason that counsel for Mrs. Bellsnyder, as well as her agent, had notified him that she was not bound by said syndic's sale, and that same did not, in any way, affect her mortgage; but he expressed a willingness to sign the act if the court so ordered.

The judgment of the court was in keeping with the allegations and prayer of the plaintiff in rule.

It appears that on the 16th of April, 1895, Mrs. Henrietta B. Cleveland, wife of Wm. B. Daniel, conveyed to widow Esther J. Trask three lots of ground, situated in New Orleans, for the price of four thousand dollars, of which the sum of one thousand seven hundred and fifty dollars is recited in the act of sale to have been paid in cash, and for the remainder, the purchaser executed her note for two thousand two hundred and fifty dollars, with vendors lien and mortgage consented thereon as security for the payment thereof—said note having been made payable to the maker's own order, and endorsed at one year after date; and bearing eight per cent. interest from date until paid.

The act of sale stipulated a special mortgage importing a confession of judgment in favor of the then present or any future holder of said note; and it also contained the covenant that in case of the failure of the maker to pay same at its maturity, the holder should be entitled to enforce said mortgage and vendor's lien by executory proceedings, and the mortgaged property be sold without the benefit of appraisement.

The insolvent made himself a party to the act of sale and mortgage, which contains the stipulation of the *pact de non alienando* in these words, viz.:

"Hereby binding herself and her heirs not to alienate, deteriorate, nor encumber the said property to the prejudice of these presents." But Daniel did not sign the note nor promise to pay the same.

The act was duly inscribed in the mortgage office.

On the 29th of April 1896, the aforesaid purchaser, Mrs. Esther Jane Trask, by notarial act, conveyed the aforesaid mortgaged property with full subrogation and substitution and with all legal warranties to Joseph Oury, syndic of the creditors of W. B. Daniel, for the use and benefit of said creditors present accepting and purchasing same—the act of sale specifying particularly that it was the same property which the vendor had acquired from Mrs. Henrietta B. Cleveland, wife of W. B. Daniel.

The price stipulated in the act of sale as the consideration for the sale was two thousand three hundred and fifty dollars, one hundred dollars of which is recited to have been paid in cash; and in satisfaction the balance the aforesaid syndic of the creditors of W. B. Daniel obliged and bound said creditors "to pay in place and stead of the said Mrs. Trask notes up to the sum of two thousand two hundred and fifty dollars, secured by vendor's mortgage on said property."

The act was signed by Mrs. E. J. Trask and by Joseph Oury—the latter appearing in the same as syndic of the creditors of W. B. Daniel, and it is signed by Max Dinkelspiel and John T. Whitaker as attesting witnessess.

It appears from the record that soon after the aforesaid transfer to Oury, syndic, John T. Whitaker, as agent and attorney for the appellant as the holder of said mortgage note for two thousand two hundred and fifty dollars, received payment from the attorneys of said syndic of the sum of one hundred and eighty dollars as the amount of accumulated interest thereon up to the 16th of April, 1896—a date only a few days prior to the date of the syndic's acquisition of the property—said receipt of the attorneys bearing date May 16, 1896.

But at the foot or bottom of said receipt and over the signature of Whitaker, agent and attorney, occurs this phrase, viz.:

"Said creditors assuming the future payment of said note and interest."

On the 20th of January, 1897, the court *a qua* granted an or
the request of the syndic for the convocation of a meeting
creditors of Daniel for the purpose of fixing the terms and
tions of the sale of the real estate standing in the name
syndic of the creditors—the petition of the syndic suggestin
advisability of a sale being made.

On the 2d of February, 1897, the creditors were duly asse
and, as the result of their deliberations, they declared "th
property herein surrendered, recovered by the syndic, and
standing in the name of Joseph Oury, as syndic of the credit
W. B. Daniel, be sold at public auction, 'on terms of cre
cash, at the purchaser's option.'"

In accordance with the foregoing order and recommend
appraisers were appointed, and they appraised the prope
$1800; and at the auction sale, in pursuance thereof, the pr
was adjudicated to the plaintiff in rule for the sum of $1200,
being two-thirds of the appraisement.

The testimony of Mr. Whitaker, agent, is to the effect t
represented Mrs. Mary Whitaker in collecting the interest
mortgage note, for which he gave the above described receip
that he represented her for no other purpose.

That he collected the interest money from the attorney of
syndic of the creditors of W. B. Daniel; that he had nothing
ever to do with the deed from Mrs. Trask or anything appert
thereto. That the mortgage note passed from Mrs. Whitaker
appellant, Mrs. Bellsnyder, as her daughter and heir. That p
the syndic's sale he received a letter from the attorneys of th
dic, attracting his attention to the fact that the mortgaged pr
was to be sold; and he admits that he was present on the d
property was sold by the auctioneer, but for the only purp
looking after the sale of another piece of property. That
not the appellant's attorney at the time of the sale.

The witness further states that he "has never under any ci
stances had anything whatever to do with the insolvency of Da
and he further declared that he had not at any time "ma
consent whatsoever in this matter as the representative o
mother, and could not have (done so) as the representative o
Bellsnyder." He further states that to his knowledge neith
his sister or his mother taken any part in these proceedings.

The argument on the part of the appellant is, that she never in any way participated in the insolvency proceedings, and had no notice of either the proceedings in Daniel's insolvency, or the alleged judicial sale which was made of the property on which she held a special mortgage containing the stipulation of the pact *de non alienando*, and a waiver of the benefit of appraisement, and the right to proceed by executory process in the collection of his note against the then present or any future holder thereof without reference to, or regard for any subsequent alienation thereof—citing Levy, Syndic, vs. Sheriff, 48 An. 410, and other authorities therein referred to.

It is further to the effect, that the statement which is contained in the receipt that Whitaker gave the attorneys of the syndic for the interest money, viz.: "Said creditors assuming the future payment of said note and interest" can not be construed as binding the *holder* of the note to a waiver or renunciation of the mortgage—said agent being wholly unauthorized to make the said admission, or to bind his principal thereby.

Our examination of the record has utterly failed to disclose in Whitaker, agent, any such authority, or any knowledge on the part of the holder, that such a receipt had been given by him to the attorney of the syndic; and the testimony shows that the endorsement on the back of the note, which evidences the receipt of the interest, is in these words, viz.: "Interest paid on this note up to the 16th April, 1896. John T. Whitaker, for holder of mortgage note."

That was the proper receipt for the collecting agent to have given; and it seems to have been sufficient to effectuate every necessary purpose.

The additional receipt which the agent gave to the attorneys for the syndic seems to us to have been a voluntary act on his part, one purely *ex gratia* and not binding on his principal.

Mrs. Esther J. Trask is the debtor of appellant and not the creditor of W. B. Daniel, the insolvent; and their assumption of the debt of Mrs. Trask in favor of appellant did not have the effect of releasing her therefrom. For that purpose the consent of the appellant was necessary; otherwise the novation of the debt by the substitution of a new debtor did not take place.

In our opinion the most that can be affirmed of the effect of the transaction which took place between Mrs. Trask and Oury, syndic,

was to give possibly an additional security to appellant; thou
have doubts about that, as the creditors of the insolvent c
intervene in the transaction, and assumed no personal respons

We can perceive no impropriety in the act of the appellant'
in accepting payment of interest from the syndic; nor did th
in any way, make appellant a party to the insolvency proce

In Levy and Carter, Syndic, vs. Thompson, Sheriff, 48 A
this court held: That a syndic's sale only divests the mo
which have been imposed upon the property by the insolvent.
principles are announced in Succession of Adam Thompson,
119; see also Traendle vs. Bouchel, 33 An. 753; Succession o
couet, 11 An. 383. The assumption by Oury, syndic, of the ind
ness of Mrs. Trask, to the appellant, conferred no greater ri
the latter than she had already by virtue of the stipulation
pact *de non alienando* in the deed of sale and mortgage—tha
conferring upon her the right to enforce her mortgage agai
property mortgaged in the hands of any third person, and
any previous notification.

This proposition is elementary and needs no citation of au
to support it.

In our opinion the case of *City Bank vs. Walton*, 5 Rob. 1
no application to the instant case. In that case the court said

"The bank having intervened in the act of sale from Wa
Samuel C. Ogden, and consented to the transfer of the p
mortgaged, we think the clause *de non alienando* in the mort
modified in its effects, if not entirely destroyed, and that th
ceedings should be against the third possessors of the proper

There is no question of the correctness of that opinion;
appellant neither intervened, in the act of sale from Mrs. T
Oury, syndic, nor did she in any way assent thereto. Nor
consider the agent's acceptance of an interest payment fr
syndic as a renunciation of the non-alienation pact.

The facts of the case of Mitchell vs. Cooley, 5 R. 240, w
cited by counsel for plaintiff in rule, are as follows, to-wit:

Mitchell sold a tract of land to Mrs. Camp, partly upon t
credit, retaining a special mortgage and vendor's lien th
The vendee subsequently made sale of the property to Daig
assumed the payment of the mortgaged indebtedness of his ve

a part of the purchase price. Subsequently Daigre sold to Robin, who likewise assumed the payment of the mortgaged indebtedness of his vendor as a part of the purchase price. Subsequently Robin sold to the defendant, Cooley, who likewise assumed the payment of the mortgaged indebtedness of his vendor as a part of the purchase price.

Subsequently the defendant sold to his brother, who likewise assumed the payment of the mortgaged indebtedness of his vendor as a part of the purchase price.

The original vendor, Mitchell, having died, and one of his sons having attained the age of majority, sued the defendant for his virile share of the defendant's indebtedness as evidenced by the aforesaid assumptions. And the defence tendered was: "*Defendant was not personally* bound to petitioner under the act of sale of Robin to him; that he only bought the property subject to the payment of the twenty-five hundred dollars," etc.

This statement shows clearly that there was no question in that case relative to the *original vendor's acceptance of the defendant's assumption;* there could not have been, as the suit brought was an *ordinary* action for the enforcement of defendant's compliance therewith.

That decision does not hold that the plaintiff or his ancestor had in any way *accepted that assumption* prior to the institution of that suit.

The judgment appealed from is erroneous and must be reversed.

It is therefore ordered, adjudged and decreed that the judgment be annulled and reversed; and it is now ordered and decreed that the demands of plaintiff in his rule be rejected at his cost in both courts.

No. 12,691.

H. & C. NEWMAN VS. A. B. COOPER, T. J. COOPER ET ALS., INTERVENORS.

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1. The testimony of the husband that his wife's father gave her the rents of his lands cultivated by the husband, and his testimony of the value of the rents will not suffice to establish as against his creditors the debt of the husband

for paraphernal funds, the proof must be clear that the husband rec money or property of the wife. C. C., Arts. 2383, 2390; 11 La. 468, 6 Ro 86; 2 H. D., p. 506, No. 4.

2. The surviving spouse in his settlement with the heirs of the decease her share of the community property, is entitled to a credit for the e debt paid by him. C. C., Arts. 564, 565; 8 An. 497, Succession of Brin 869.

APPEAL from the Sixth Judicial District Court for the of Richland. *Ellis, J.*

J. W. Willis for Plaintiffs, Appellants.

A. A. Gunby for Intervenors, Appellees.

Argued and submitted January 10, 1898.
Opinion handed down January 24, 1898.

The opinion of the Court was delivered by

MILLER, J. The plaintiffs appeal from the judgment decre intervenors to be creditors of the community between their and to be paid by preference over the plaintiffs, creditors father of the intervenors, with mortgage on his share of th munity property.

The community was dissolved in 1883 by the death of the of the intervenors. The plaintiffs' mortgage by the survivi band was executed in 1888. In the effort to foreclose the m the plaintiffs were opposed by the intervenors, children of th riage, claiming to be paid from the community the amount all have been received by their father of the paraphernal funds mother. This is the third appeal in this litigation. We held previous occasions that the intervenors, creditors of the com were entitled to preference of payment over plaintiffs, an mortgage was operative only on the property to the extent half thereof, subject to the deduction of all community deb

the amount of the community debt due the heirs of the wife, and the *residuum* subject to plaintiffs' mortgage we l the case. The lower court has fixed the debt due the ers, decreed the sale of the property, that the intervenors y preference from the proceeds, and that one-half the resi- plied to plaintiffs' mortgage and the other half is awarded ervenors as heirs of their mother. On this appeal the con- f plaintiffs is that the debt to the intervenors fixed by the is not warranted by the testimony or the law.

gument for the plaintiff assails the claim of the heirs of the ght hundred and five hundred dollars for rents allowed them dgment of the lower court. On the proposition that these were paraphernal funds of the wife converted by the hus- have the testimony of the husband that he worked land her-in-law, that later he and his father-in-law worked his hares, that lands were worth five dollars per acre, and that r-in-law gave his daughter, the mother of the intervenors, of the rents of his lands, two hundred dollars per year for s, and five hundred dollars, one-half the rents for the year were worked jointly or on shares by the husband and his -law. It is insisted this testimony does not show that either r property of the wife was ever received by the husband. and owed rent to his father-in-law, if any was stipulated, ands worked by the husband, or by him and his father-in- hares. These rents, community debts of the husband, can arged against the husband's creditors as paraphernal funds fe received by him. In this class of cases our courts have xacted clear proof of the origin of the paraphernal funds ndebtedness of the husband for those funds asserted by the t is to say, there must be proof that the husband received e paraphernal funds, and the husband's testimony alone has, instances, been deemed insufficient. Babin vs. Brosset, 58; Oliver vs. Oliver, 6 Rob. 36, and the line of cases in en's Digest, p. 508, No. 4. We do not find in the testimony sband that the father of his wife gave rents of lands culti- the husband of the value stated by him, the basis for a nal debt by the husband to be allowed against his creditors. wer court allowed the wife fifteen hundred dollars for the of her paraphernal property inherited from her father.

We do not understand there is any question as to the amo
these revenues, and the testimony of the husband is these
were used by him. On this part of the case the plaintiffs' c
tion is, that as the wife after her father's death administered h
property there could be no debt of the husband for the rev
But the mere fact that the wife assumed the administration
paraphernal funds does not exclude the receipt and conversion
funds by the husband. The testimony is her separate propert
duced a net revenue from her father's death in 1878 to her own
in 1883, amounting to fifteen hundred dollars, and that the hu
received and used the revenues.

It is conceded, and if not, is proved that the husband re
five hundred dollars of his wife's separate funds from her d
there is some dispute as to the amount, but none as to the fa
the husband disposed of some portion of the wife's property
the testimony fixes the amount, we think, with reasonable ce
at two hundred and sixty dollars. The proof is the hu
received of her funds two hundred and forty dollars, given
her father, and three hundred dollars she inherited from hi
the extent, then, of twenty-eight dollars, we conclude the cl
the heirs established.

On the other hand, the husband, it is proved, paid five hu
and five dollars, the amount of a community debt, for whic
entitled to a credit in his settlement with the heirs; the tw
eight hundred dollars diminished by this credit leaves twenty
hundred dollars due the heirs. Civil Code, Arts. 584, 565; S
sion of Fitzwilliams, 3 An. 489.

It is therefore ordered, adjudged and decreed that the jud
of the lower court be avoided and reversed so far as it adjudg
intervenors to be entitled to three thousand three hundred a
dollars as heirs of their mother, and it is now ordered, adjudg
decreed that the debt due their mother for paraphernal funds
it is hereby fixed at twenty-three hundred dollars, with
interest from their mother's death; that as directed by the
court the community property be sold, from its proceeds the
paid the aforesaid debt to the heirs; that one-half of the resi
paid the intervenors; that the other half of said residue b
plaintiffs to the extent requisite to pay their mortgage deb
that intervenors pay the costs of the appeal.

No. 12,710.

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STATE OF LOUISIANA VS. DESIRE HERBERT, JR., AND LAODICE LANDRY.

A motion to quash an indictment on the ground that the grand jury who presented it was illegal, because they were not drawn and organized on the first day of the term as fixed by law, comes too late if not filed on the first day of the term; and same will be overruled, unless exceptional circumstances are stated showing clearly that a compliance with the law in this respect was impracticable.

APPEAL from the Seventeenth Judicial District Court for the Parish of Vermilion. *De Baillon, J.*

M. J. Cunningham, Attorney General, and *M. T. Gordy, Jr.*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

A. & Chas. Fontelieu, Edwards & Green and *W. B. White* for Defendant, Appellant.

Submitted on briefs January 29, 1898.
Opinion handed down February 7, 1898.
Rehearing refused March 7, 1898.

The opinion of the court was delivered by

WATKINS, J. From a verdict convicting them of the crime of grand larceny and a judgment sentencing them to ten years' imprisonment in the State penitentiary, the defendants have prosecuted this appeal.

One of the grounds principally relied upon is a motion to quash the indictment, and it rests upon the following propositions, viz.:

1. That the grand jury who preferred the indictment against them was not impaneled on the first day of the regular jury term of the court, as the law requires—same being the 4th of October, 1897.

2. That no legal order was made or issued by the presiding judge of the court adjourning the regular term thereof.

3. That the grand jury who preferred said indictment, not having been impaneled until twenty-eight days after after the first day of

the term, as fixed by law for the opening of the court, same b
functi officio.

4. That the order of the judge directing and requiring the
to instruct the jury drawn for service during the first week
regular jury term of court to return on the 2d of November,
was wholly illegal and void, and of no effect in law.

This motion was filed, tried, evidence taken, argued, sub
and overuled on the same day, and defendants' counsel rese
bill of exceptions.

The judge refused to sustain the motion to quash, on the
that it was not timely, having been presented for the first ti
the day of the trial, and several days subsequent to the defe
arraignment.

The record discloses the following facts, viz.:

That on Monday, the 4th of October, 1897, the day fixed b
for the convocation of the jury term of the court, the presidin
ordered the sheriff to open the court and discharge the gra
petit juries, which had been summoned for that day, until Tu
the 2d of November, 1897—same having been done an a
of yellow fever quarantine.

That on the 12th of October, 1897, the judge made an
to the effect, that there would be held a special term of court
mencing on Monday, the 15th of November, 1897; and th
order was subsequently so modified as to fix the date
opening of said special term of court on the 24th of Nov
1897.

That on Tuesday, the 2d of November, 1897, the day fixed
order of the judge for the holding of the regular term of cou
sheriff returned into court the *venire facias*, containing t
of grand and petit jurors, and that same were regularly call
answered to their names, and therefrom the grand jury was
larly chosen, set apart and sworn.

That on Thursday, the 4th of November, 1897, the court o
the jury commission to draw, without delay and *instant*
service at the special term to be convoked and holden on th
of November, 1897, thirty names for service as petit jurors.

That on Friday, the 5th of November, 1897, the gran
returned into court the indictment against the defendants, ch
them with the larceny of five cows.

That on Monday, the 8th of November, 1897, the two defendants were regularly arraigned, and pleaded not guilty and elected to be tried by a jury; and that upon the same date the judge made an order that the criminal term of the court be adjourned until the 24th of November, 1897, and that all persons under bond be directed and required to report at that time.

That on the 24th of November, 1897, the judge made an order directing and requiring the jury commission to forthwith draw from the general *venire* box the names of fifty persons to serve as tales jurors, on the 30th of November, 1897.

That on the 26th of November, 1897, the cause was by consent of parties fixed for trial on the 30th of November, 1897.

That the defendant's motion to quash was filed on the 30th of November, 1897, the day set for the trial.

It thus appears that the statement of judge was fully justified by the record—the grand jury having been drawn and regularly organized on the 3d of November, 1897, the first day of the term of court at which the indictment was found and presented to the court, and under which the defendants were regularly arraigned and plead not guilty several days subsequently.

It is of no consequence that the court was, on the 4th of October, 1897—the day fixed by law for it to have convened—adjourned over, by order of the judge, to the 2d of November, 1897; as the judge also ordered the sheriff to open the court regularly on the 4th of October, 1897, and adjourn same to the date designated, and to discharge all jurors who had been summoned until that date.

Under that state of facts, the regular term of the court did not lapse, but was only adjourned; and consequently the grand jury was properly and legally organized on the 2d of November, 1897, the date to which the regular term of court had been adjourned.

Subsequently the grand jury presented the indictment against the defendants; and several days thereafter the defendants were arraigned, plead not guilty, and demanded a trial by jury.

Several days subsequently, the cause was, by consent, fixed for trial; and four days later the defendants' motion to quash was filed, seeking to avail themselves of alleged formal defects in the organization of the grand jury.

If in point of fact these alleged informalities actually existed, they must have been as well known to the defendants at the time the

indictment was filed, and they were arrested thereunder a
were at the time the motion to quash was filed.

That a motion to quash an indictment on the ground th
venire was irregularly drawn came too late, same not havin
filed on the first day of the term, and no exceptional circums
having been stated as rendering compliance with the law i
respect impracticable, has been recently held by this court
faith of previous adjudications. State vs. Collions, 48 An. 1454
vs. Pruett, 49 An. 283; State vs. Ashworth, 41 An. 683; St
Vance, 31 An. 399; State vs. Sterling, 41 An. 679; State vs. Le
46 An. 1195.

In the instant case no exceptional circumstance is stated
rendered compliance with legal requirements impracticabl
hence we deem it our duty to adhere to previous adjudicatio
sustain the ruling of the trial judge.

There are some other bills of exceptions in the record, bu
much as they have not been argued in the brief of the defe
counsel we do not feel called upon to examine and pass upon

Judgment affirmed.

No. 12,492.

IN THE MATTER OF THE PELICAN SAW MILL AND MANUFAC
COMPANY.

Reiterated that it is the amount of the fund to be distributed, and not the
claim of the complaining creditor, that determines the jurisdiction
court Motion to dismiss appeal denied.

Where creditors, recognized on a receiver's account, are opposed, it is inc
on such creditors to adduce the proof necessary to substantiate thei
and failing in this they will be stricken from the account.

After the judgment amending and homologating the account has beco
and the funds have been disbursed by the receiver pursuant to its m
this court, under the facts here presented, will not reverse and re
order to permit opportunity to complaining creditors to appear an
their claims.

APPEAL from the Civil District Court for the Parish of O
Ellis, J.

Rice & Montgomery and *F. L. Richardson* for Receiver, Ap

Hughes & Favrot, Buck, Walshe & Buck, Benjamin Rice Forman and *Hugh C. Cage* for Opponents and Appellants.

Argued and submitted January 28, 1898.
Opinion handed down March 21, 1898.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

BLANCHARD, J. The motion to dismiss is made on the ground that the amount claimed by each appellant is below the appealable jurisdiction of this court.

The provisional account of the receiver proposing to distribute fifteen thousand five hundred and thirty-three dollars and seventy-six cents, and his final account proposing to distribute four thousand one hundred and eighty-nine dollars and seventy-five cents additional, or a total of nineteen thousand seven hundred and twenty-three dollars and fifty-one cents, were tried together, amended and homologated under one judgment.

Representing themselves as creditors of the insolvent concern and averring error in the judgment and injury to themselves, A. M. Edwards, John Stranger and Henry Buddig prosecute this appeal.

It is not the amount of their claim that determines the appellate jurisdiction; it is that of the fund to be distributed. Constitution, Art. 81; Murray vs. Sweeney, 48 La. An. 761; Amendment, Acts 1882, p. 174.

The motion to dismiss is denied.

ON THE MERITS.

Appellants were creditors of the insolvent corporation. They appeared as such on the books of the concern. They were listed as creditors on the provisional and final accounts filed by the receiver. When these accounts were presented to the court the usual order was made for their advertisement according to law, and it is shown that they were advertised for ten days in the English and French languages. Oppositions were filed, and these and the accounts opposed came on for trial in due course.

The oppositions were leveled at each and every claim listed on the accounts as debts due by the corporation. and the three

complaining creditors herein were mentioned by name an
claims opposed as not being debts due.

Opponents prayed that the items opposed be rejected a
allowed and stricken from the accounts.

There were numerous creditors. Many of them appeared
trial of the oppositions and substantiated their claims. Bu
eight of the creditors, who had been placed on the rec
accounts as such, failed to appear, notwithstanding the oppo
brought into question and contestation their claims. Among
were the three appellants herein. No proof whatever was
on their behalf to make good their debts in this contest betwe
creditors.

As a consequence, in the final judgment on the account
claims were disallowed. In a proceeding where everything w
puted and combatted and a trial had contradictorily with op
creditors, nothing could be allowed which did not have
of proof to stand upon.

Claims not supported by testimony could have no ratio
claims proven, where opposition had put all to the proof.

On this point the learned judge of the court below said: "
items of ordinary debt that I have ordered stricken fro
accounts were all opposed, and the parties have brought no p
sustain them. If they suffer loss, it is the result of their ow
in not producing their proof."

The judgment of homologation of the accounts, as amende
rendered January 22, 1897, and signed February 3, 1897. A mon
Stranger and Edwards, appellants herein, appeared in the lower
for the first time, and took a rule on the receiver to show cau
their claims should not be paid as ordinary creditors. Thi
on trial, was dismissed for the obvious reason that they no
had, before the court, the character of creditors of the in
corporation. Called in question in the way the law provides
had been no proof at the trial of their claims, once recogni
the accounts, and the same had been stricken therefrom. The
ment of the court doing this had become final, it was the
date for the receiver to pay out and disburse among those w
proven their claims and been recognized as creditors the mo
his hands, no suspensive appeal had stopped his doing s
he had made the payments. At least nothing to the co
appears.

Their rule to enforce payment having failed, Stranger and Edwards took an appeal, both from the judgment amending and homologating the accounts and from the adverse judgment on the rule.

Buddig, the other appellant herein, appeared about this juncture *for the first time*, and took an appeal.

These appeals were all necessarily devolutive—it was too late to appeal suspensively.

There is no testimony in the record which justifies this court in amending the accounts appealed from so as to include appellants thereon as ordinary creditors. It is not contended by appellants that there is.

But they do insist on the reversal of the judgment, to the end that the case may be remanded for another trial below. This would give appellants the opportunity *now coveted* to prove their claims and take rank on the list of ordinary creditors. If this should be done and these parties proved their claims and became recognized as ordinary creditors, the result would be, since there is not enough to pay all, that those creditors now recognized on the adjudged account as such, would receive less.

But, meanwhile, under the judgment and mandate of the court, not suspensively appealed from, the receiver has disbursed the funds in his hands. Those recognized as ordinary creditors on the approved account have received their *pro rata* share.

Should the case be remanded on this demand of appellants and the account be then amended by including them and the forty-five others who failed to appear and prove their claims in the first instance, where would the money come from to pay them their percentage?

The receiver has it not, for he has paid it out on the first judgment recognizing the other creditors and striking these from the list.

Must the receiver himself be required to make up the amount to them out of his own funds, or to be mulcted for the same on his official bond?

Or will the parties, later recognized as ordinary creditors, have to pursue those earlier recognized as such, to force them to disgorge a part of what they had been paid on their claims? A fruitful field of litigation would be here presented.

The appellants were, beyond doubt, creditors, and the receiver did his duty, both to his trust and to them, in placing them on his

account as such. Other creditors had the right to oppose did so.

The provisional account, which first recognized appell creditors, was filed November 15, 1895.

The second and final account, which also recognized th filed May 5, 1896.

Between the two dates the case had come to this court on a anterior to this one, prosecuted by other creditors on other g

On February 20, 1896, Bankston and others filed oppositio lenging every item on the provisional account, and, by na claims of these appellants.

They renewed this opposition on May 14, 1896, to the final a

Other creditors, about that time, presented similar opposit

The taking of evidence on the trial of the accounts and the tions filed thereto, began on October 28, 1896, continued thro remainder of that month, was resumed again on November the case was argued and submitted on December 5, 1896, a ment was signed February 3, 1897.

It thus appears the settlement of the affairs of this insolv poration was pending in court for largely more than twelve before the judgment now appealed from became final, and mo eleven months had elapsed from the filing of the first opp challenging appellants' claims, before the judgment was signed struck their claims off the account. Yet in all that time the no appearance to defend their rights thus attacked. And no put up the contention that they had no knowlege or informat any one disputed they were creditors, and complain they hav condemned without notice or hearing. Whose fault was this

If the receiver had ignored their claims and filed his accou out recognizing them as creditors they would have had to and file oppositions in order to obtain a place on the account

This was the only way, and if they had neglected it account been seasonably homologated, on due proof, they have been barred.

Under such circumstances, suppose they had later appeared an appeal, brought the case here and urged that the judgm reversed and the case remanded in order that they might opposition and have themselves included on the account as cr would they be listened to? Surely not.

Is there any substantial difference in the case as now actually presented?

The receiver put them on his account; co-creditors opposed; they neglected throughout an entire year to appear and make good their right to a place thereon. The case went to trial without them, other claims, proven, were allowed; theirs, without proof, disallowed. Now they appeal, after disbursement of the fund, and ask remanding of the case in order that they may adduce proof and obtain a place on the account. It is too late. By their own laches they are left out. The receiver did his duty when he placed on his account all whom he considered creditors, and other creditors having opposed, the issue, as correctly stated by the trial judge, was shifted and the contest became one among creditors. It was the concern of the creditors whose claims were opposed to adduce the evidence to sustain them. Calder vs. Creditors, 47 An. 1539. It was not the duty of the receiver so to do, nor to take part in such a contest between creditors.

The law favors the vigilant, while it turns a deaf ear to those who find their right impaired as the result of their own indifference, inattention, or want of care.

Unlike the Calder case, *supra*, gross neglect on part of the complaining creditors is apparent here, and, all things considered, we do not see our way to remanding the case.

Judgment affirmed.

No. 12,557.

THE STATE EX REL. BOLLING C. HALL, FOR USE, VS. JUDGES OF THE COURT OF APPEALS, SECOND CIRCUIT.

The judgment of the Court of Appeals does not become final by the lapse of ten days after the adjournment when there is pending and undisposed of a rule for a new trial seasonably taken by the party cast. C. P., Arts. 546, 558; Act No. 100 of 1896; 35 An. 1104.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

Newton & Hall and *Lamkin & Millsaps* for Relator.

Respondent Judges in person (*Potts & Hudson* of Counsel).

Submitted on briefs June 15, 1897.

Opinion handed down June 28, 1897, WATKINS, J., making peremptory.

Rehearing granted December 13, 1897.

Submitted on rehearing February 21, 1898.

Opinion on rehearing handed down March 7, 1898.

ON REHEARING.

The opinion of the court was delivered by

MILLER, J. The relator applies for the writs of *certiorari* and hibition to protect his asserted right to the judgment in his rendered by the Circuit Court of Appeals for the Second C which he claims had become final and was illegally set aside subsequent judgment of that court.

It appears that at the term of the Court of Appeals for S Circuit, of January, 1897, judgment was rendered in relator's on his appeal from the judgment of the District Court in fa the Alexandria & St. Louis Railway Company; that in due ti Company applied for a rehearing, on which the court took no before the expiration of the term; thereupon the parties suit through their counsel agreed that the court might pass rehearing within fifteen days thereafter; the judges failed to and on the 16th February, the sixteenth day from the date agreement, the judges made the order that being unable to the application for the rehearing be continued to the next r term, beginning third Monday of May, 1897, at which ter judges designated an attorney to aid them in the decision thereafter, the court thus constituted rendered judgment rev that previously rendered.

In this condition, the relator, plaintiff in the suit, made the p application to this court for relief against that which he concei be the illegal action of the Circuit Court in reversing it judgment. His contention is, that the first judgment b final in ten days after the adjournment of the court, notwith ing the application for the rehearing then pending, and the supposes his contention supported by the Act No. 100 of which makes judgments in the Courts of Appeal final fro after adjournment of the term at which they are ren

provided that three judicial days shall always be allowed for motions for rehearing, if the term shall not expire before the delay shall elapse, and if the term does expire before the three judicial days, the rehearing applied for within three days after the rendition of the judgment, shall be considered in chambers and a decision filed within ten days after adjournment. If the application is refused the judgment becomes final; if granted, the case shall be continued on the docket; and, in all cases, applications for rehearing may, by consent, be taken under advisement until the next term of the court. If, then, we sustain relator's contention, he loses the benefit of his application for a rehearing, not from any fault of his own, but simply and only because of the inability of the judges to agree, or rather their failure to decide within ten days. That contention sustained, the right to ask the rehearing would be left, but would be of no use if the judges to whom it is addressed chose not to act, or were unable to act, or acting, failed to agree.

In our view, no such construction can be placed on the Act No. 100 of 1896. It did not intend to inflict the penalty on the litigant of deprivation of any rehearing because the judges failed to act on his application. They should act within ten days from the adjournment, but if they do not, or, as in this case, are unable to agree, the litigant's application for a rehearing must be disposed of at the ensuing term. No action upon his application for a rehearing, instead of defeating it, in our view, action on the application could be enforced by *mandamus*. In our view, the decision of our predecessors that the litigant was not deprived of the benefit of his rule for new trial, seasonably taken, because of the adjournment of the court without acting on the rule, is quite applicable here. Under the Code of Practice the litigant is allowed his rule for new trial, if taken within three judicial days from the rendition of the judgment. Another article requires all judgments to be signed at the expiration of three days from the rendition, and, by an amendment, applications for new trial were required to be determined and all judgments to be signed before the adjournment of the court, whether or not three judicial days had elapsed. It was held under these articles of the Code of Practice, as amended, the litigant's rule for a new trial was not defeated by the adjournment of the court without determining the rule. State *ex rel.* Allen & Syme vs. Judge, 35 An. 1104. Obviously, on principle and authority the litigant

should not be deprived of his legal right to a new trial mere only because the judge fails to act on his application. That i tically decided in the case cited. With equal reason, we thi application for the rehearing in the case now under review lapse and the judgment become final because within ten day the adjournment of the term the application was not disp because the judges could not agree.

It is therefore ordered, adjudged and decreed that our p order on this application for the writs of *certiorari* and prob be set aside and annulled, and it is now ordered and adjudge the relator's application be refused at his cost.

No. 12,677.

JOHN SEALY vs. G. L. HALL ET ALS.; R. B. HAWLEY & Co., OPPONENTS.

An irregularity or want of notice of a rule for new trial is unimportant w testimony brought up on the appeal supports the judgment sought t aside on the new trial.

APPEAL from the Nineteenth Judicial District Court for the of Iberia. *Voorhies, J.*

Foster & Broussard, Andrew Thorpe and *T. H. Thorpe* for Opponents, Appellees.

Walter J. Burke & Bro. for Defendants, Appellants.

Argued and submitted December 27, 1897.
Opinion handed down January 24, 1898.
Rehearing refused March 7, 1898.

The opinion of the court was delivered by

MILLER, J. The defendants appeal from the judgment dec opponents' payment of a debt with privilege on certain tenances of a sugar mill.

There had been a previous judgment in the opponents' fav in the enumeration of the appurtenances there was an omissio

the rule for new trial the court extended the description of the articles covered by the privilege so as to embrace all intended by the original judgment. No notice of the rule for new trial was given the defendants, and from the judgment on the new trial this appeal is taken.

It is insisted by defendants that the judgment can not be changed in any material respect except on a rule for a new trial, duly served on the parties in interest. It is claimed by the opponents that the defendant in execution is not entitled to notice, and that the judgment merely corrected an error and supplied that which it was intended to be incorporated in the original judgment.

The appeal brings up all the testimony on the trial and sustains the judgment rendered on the rule for new trial. The objection to the rule for the new trial is, therefore, of no importance, as our judgment must give effect to the testimony sustaining the opponents' demand. Whipple vs. Hertzberger, 11 An. 475.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

No. 12,467.

CITY OF NEW ORLEANS VS. GEORGE P. KERR AND JOHN GALLY.

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The powers and obligations of municipal corporations are twofold in character, (1) those that are of a public nature, and (2) those that are of a private nature.

As to the first, the municipal corporation acts as the agent of the State—discharging duties incumbent upon the State—and as the representative of sovereignty is not answerable for the non feasance or malfeasance of its officials.

As to the second, the corporation represents the pecuniary and proprietary interests of individuals, and the rules which govern the responsibility of individuals are properly applicable.

While, in a general sense, not liable for the non-feasance of its officers, the city of New Orleans is responsible for damages arising *ex contractu*, having as their source the breach of a contract duly executed by its corporate agents acting within the scope of their authority and in the line of their duty.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

James J. McLoughlin, Assistant City Attorney, and *Samuel L. Gilmore*, City Attorney, for Plaintiff, Appellee.

John C. Wickliffe and *Joseph N. Wolfson* for Defendants, A
lants.

Argued and submitted November 29, 1898.
Opinion handed down February 7, 1898.
Rehearing refused April 4, 1898.

The opinion of the court was delivered by

BLANCHARD, J. This is an action brought by the city of Ne
leans against the defendants for a balance due upon a sale o
of the franchise or right to impound stock within the city's
and to receive the fees therefor.

Defendant Kerr, who was the pound contractor, answered
while there was an apparent balance due the city on his contr
was absolved from liability therefor by reason of flagrant br
of the contract on the part of the city in failing to give him
police protection in the discharge of his duties as pound k
without which his contract was unavailing, and in harassi
annoying him through its officers and agents.

Then, assuming the character of plaintiff in reconvention,
up a claim against the city for nine thousand three hundr
twenty-two dollars and thirty-seven cents for damages accr
him by reason of the breaches of contract aforesaid. This c
set forth with much detail.

The judgment below was against both parties. It rejected
tiff's original demand and that of defendant in reconvention.

Defendant alone appeals, and the case is before us only as
reconventional demand of the latter.

Defendant's contract with the city was entered into on the
May, 1891, and was for the term of one year. The Mayo
executed the contract on behalf of the city, was specially auth
thereto by ordinances of the City Council, and the formal co
was in confirmation of a sale and adjudication of the pound fra
previously made to defendant.

The words used are that the city "does by these presents
bargain, sell and confirm" unto the defendant "the revenues
public pound" for the period named.

The ordinances of the city relative to the impounding of

were referred to in the instrument, and the principal one was copied bodily into it as a part of the contract.

One section of this ordinance declares that all animals found upon the streets contrary to its provisions "are to be taken up by the police, the contractor or his assistants and placed in the nearest pound," etc.

Another section provides "that it shall be the duty of the city police to render such service or assistance as may be necessary to the pound keepers in the discharge of their duty."

Some four or five months after the contract became operative, another ordinance was adopted by the City Council, which, after first declaring that experience had shown the impracticability of enforcing the pound contract without proper police protection and that it was the duty of the city police to render such assistance as was necessary to the pound keeper, his assistants and employees in the discharge of their duty, proceeded to request the Board of Police Commissioners to instruct the superintendent of police to make a permanent detail of two officers for the purpose.

Still later, and about a month before defendant's contract was to expire, further action was taken by the City Council in the form of a motion adopted requesting the Mayor to direct the superintendent of police to require the strict enforcement of the preceding ordinance relative to pounds, and calling upon the several recorders of the city to see to the enforcement of the same, and admonished them that in case of failure to do so they would be held amenable to the council for dereliction of duty.

These several corporate acts are practical admissions that theretofore the city ordinances relating to the impounding of stock and the city's obligation to the pound contractor with reference thereto had not been adequately enforced.

And the testimony taken leaves no doubt upon the mind of the truth of this fact.

It was not possible to carry out the contract without police protection and assistance.

The contractor, his drivers and assistants were threatened, assaulted, beaten and driven off.

Cattle and other stock taken up and on their way to the pounds were rescued by mobs.

Frequent arrests of the defendant were made on charges of illegal

conduct in carrying out the contract, on all of which charges one, he was acquitted, and as to the one upon which h convicted, he was subsequently released on a writ of *habeas c*

Once he was locked up all night and part of a day in the city on a trumped-up charge.

One of his pounds was broken into by police officers claim act under order of the then acting Mayor, and a horse impo released.

Other acts of misfeasance and non-feasance of the police and city officials, in reference to defendant and his contract with th are shown.

He was not furnished the necessary police protection and ance, and for the greater part of the time it was withheld fro entirely.

Indeed, it is shown that the then Mayor gave an orde no police protection be given defendant, and that because order the Chief of Police refused details of policemen.

The record teems with evidence of application after appli made by defendant and his attorney for police protection and ance.

There is no room for doubt that the contractor was rea all times to carry out his contract, willing and anxious to do zealous in his efforts thereunto. So much so, in fact, that it re in numerous complaints lodged against him.

That he may in instances have overstepped the limits of a ju cretion in the manner of its execution, is probable. But there proper way of meeting this and of dealing with him in regard t without withholding the protection and aid of the police nec to the legitimate execution of his duties under the contrac guaranteed to him by the instrument evidencing the same.

The amount he was to pay to the city monthly under his co was thirty-one dollars.

That he did not pay all the monthly instalments and ow balance of two hundred and seventy-one dollars, which the city for herein, is explained by him on the ground of the city's fail meet its obligations to him under the contract.

The way defendant was to be compensated for the work done his contract was by fees collected on animals impounded, an evidence shows the franchise was a valuable one, and, per

lucrative, if adequate police protection and assistance had been extended him.

The powers and obligations of municipal corporations, like the city of New Orleans, are twofold in character: those that are of a public nature and those that are of a private nature.

This court by repeated decisions has recognized this distinction. 1 An. 437; 9 An. 461; 12 An. 190, 482; 14 An. 120; 26 An. 478.

As to the first, or public character of its powers and obligations, the municipal corporation represents the State—discharging duties incumbent on the State. As to the second, or private character of its powers and obligations, the municipal corporation represents the pecuniary and proprietary interests of individuals.

As to the first, where a municipal corporation acts as the agent of the State, it becomes the representative of sovereignty and is not answerable for the non-feasance or malfeasance of its public agents.

As to the second, the rules which govern the responsibility of individuals are properly applicable. Am. and Eng. Ency. of Law, Vol. 15, p. 1141; Western College vs. City of Cleveland, 12 Ohio St. 337; Rusher vs. City of Dallas, 16 S. W. 333; Whitefield vs. City of Paris, 19 S. W. 566; O'Rourke vs. City of Sioux Falls (S. D.), 54 N. W. 1044; 61 Fed. Rep. 64; 62 Fed. Rep. 240.

In the instant case one of the items of damage claimed by defendant is one thousand dollars for his illegal arrest and imprisonment by the police under the direction of the city officers.

Under the distinction between the powers and obligations of the city above noted, no liability attaches to her on account of this act of malfeasance of her officers. Stewart vs. City, 9 An. 462; Lewis vs. City, 12 An. 190; 2 Dillon, Sec. 975.

This was a tort and the action based thereon arises *ex dilicto*.

But as regards other items of damage claimed (to be noted later), the action to enforce same arises *ex contractu*, and the city is liable. Vidalat vs. City, 43 An. 1122; 2 Dillon on Corporations, Secs. 935, 980, 981, 983.

The city had the right to impound cattle; it comes within the police powers of the city. (Am. and Eng. Ency. of Law, Vol. 10, p. 137). It is necessary to insure cleanliness and the public safety. Having the power to do this itself, it could let it out by contract and did so, and stipulated as part of the contract that it would furnish police protection to enable its contractor to perform his duty and carry out

the contract. Failing to do this, it is liable as for breach contract.

While not liable for the non-feasance of its officers in a g sense, it is liable for debts incurred through its corporate acting within the scope of their authority and the line of thei It is on this principle that it is liable to defendant for failure obligation to furnish him the means of fulfilling his contract which depende i alike the performance of his duty to the ci the realization to himself of the profits of the enterprise.

In La Rosa vs. Mayor, 4 La. 24, it was held that when the New Orleans made an adjudication of a certain right, if d reference to and conformity with an ordinance of the City C it imposes all the obligations and confers all the rights crea the ordinance. See also Johnson vs. Municipality, 5 An McLaughlin vs. Same, 5 An. 504.

If we view the city as *vendor* of this franchise to the defe then she is liable for breach of the warranty respecting the l peaceable possession of the thing sold. C. C. 2476, 2500 *et se*

If we view the city as *lessor* of the right, then she is lia breach of her obligation to cause the lessee to be in peaceab session of the thing during the continuance of the lease. 2692, 2696.

So far as defendant's reconventional claim is one soun damages arising *ex contractu*, he is entitled to be reimbur loss he has sustained and the profit of which he has been de to the extent that the proof substantiates the same. That is he may recover such damages as were contemplated or may r ably be supposed to have entered into the contemplation parties at the time of the contract. 43 An. 1128; C. C. 1934; 105; 11 An. 300.

Defendant claims twenty-five dollars for the destruction pound in the Fifth Municipal District. The evidence does not lish this item with sufficient certainty and it is disallowed.

The same is true of the claim for twenty dollars, amount of fees said to have been collected in the Fifth District, and officers of the city are alleged to have compelled his repr tive to refund, and the claim for twenty-five dollars for pou on stock represented to have been turned out of the said po the city's representative.

Both items are disallowed.

The claim of one thousand and fifty dollars for pound fees upon four hundred and twenty head of stock, taken up by defendant, and which, while being driven to the pound, were rescued and taken from his custody by mobs and lawless people, is made out and must be allowed.

Under the pound ordinances of the city and under his contract, the moment stock running at large were apprehended by the pound keeper, his right to the pound fees attached, and if by reason of the lack of sufficient police assistance such stock is forcibly taken from his custody, the city became liable for breach of its contract obligation to furnish the protection necessary in the premises. Moreover, the stock being apprehended and his claim to the fees having attached, the latter became a right of property, for damages to which by mobs and riotous assemblages the city is responsible under the statutory law. Section 2580, Revised Statutes.

The claim of four thousand eight hundred and thirty-five dollars and thirty-seven cents for pound fees alleged to have been lost by reason of the city's failure to furnish police protection during two hundred and sixty-seven days of the contract can not, on a review of the whole evidence, be held to be made out with sufficient certainty. This item is asserted under the head of "profit of which he has been deprived," and was calculated on the basis of the contractor's earnings on the days when he did have police protection. See Schleider vs. Dietman, 44 La. An. 462.

On the next item, one thousand two hundred and eighty-seven dollars for the rent of the pounds during the two hundred and sixty-seven days, when defendant could not use them because of lack of police protection, nine hundred and thirteen dollars is allowed, being the amount defendant testifies he actually paid out for such rent during that time. This is a damage for which the city must be held liable. The pounds were useless without the police protection necessary to enable defendant to impound stock, and defendant could not give up the pounds and save the expense, for he could not foresee that the policy of withholding police protection would continue. He was compelled to be ready himself to perform his duty at all times, and one of the requisites to this end was the maintenance of pounds for the detention of stock.

With regard to the last item, one thousand and eighty dollars,

compensation to employees, drivers and pound-keepers dur
time defendant was without police protection, the evidence d
establish with certainty that this much is due. We are s
however, that defendant is entitled to an allowance under th
and will put it at one-half of the sum claimed, or five hundr
forty dollars.

The city is liable for this on the same principle that the cl
rent of the pounds is sustained.

We have given due consideration to the several defences o
part of the city against the reconventional demand, but a
strained to hold that so far as this claim is herein sustaine
have not been found to be applicable.

It is, therefore, ordered, adjudged and decreed that the ju
appealed from, in so far as the same rejects in whole the deman
convention, be annulled, avoided and reversed, and it is now
that defendant, George P. Kerr, do have and recover of the
New Orleans, on his demand in reconvention, the sum of tw
sand five hundred and three dollars, with legal interest there
judicial demand, to-wit: September 10, 1892, together wit
in both courts.

No. 12,684.

STATE OF LOUISIANA VS. RUFFIN WALKER.

A provocation which would not naturally cause instant resentment, b
would have to be thought or brooded over after its commission in
produce rage or anger is not in contemplation of law a provocation
to reduce an intentional killing from murder to manslaughter.

The use of the words "ordinary man" for "reasonable man" in the cha
by the judge is in no sense prejudicial to the accused.

It frequently happens that a witness contradicts himself for want of
application of the questions asked him. Where there is a difference
counsel as to what the answers made *were* the court is authorized to
witness an opportunity to set himself right. State vs. Wiggins, 45 An

The District Attorney having propounded to the defendant then on th
certain question, his counsel objected that it had been several times
answered *in the negative* and should not be asked anew. The District
contended that it had been answered in the *affirmative*. The court ove
objection, stating "it seemed that this witness has answered this que
ways, and the court will permit the attorney to ask the question agai
finally determine this matter." Counsel of defendant objected to
ment and reserved a bill on the ground that "it was a comment o
dence." The court stated to the jury that it was not intended as a co
the evidence, but merely as a reason for permitting the question to
and that they should pay no attention to the statement.

State vs. Walker.

The object of the question propounded by the State was through an affirmative answer given by the defendant to hold the case down to one of "*murder*." The effort was unsuccessful, the jury having returned a verdict of "manslaughter." *Held*, that while it is the duty of district judges to carefully abstain from any expression of opinion or comment upon the facts of a criminal case not only in their charge to the jury, but in their rulings in the presence of the jury upon the admissibility of evidence, and to avoid, as far as possible, at all times, both in their language and in their conduct and actions, saying or doing anything from which the jury might draw any conclusion as to their view of the case before them the statement of the judge in this particular case furnished no legal ground for reversal.

APPEAL from the Tenth Judicial District Court for the Parish of Rapides. *Hunter, J.*

M. J. Cunningham, Attorney General, and *Phanor Breazeale*, District Attorney, for Plaintiff, Appellee.

Julius F. Ariail, *Robert P. Hunter* and *John N. Ogden* for Defendant, Appellant.

Argued and submitted January 15, 1898.
Opinion handed down February 21, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant, indicted for murder, was convicted of manslaughter and sentenced to the penitentiary for eight years. He has appealed. He relies for reversal upon two bills of exception. The first bill is as follows:

"The District Judge charged the jury as follows:

"It is essential that the excited and angry condition of the party committing the act entitling him to a milder consideration of the law should be superinduced by some insult, provocation or injury which would instantly produce, in the minds of ordinary men situated as the prisoner was the highest degree of exasperation," which charge, read from the written charge of the judge, was objected to because it required of the accused more than the law demands, in erroneously restricting him to an instant of time and requiring that the tests should be applied to him as an "ordinary" man, and that the provocation should, in order to make the crime manslaughter, have produced the highest degree of exasperation; and particularly is the

charge erroneous because subsequently, in the written cha court, without qualification, instructed the jury as follows prosecution must be such as would stir the resentment of an man.' In reference to this bill the court made the followin ment: 'This exception is directed at that part of the charge r to manslaughter. The charge given in this case is taken from the criminal law writers and the decisions of our cou taken altogether, the only fault to be found with it, in my is in its liberality. All the writers lay down the doctrine assault or provocation must be such as would stir the resent an 'ordinary' man in order to reduce the crime to mansl There must be some standard by which an accused must be and to judge him from the standard of an ordinary man liberal enough. As to the objection directed at the word ' the court followed the law, and besides this, fully charged in reference to 'cooling time,' etc., as will appear by the attached to the bill and made a part thereof. Wharton on H Secs. 449, 459; Desty, A. C. L. 378, Sec. 128, § 370."

Defendant's counsel tendered to the judge a bill of exce which the following recitals were made.

"That during the trial when the defendant was on the stan caoss-examination by the District Attorney he was asked lowing question: 'Did you not anticipate the probable r calling the deceased Tallie Brown a liar at the time you utt words?' to which the counsel for defendant objected, u ground that the same question had been propounded and a by the witness several times. Whereupon his Honor Edwin ter, in the presence and hearing of the jury, ruled as follow District Attorney can ask the question because the witnes Walker) has answered the question two or three different two or three different ways.

"Immediately thereupon counsel for defendant reserved bill of exceptions to the ruling of the court, for the reaso was an illegal comment upon the testimony of the accuse bill being handed to the District Attorney, and by him found is given to the judge presiding, for his consideration and a after a statement of the District Attorney, which is attache made part of the bill.

The District Judge at the foot of the tendered bill, stated

declined to sign the bill, because the facts were not correctly stated, that the court had written a statement of the facts and signed it, in place of this; that after it had prepared this statement it was submitted to the District Attorney, who stated that after reading it he was satisfied of its correctness, and that the statement he had signed for defendant's counsel was not correct; that he (the judge) would not sign any bill which did not correctly state the facts.

The court's statement of the facts referred to in his reasons for refusing to sign the bill as presented was as follows:

"While the accused was being cross-examined by the District Attorney he was asked: 'Did you not anticipate the probable result of calling the deceased, Tallie Brown, a liar at the time you uttered the words?' Counsel for defendant objected and stated that the witness had answered the question several times stating that he did not. The District Attorney contended that he had answered him that he did. It was admitted by both counsel that to the State the witness had answered one way and to his own counsel another way. The District Attorney said he wanted a final answer upon this point. This was what defendant's counsel objected to and was the cause of his contention. The court ruled that the District Attorney could ask the question and in giving the reasons for the ruling said: 'It seems that the witness has answered this question both ways (meaning that by admission of counsel on both sides this was a fact) and the court will permit the attorney to ask the question again so as to finally determine the matter. 'The counsel for defendant objected to this statement, and asked for an exception on the ground that it was a comment on the evidence. The court then stated to the jury that it was not intended as a comment on the evidence, but merely as the reason for permitting the question to be asked, and that they would pay no attention to this statement. I understand this rule to mean that the judge shall not state to the jury what has or has not been proven. This statement can not, in my opinion, be construed into a statement of what had or had not been proven or into any sort of a comment on the evidence in the sense meant by the law, and even if it had been, how could it have injured the defendant before the jury when his own counsel had admitted in their presence that he had answered the question both ways. My statement of it could not have made it more impressive than their own open admission. It is presumed that the jury followed the instructions of the

court; that the remark was not a comment on the evide
was not intended as such, and they must not regard it. Th
certainly no injury to the accused since they only found hi
of manslaughter, while if they had thought the accused conte
the result of his words to deceased and used them to induce
resent them in order to get a chance to kill deceased the
have found him guilty of murder.

"Notwithstanding the statement of the court to counsel a
jury, counsel insists on his exception, which, with the Distric
ney's statement, is attached hereto."

The District Attorney's statement referred to was as
"My recollection of the question asked by myself is: 'W
called Mr. Brown a liar did you not anticipate and expect
resent it?' The counsel for accused objected to this que
the ground that the witness had already answered it two
times. The court overruled the objection. In ruling the
admissible, the court, in substance, said (as I recolle
the District Attorney had the right to ask the witness the q
as he was evidently trying to get the witness to answer it po
as the witness had answered it two or three different times i
three different ways. When counsel objected, that it was a c
on the facts or testimony of the witness, the court deni
it was a comment on the facts or testimony of the witne
court denied that it was a comment, and stated that he wa
giving his reasons for his ruling, and that as counsel for the
and the State differed as to the statement of the witness, he
gave the above as settling the controversy between counsel
giving his reasons for the ruling. The court expressly den
he was commenting on the facts, and I think so expressly s
the jury. If not directly to them, certainly they heard
claimer."

In the brief filed on behalf of appellant, counsel, referring
judge's charge, say:

"To that part requiring the 'highest degree of exasp
without qualification we do strenuously object. The charg
restrictive, in that it failed to warn the jury that this state
must be rendered incapable of cool reflection." Am. and En
of Law, Vol. 9, p. 579.

"Following this portion of the charge and *not connected t*

the court (incorrectly) lays down this proposition: 'The law requires two things to reduce the crime from murder to manslaughter. First, there should be a provocation; and, second, the blow be clearly traced to the passion arising therefrom. The provocation must be such as would stir resentment of an ordinary man.'"

In Desty's American Criminal Law ("Sec. 128 d—Killing in Heat of Passion"), the author, referring to the condition of mind under the influence of which an accused who has committed a homicide must be in order to reduce the crime from murder to manslaughter, declares (citing Preston vs. The State, 25 Miss. 383): "The excited and angry condition must have been caused by some insult or injury which would naturally and instantly produce a high degree of exasperation."

The passage quoted by appellant from the American and English Encyclopedia of Law, under the subheading of "*Provocation causing passion—What provocation sufficient,*" states the law to be that "the provocation sufficient to reduce an intentional killing from murder to that of manslaughter must arise at the time of the commission of the offence, or before the passion of the slayer had time to cool. The provocation by deceased must be the direct and controlling cause of the passion, and it must be such as naturally *and instantly to produce in the minds of persons ordinarily constituted the highest degree of exasperation*, rage, sudden resentment or terror, *rendering the mind incapable of cool reflection.*"

The District Court, in its charge, substantially adopted this presentation of the law, which counsel refers to as correct. If it has departed from it the departure can not be said to have been to the prejudice of the accused.

In making use of the word "instantly," the court was evidently dealing with the character of the provocation given. A provocation which would not naturally cause instant resentment, but which would have to be thought or brooded over after its commission in order to produce rage or anger was declared by it not to be a provocation such as the law contemplated, as one sufficient to reduce an intentional killing from murder to manslaughter. We see no error in that statement. Desty's Am. Crim. Law (Sec. 128-g), referring to "provocation," quotes Rex vs. Thomas, 7 Car. and P. 817; Judge vs. State, 58 Ala. 413, and Fields vs. State, 52 Ala. 348, in support of the following propositions which he adopts: "That the law requires two things: first, there should be provocation, and second, the blow

must be clearly traced to the passion arising therefrom, and th provocation must be such as would stir the resentment of a r able man."

These two propositions were given by the District Court jury, the only deviation therefrom being in the substitut the words an "ordinary man" for the words, a "reasonable Here again we think that the departure was not prejudicial accused. If there be any substantial difference between a "r able man" and an "ordinary man," or a man of ordinary influenced and governed in his conduct by such passions and ments as are found in the "average" man, we think the st adopted more liberal than the one contended for. The ter conveys to the every-day juror a much clearer and better idea standard of man called for by the law than the one which it is to replace it by.

We do not attach the same significance and importance remark made by the District Judge during the progress of th and which is referred to in the second bill of exceptions, as of defendant do. We do not understand the District Judge to made any statement in court that defendant's counsel had ma admission relative to his client. The declaration made by the that "it was admitted by both counsel that the witness had an the State one way and his own counsel another" is a statemen by him not in court, but in the bill of exceptions which was re in order to explain the reason and grounds upon which he had That particular statement never went to the jury. We unde the judge as intending to inform this court that precisely wh answer of the witness to a particular question of the District ney had been, and what that to the same question propo to him by his own counsel had been, was a matter of cont between counsel; that the District Attorney insisted upon havi question asked and answered another time to the end of settli contention; that counsel of accused objected to this being al that the question was permitted (over the objection) to be ask answered. After making this statement of fact, the judge de that in ruling upon the point submitted to him, he said: "It this witness has answered this question both ways. The cou permit the attorney to ask the question again to finally dete this matter."

No exception was taken to the fact itself that the questi

permitted to be again asked, and we are not informed what the answer to the same was. The exception as made was to the words made use of by the court in announcing its ruling. The judge in the bill of exceptions asserts as a fact (and that assertion is not denied) that the witness had answered the question in different ways. If so, it was right and proper if there was any contention between counsel as to what the answers were that the witness should be given an opportunity to set himself right. State vs. Wiggins, 45 An. 416. We presume he did so, for no complaint of prejudice through his answer is contended for.

We fully concur in the opinion expressed by our predecessors in State vs. Alphonse, 34 An. 9, that it is the duty of the District Judge to carefully abstain from any expression of opinion or comment upon the facts of the case in a criminal prosecution not only in his final charge to the jury, but also in his rulings upon the admissibility of evidence in the presence of the jury. Not only this, we think he should avoid, as far as possible, at all times, both in his language and in his actions or conduct, doing anything from which the jury might draw any conclusions as to his views in regard to the case before them. We do not think, however, in the case at bar, that the judge's language created in the minds of the jury the unfavorable impressions touching the accused which counsel maintain they did. It frequently happens that a witness contradicts himself for want of a correct appreciation of the questions asked him, and where as a fact the testimony of a witness has been contradictory, we do not think the mere statement of that fact being assigned by the court as a reason for its permitting the witness to be asked to make a further statement without any opinion expressed adversely to the witness would bring about the serious consequences attributed to it.

The verdict rendered in the case would go to show otherwise. We see enough through the record to know that defendant called the deceased a liar; that the latter then struck him. Whereupon appellant killed him. We do not think it can be successfully claimed that under such a condition of things appellant was justified in so doing and should have been *acquitted*. The object of the question propounded by the State was to hold the case down to one of *murder*. This effort was unsuccessful. We find no ground for reversal.

For the reasons assigned, it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

No. 12,744.

STATE OF LOUISIANA VS. E. R. MCMICHAEL ET ALS.

428 522 428 29 428 653 722

A statement made by sureties of an accused person who failed to m appearance as required by his bond, and whose bond had in conseq said default been forfeited, that "they weve prepared to produ principal," is not the formal surrender of a principal required by Sec the Revised Statutes. The court affirms State vs. Martin, 49 An. 752.

Where the crime with which a person stands charged is a felony his atto without authority to waive his arraignment in his absence. State vs ins, 41 An. 543; State vs. Jones, 70 Iowa, 505; Younger vs. State, 2 West 98 Am. D. 791; Bishop's New Criminal Procedure, Vol. 1, par. 268; Pe Redinger, 55 Cal. 298; American and English Encyclopedia of Law " Criminal Procedure," page 762.

APPEAL from the Ninth Judicial District Court for the of De Soto. *Hall, J.*

J. B. Lee, District Attorney, for Plaintiff, Appellee.

Elam & Egan (*J. D. Wilkinson* of Counsel) for Defendants, lants.

Argued and submitted February 26, 1898.
Opinion handed down March 7, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 4th of December, 1897, E. R. McM as principal, and C. B. Hicks, L. M. Cook and C. A. D as securities, executed a bond in favor of the Governor of the or his successors in office, in the sum of three hundred dollars condition of the bond was, that whereas, E. R. McMichael ha arrested under warrant issued by the justice of the sixth of the parish of De Soto, for assault, with intent to rape, and been ordered by the District Judge that he be allowed said amount for his personal appearance before him at th regular jury term of the District Court, commencing at the house, in the town of Mansfield, on the 24th of January to answer said charge—the obligation of the principal and s would be null and void if the said bounden McMichael shoul and truly appear on that day, and from day to day, and

to term, and to answer to said charge, or until legally discharged; otherwise it would remain in full force and effect.

The District Court for the parish of De Soto met in regular session on the 24th of January, 1897, being the fourth Monday of that month. On the 26th of January the grand jury returned an indictment against E. R. McMichael, charging him with an assault with intent to rape.

On the 27th of January, McMichael and his sureties were called on their appearance bond at the court house door, and defendant having failed to appear and answer, judgment of forfeiture was entered against both principal and sureties.

On the 3d of February the sureties appeared and moved to have the decree of forfeiture of the bond set aside, declaring that "they were then prepared to produce their principal."

On the trial of the rule to set aside the forfeiture (commenced February 3, and resumed February 4) it was admitted "that E. R. McMichael was in the town of Mansfield on the morning of January 27, 1898, the day when he was called on his bond, but at the time he was called on his bond he had left town.

"That when the State ordered him called on his bond counsel for defendant offered to waive arraignment.

"That he knew he was indicted at the time he left the town on January 27, 1898. That he returned to town on Tuesday, February 1, 1898, but did not appear in court.

"That the jury for the week had been discharged before he appeared or filed any rule to set aside the forfeiture of his bond; that the court, in open session, on February 2, 1898, discharged the jury for the next week, which was the last week for which a jury was drawn.

"That the indictment was returned January 26, 1898.

"That at the time the jury for the week was discharged, on February 3, 1898, a jury was out deliberating on a case which had been tried and submitted to them on February 2, 1898; that the jury was still out when the trial of the rule to set aside the forfeiture began, and after the trial of the rule had been adjourned over to the following day, to summon witnesses, this jury failing to agree, was discharged from the case and for the term, and a mistrial ordered in that case.

"That there was no suggestion or request made to the court by

counsel for defendant to hold either the jury for the week or t
that was out deliberating on that case for the purpose of try
defendant, McMichael.

"That the rule to set aside the forfeiture was filed on th
day that the jury for that week was discharged, and after it ha
discharged.

"That two cases had been previously fixed for trial for th
February, and that these two cases were continued on motio
District Attorney, on account of sickness, and absence of w
before the rule was filed, and before the jury was discharged.

"That the court was opened and held on February 4 for t
of the rule to set aside the forfeiture and for the sentencing
prisoners and other civil business, and that the court wou
been held whether the rule was tried or not.

"That the District Judge informed counsel for defendant
days before the filing of the rule that court would be ope
February 4 for the purpose of trying an account in a succe
which they were counsel.

"That there were nine cases fixed for February 8, 1898, in
which cases Mr. T. G. McMichael, of counsel for defenda
counsel, and that in these two cases he announced he was re
trial when they were called; but the cases were continued a
stated.

"That in four of the cases fixed for February 8 the def
pleaded guilty on January 31, and that three of them we
prosequied on January 31; that on February 1 the defendant
of the cases were sentenced, thus disposing of all the cases f
Thursday, except the two referred to in the above admission

"That no criminal cases were fixed for a later day than Feb

"That for the past four years the criminal terms of the
Court have been held for three weeks, except for one term
February, 1896, when it was held for only two weeks.

"That all cases of parties in custody, except the two cases
ously referred to, had been tried when the jury was discharg

"That the defendant, McMichael, was in the town of Mann
Thursday, February 3, 1898, when the rule to set aside was fi
for the purposes of the filing and trial of the rule, the District
ney waived the presence of the accused in court.

"That the defendant tendered the sheriff a new bond on th

day of February in the place of the one forfeited signed by sufficiently solvent securities, including among others the names of the sureties on the bond forfeited.

"That the principal, McMichael, and all his sureties were in the town of Mansfield on Tuesday, February 1, 1898."

The sheriff as a witness testified that he did not see McMichael on Tuesday, February 1, 1898. That he saw Hicks, Douglass and Cook in Mansfield on that day; that there was no offer made by them to surrender McMichael to him on the bond and have it canceled.

The court refused to set aside the forfeiture and rendered judgment against McMichael and his sureties *in solido* for the sum of three hundred dollars with legal interest from date for the use and benefit of the public schools of the parish of De Soto and all costs.

All the defendants appealed.

The fact that counsel of the accused on the second day of the term of court offered on his behalf to waive arraignment can have no influence upon the decision of this case. The crime with which the defendant was charged was a felony. His attorney was without authority to waive his arraignment on his absence. Am. and Eng. Ency. of Law, "Criminal Procedure, page 762; citing People vs. Redinger, 55 Cal. 298; Bishop's New Criminal Procedure, First Vol., par. 268; Younger vs. State, 2 West Va. 579; 98 Am. D. 791; State vs. Jones, 70 Iowa, 505; State vs. Meekins, 41 An. 543.

A personal appearance and plea in person are necessary at the arraignment for a felony. This can not be done by attorney.

We are satisfied from the facts stated that McMichael's course was actuated by a purpose to avoid trial at the term of court at which he was indicted, and that his presence in court on the 3d and 4th of February (had be been present) would have been simply by reason of the fact that he knew that he could not be tried. A statement made by the sureties of an accused person who had failed to make an appearance as required by his bond and whose bond had in consequence of said default been forfeited, that "they *were prepared to produce their principal*" is something other than "the formal surrender of him by them to the sheriff or his deputy sheriff in open court, or within the four walls of the prison."

This formal surrender so made is declared by Sec. 1033 of the Revised Statutes to be essentially necessary for the release of the sureties from their responsibility.

The law is precise, emphatic, and leaves no room for const

We see no material difference between this case and tha State vs. Martin, 49 An. 752.

For the reasons hereby assigned:

It is ordered, adjudged and decreed that the judgment a from be and the same is hereby affirmed.

No. 12,581.

THE STATE OF LOUISIANA VS. MRS. LOUISA HOHN.

50 432
35 164

50 432
17 427

50 432
18 55
18 752

Where the legality or constitutionality of a municipal ordinance impos is not attacked, this court can not, through an appeal, inquire into th of the proceedings taken or the correctness of the judgment rendere

APPEAL from the First Recorder's Court of the City Orleans. *Finnegan, J.*

C. H. La Villebeuvre, Assistant City Attorney, and *S. L. Gilm* Attorney, for Plaintiff, Appellee.

O. B. Sansum, for Defendant, Appellant.

Argued and submitted March 12, 1898.

Opinion handed down March 21, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant having been found guilty of tion of an ordinance of the city of New Orleans was sentence a fine of twenty-five dollars, and in default of payment of t to be imprisoned in the parish jail for thirty days. She a Her case is thus presented by her counsel:

"Defendant was arrested and charged as stated in the aff follows:

"State of Louisiana, First Recorder's Court of the city of New Orleans.

"THE STATE
"VS.
"MRS. LOUISA HOHN.
"531 FIRST.

"Personally appeared before me, E. Finnegan, Recorder of the First Recorder's Court of the city of New Orleans, and Justice of the Peace duly commissioned and sworn, Sergeant M. P. Creagh, Sixth Precinct, who, having been duly sworn, doth depose and say:

"That on the twenty-fourth day of July, 1897, at about 9 o'clock A. M., at 531 First street, between Rousseau and St. Thomas streets, in this district and city, one Mrs. Louisa Hohn did then and there violate Ordinance No. 4929, Art. 1081 Flynn's Digest, relative to houses of prostitution or assignation, notice to remove by Mayor—all against the peace and dignity of the State. Wherefore, deponent charges the accused with violation of Ordinance 4929 C. S., and prays that she be arrested and dealt with according to law.

"Sworn to and subscribed before me this twenty-fourth day of July, 1897.

"(Signed) M. P. CREAGH.

"(Signed) E. FINNEGAN,
"*Recorder.*"

The defendant filed the following plea:

"The defendant, Louisa Hohn, in her own proper person, comes into court here and says that the First Recorder's Court has no jurisdiction to hear and determine the matter complained of, because, she says, that no issuable facts are stated or alleged in the affidavit of M. P. Creagh, and that the court here has no power or right to try the defendant upon any charge whatsoever until facts sufficient in law to constitute a breach or violation of law shall be stated and set forth upon the oath of some credible person charged with the duty of complaining against the defendant.

"That no citizen can be arrested or put upon trial for any breach of any municipal ordinance until specific facts, particularly stated and set forth, stating the time, manner and place where the alleged breach was committed; because, until specific facts shall be set forth, and the time, manner and place certainly mentioned, the accused can not know or understand what witnesses or evidence shall be necessary and proper to defend the accusation.

"That the affidavit upon which the recorder's warrant was against the defendant states no matter or thing to which the d ant is bound by law to answer or controvert. Wherefore, def prays that she be discharged without bail."

The objections were overruled, and to the ruling of the defendant excepted and reserved a bill of exceptions.

In this court appellant complains of the rulings of the reco admitting and also in refusing to admit testimony, and charg the judgment was not justified by the evidence.

Her counsel urges upon us that "no power has been co upon the Common Council of New Orleans to compel any owner or lessee of any house to move out of or away fro house; but if any such power had been framed, it is unconstit and void, because it is an unreasonable penalty and destruc the citizen's rights of property without due process of law."

That "the judgment of the court is erroneous because def is not charged with keeping a house of prostitution or assig nor is there any charge that defendant occupied her house purpose forbidden by law."

That "the judgment of the court is erroneous because it den fendant one of the rights guaranteed by the Constitution United States and by the Constitution of the State of Louisi wit:

"The accused shall be informed of the nature and cause accusation."

That "the judgment is erroneous, because it deprives defen her property without due process of law. That it is void bec appears by the proceedings certified to, that defendant adjudged guilty of keeping a house of prostitution, but she w demned for failing and neglecting to move out of her house."

It will be seen that no issue was made before the record the legality or constitutionality of the ordinance for the viol which defendant was condemned by the judgment. The ob urged in the lower court were as to the affidavit on which ant's arrest and trial were based—the testimony sought to be duced and sought to be rejected at the trial—and the jurisdi the recorder based on the character of the affidavit.

Objections of that character can not be reached and revie this court through an appeal, as we have repeatedly said. The

of our inquiries in cases of this character is as to the legality and the constitutionality of the ordinances themselves. We can not through an appeal inquire into the legality of the proceedings taken, nor the correctness of a judgment rendered under a valid ordinance, or one not attacked for illegality in the trial court.

We are forced to dismiss the appeal.

The appeal is hereby dismissed.

No. 12,721.

SUCCESSION OF JOHN A. GRAVES, DECEASED; ON APPLICATION OF CHARLES G. GRAVES TO BE APPOINTED ADMINISTRATOR; OPPOSITION OF MRS. C. E. GRAVES.

The succession owed no debt. The appointment of an administrator would only be productive of delay and expense in the settlement of the succession and would not effect more than can be done by the heirs in matter of the partition. The judgment of the District Court, rejecting the application of one to be appointed administrator, is affirmed.

The administrator is not a necessary party to the final liquidation.

APPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

Elam & Egan for Applicant, Appellant.

William Goss for Defendants, Appellees.

Argued and submitted May 17, 1898.

Opinion handed down May 30, 1898.

The opinion of the court was delivered by

BREAUX, J. John A. Graves died in the parish of De Soto. He left a widow and two minor children, issue of his last marriage.

He left children of prior marriages. He owned property of which an inventory and appraisement were made a few days after his death. His son, Charles E. Graves, applied to be appointed administrator of his succession.

His widow, Mrs. C. E. Graves, alleging that there were no debts

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to pay and no necessity to incur the expense of an admin
opposed the appointment of an administrator.

In argument Charles E. Graves affirmed that the succe
not sufficiently in debt to warrant the appointment of an
trator, but contended that none the less an administrator
appointed for the reason that property was withheld from th
sion which might be recovered by an administrator.

On the hearing of the application a number of witne
examined.

The District Judge was of the opinion that there were no
credits rendering it proper to appoint an administrator;
heirs could sue each other for a partition now as well as
delay and expense of an administration. He rejected the a
of C. E. Graves to be appointed administrator.

From the judgment he appealed.

We have seen that there are no debts. The succession
quence falls within the grasp of the general rule: where
no debts and those in interest oppose the appointment no
trator should be appointed. It may well be, exceptional
case might arise requiring the appointment of an administr

Here, no good reason suggests itself to justify such an
ment. The evidence does not make it appear that the s
had with any degree of certainty any credit against thir
which rendered the appointment of an administrator necess
recovery in the name of the succession. Why the expe
administration if the succession is not to be benefited by it
would be a delay in the settlement of the succession; all to
useful purpose in so far as the record shows.

The rights of the parties *inter se* can be settled in a partit
heirs and the widow of the later John A. Graves are presen
properly make such a partition as will give to each of the
parties that to which he is entitled.

The administrator would not make the partition and real
authority to assist the heirs in making the partition in any

The heir is completely authorized without the assistan
administrator. If there were debts the appointment should
Succession of Clark, 30 An. 807.

But the evidence discloses that there are no debts due
persons. The indebtedness of the heirs is a matter which
up in the partition proceedings.

In Brashear vs. Cornor, 29 An. 349, this court said: "The heirs may stop administration and provoke a partition among the coheirs at any time, if there are no debts." *A fortiori* the heirs or other interested persons may oppose successfully the appointment of an administrator when there are no debts by the succession and the succession is in a condition that a partition may be made and the rights of all parties in interest fixed.

Even when there are debts the heirs may bring the administration to a close by giving security for their payment. It follows, there being no debts, that an opposition to the appointment of an administrator is without ground to stand on save in very exceptional cases. We have not found that the case before us should be considered at all exceptional, as it presents only the necessity of a partition.

Ordinarily, there is no necessity to appoint an administrator to administer a succession not burdened with debt. Succession of Melasie Hebert, 33 An. 1099.

In Succession of Walker, 32 An. 321, the heir was a minor, and yet the court held, as there was no debts to pay, and no legacies to discharge under the will, the appointment of an administrator would serve no useful purpose.

The decision in matter of the Succession of Story, 3 An. 502, was a well considered decision by Judge Eustis.

The court, in that case, said: with reference to subjecting the succession to the charge of administration, the appointment of an administrator rested with the discretion of the judge on the facts before him. "The right of the heirs to the immediate partition can not be questioned; it was," continued the court, "insisted on by the appellant, and this administration, if carried out, could be little else than an impediment to the proceedings in partition."

There may be cases, said the court, in which an administration would be advantageous even in case there are no debts, but there was no advantage discovered in this respect in the case from which we quote, as there would be none in our judgment in the case now before us for determination. It would only, as in the cited case, occasion delay and useless expense.

Whether as against third persons alleged debtors to the succession, the applicant to be appointed administrator, has or has not indicated clearly enough that they are debtors as alleged, is of no great importance here.

He and his coheirs, who may choose to sue third p
claims they think are due will not be prejudiced by this
grant this application.

It is ordered, adjudged and decreed that the judgment
from is affirmed.

No. 12,718.

RILEY Y. WOODLIEF VS. GEORGE C. LOGAN ET A

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A final judgment should be read in open court.

While it is not necessary that the judgment shall recite that it was
court, if the judgment does not so recite, it should affirmativel
proper entry in the minutes.

For the purpose of the trial of the rule to dissolve the injunction, th
of the petition were taken as confessed. By them it appears t
ment was not read in open court. In the absence of any eviden
showing compliance with Art. 543, C. P., in regard to reading the
open court, the court holds that the question is jurisdictional, an
can be no valid judgment without reading it as required, and ent
also showing that it has been signed. It must appear that the s
and signing the judgment was in open court and not at chambers.

APPEAL from the Civil District Court for the Parish
Rightor, J.

Rice & Montgomery for Plaintiff (defendant in injunc
pellee.

James McConnell, Jr., for Defendants (plaintiffs in i
Appellants.

Argued and submitted May 18, 1898.

Opinion handed down May 30, 1898.

The opinion of the court was delivered by

BREAUX, J. Some of the sureties of George C. Logan,
tractor for carrying the United States mail, appeal from
judgment condemning them to pay an amount on the subc
bond.

The heirs and representatives of one of the sureties did
from the judgment, but sued out an injunction and alleg

petition that the judgment was null and void, for the reason that it was not read and signed by the judge in open court.

The special averment of the appellant on this point was, that during a temporary recess of the court and after the judge had left the bench, and prior to reascending the bench, without reading the judgment handed to him by plaintiff's counsel, he (the judge) handed it to the clerk with instructions to enter it upon the minutes; and that he failed to comply with the requirement: "All judgments shall be read by the judge in open court."

In the second place the averment is, that on the date the judgment bears, the presiding judge of the court was ill and unable to attend court, and that the judgment was not *signed* in open court.

There was, it appears, a hearing for preliminary injunction (on the application for an injunction) before another judge than the one by whom the judgment had been pronounced; the latter was at the time absent on leave.

On this hearing the judge took notice of the minutes of the Civil District Court for June 18 and June 25, 1897. They were copied in the transcript of appeal.

Entertaining some doubts as to the validity of the judgment, for reasons assigned a preliminary writ of injunction or rule *nisi* was issued on the application for an injunction.

The judge by whom the judgment (assailed as null) had been pronounced having returned, counsel for plaintiff interposed before his court a rule to dissolve the injunction, on the ground chiefly that the petition for injunction disclosed no legal or equitable grounds therefor.

Though other grounds were assigned in the rule to dissolve, appellants' counsel informed us in open court that he urged in the lower court, only the ground last stated.

Appellants invoke the rule well known that upon the trial of a rule to dissolve, upon the face of the papers, its averments are taken as confessed by the plaintiff in rule.

The court sustained the rule and dissolved the injunction with damages.

From the judgment the plaintiff in injunction prosecutes this appeal.

It does not appear by the entries in the minutes that the judgment was read in open court. Nor do the minutes make it appear that the judgment was signed.

The article of the Code of Practice, 548, calls for the reading of all judgments by the judge in open court.

The chief reliance of the plaintiff Woodlief, defendant in injunction, in support of his execution of the judgment assailed by plaintiffs in injunction, is upon the minutes, contradicting, he asserts, the allegations of complainants' petition, or explaining or modifying the averments of their petition, and he contends further that plaintiffs' allegations could only be sustained by parol; that the minutes can not be contradicted by parol.

He invoked the rule that only that is considered pleaded at all which is pleaded well; that upon a rule to dissolve an injunction, pleadings are not to be taken as true when they lead to the impossible or impracticable, that it would serve no purpose to set aside proceedings and remand a case to enable one to offer evidence which the court under the rules of evidence must decline to receive as not admissible.

We have not discovered from the minute entries that the judgment was read in open court, or that it was signed. It is conceded that the judgment was signed, but it is alleged that it was signed by the judge at his home, as he was ill at the time and could not have been in court.

We have not found after an attentive reading of the record that the testimony, admissible under the allegations of the petition of plaintiff in injunction, would contradict the minutes. They (the minutes) are absolutely silent upon the subject, and for that reason evidence would be admissible to prove the facts alleged and to have them accordingly amended.

We were then brought to a consideration of the question presented of no ground for the injunction from the point of view urged by plaintiff, defendant in injunction, that the defect was one of form. The question was not free from difficulty in deciding it. Were it *res nova* it may be that our conclusion would be different.

In Hernandez vs. James, 23 An. 483, the court perpetuated an injunction on the ground that a judgment rendered out of term time is null, though the judge *a quo* assumed that it was term time.

In Laurent vs. Beelman, 30 An. 363, the court held that a final judgment in default signed at chambers is void.

A similar question was presented in State *ex rel.* R. R. Co. vs. Judges, 48 An. 905; this court in that case decided that a judgment

must be read and signed in open court; citing Culver vs. Hart, 21 An. 306; Hernandez vs. James, 23 An. 483; State *ex rel.* Dixon vs. Judge, 26 An. 119; Succession of Bougere, 29 An. 378; Laurent vs. Beelman, 30 An. 363.

The matter in hand was treated in all these cases as jurisdictional.

From that standpoint we are of the opinion that it should appear affirmatively somewhere in the proceedings that the judgment was read and signed in open court; especially in view of the admission for the trial of the rule; that the judgment was not read and signed in open court.

The case is remanded in order that the judgment may be read in open court, and signed, if it has not heretofore been read and signed in open court.

It is ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed.

It is ordered, adjudged and decreed that the case be remanded, to be proceeded with in accordance with law and the views herein expressed; that the appellee pay the costs of appeal.

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No. 12,634.

SPIRIDONE LOYACANO VS. FREDERICK JURGENS.

An owner is responsible for personal injuries inflicted by his wagon when engaged on his business, and which are occasioned by the want of care or negligence of the driver, his employee.

The law of the road is to keep to the right, and city ordinances in New Orleans require it. But where the right or lower side of the street was not in proper condition for the safe and easy passage of vehicles and the upper side was, and it appearing that it was usual for vehicles to use the upper side whether going toward or from the river: Held—the fact that plaintiff's vehicle (going from the river) was on the left or upper side of the street at the time of the collision does not militate against his case.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

Edwin T. Merrick for Plaintiff, Appellee.

Dart & Kernan for Defendant, Appellant.

Argued and submitted May 7, 1898.
Opinion handed down May 30, 1898.

The opinion of the court was delivered by

BLANCHARD, J. Plaintiff sues to recover three thousand dollars damages for personal injuries received.

A collision occurred between two wagons on Elysian Field New Orleans, in October, 1895.

One of the wagons was owned and driven by Paul Dema other belonged to defendant, was on a business errand of driven by an employee in his service.

The first mentioned wagon was the smaller of the two; was a load, and three persons occupied a seat at its front. T Demagio, the driver, sitting at the right, plaintiff sitting a and a boy four years old, the son of Demagio, sitting betwe The wagon was at the time in the service of plaintiff, a oyster dealer, who had hired it to transport a load of fruit a his place of business, he making the trip with the wagon.

The wagon of defendant was of the character of vehicle coopers for transporting barrels, having arms or hoops e along either side of the wagon-bed and projecting over an it about one foot and a half. It was at the time of the empty, and the only person in it was the driver.

Elysian Fields street is a wide avenue, in the centre of w space called "Neutral Ground," on which are located the a railroad company. On either side of the street is a road may be described as a double street, or two streets divided rated from each other by the neutral ground.

The evidence is that the down-town side of the street described as "a bad road," not in use by vehicles. The up-t is a fairly good roadway and is used by vehicles, wheth toward the river or in the reverse direction. On this ro located the track of a street railway.

The wagon in which plaintiff was riding had approached Fields street from the lower side, coming into it from Decatu It traveled across the street to the upper side and reaching t railway track got on to it and proceeded slowly in the directi rear of the city.

Defendant's wagon was on the same railway track going in the direction of the river or front of the city. It was moving at a more rapid pace than was the other vehicle.

The two wagons met between Decatur and Chartres streets, a collision occurred with disastrous effects to the smaller wagon, whose three occupants were thrown out, one of them (plaintiff) having his leg broken. An ambulance was called, he was conveyed to the hospital, where he remained about a week receiving surgical attention, and was then carried to his home, where he was confined to his bed for eight months under the care of physicians. He was severely injured, being still on crutches at the time of the trial of the case below, more than a year and a half after the accident. That he will ever recover entirely from its effects appears altogether improbable. He is a young man, less than thirty years of age.

There is in the case the usual conflict of testimony characteristic of damage suits. The judgment below was in favor of plaintiff for five hundred dollars. Defendant appeals, and, in this court, plaintiff prays that the amount allowed him be increased to twenty-two hundred dollars.

The weight of testimony, we think, sustains plaintiff's side of the controversy. The accident would have been avoided had the driver of defendant's empty wagon been more attentive to his duties and made a more serious effort to avert a collision.

That he felt himself blameworthy is shown by the fact that as soon as he ascertained one of the occupants of the other wagon was hurt he ran away, was pursued by Demagio, driver of the other wagon, captured and turned over to a policeman, who conveyed him under arrest to the station.

His testimony on the stand as a witness for the defence is intrinsically unworthy of belief, and is disregarded. No credence can be given to the evidence of a witness who so grossly misstates material facts and persists in such misstatement—facts shown by the testimony of other witnesses to have been misstated by him.

The driver of the wagon in which plaintiff was riding pulled to the right, as was the law of the road, on nearing the approaching wagon, and it does not appear that the charge of contributory negligence can be sustained against him. So thought the District Judge, who saw and heard the witnesses. While there was evidence to the effect that defendant's driver also attempted to turn out of

the track of the street railway, we are not satisfied that he reasonable precaution to avoid the accident.

If the lower side of Elysian Fields street was not in proper c tion for the safe and easy passage of vehicles, and the uppe was, and it appearing that it was usual for vehicles to use the side, whether going toward or from the river, then it can not tate against plaintiff's case that the vehicle in which he was was on the left or upper side of the street instead of the ri lower side.

The law of the case is, an owner is responsible for personal in inflicted by his wagon when engaged on his business and when sioned by the gross negligence of the driver, his employee. trecht vs. Fasnacht, 17 An. 166; Perez vs. Railroad Compan An. 1391.

The *quantum* of damages, as fixed by the lower court is, we too low. Plaintiff had his leg broken and his feet crushed suffered great pain, and lay abed for eight months, during time his shop was closed. He had a small remunerative bu when the accident occurred, the profits of which were lost as sequence of the casualty. There is no testimony in the r touching the circumstances of defendant. It may be, however the trial judge had knowledge otherwise of his circumstances this may account for the small allowance made by him. A p circumstances may not improperly be considered to a reasonab tent in estimating damages to be awarded in a case like this, defendant *personally* was not at fault. It were the better pra though, that the same be disclosed by the evidence when int to be invoked.

Several times the amount awarded this plaintiff would not much for the injuries he sustained. While this is so, we hardl warranted, in this particular case, in increasing the allowance b eight hundred dollars.

For the reasons assigned, it is ordered, adjudged and decree the judgment appealed from be amended by increasing the a thereof from five hundred dollars principal to eight hundred d principal, and as thus amended the same is affirmed at the c defendant and appellant.

NOS. 12,839 AND 12,840.

STATE EX REL. MARY L. NEYLAND VS. STEPHEN D. READ, JUDGE TWELFTH JUDICIAL DISTRICT COURT, PARISH OF CALCASIEU, AND R. L. BELDEN, PLAINTIFF.

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There is no legislative authority to try appeal cases in the District Court before juries. The right to trial by jury is given in civil cases before courts exercising original and not appellate jurisdiction.

The issue regarding the improper division of the amount into three different suits was not before the Supreme Court, it not having been raised before the District Court.

ON APPLICATION for writs of *Mandamus* and *Certiorari*.

A. R. Mitchell for Relatrix.

Thomas Kleinpeter and *R. L. Belden* for Respondents.

Submitted on briefs May 21, 1898.
Opinion handed down May 30, 1898.

The opinion of the court was delivered by

BREAUX, J. Robert L. Belden sued the relator on a balance claimed as being due by her. The suit was brought before the magistrate of the Third Ward of Calcasieu.

The relator answered, and pleaded in reconvention an amount exceeding three hundred dollars.

Her demand in reconvention was dismissed for want of jurisdiction. The court pronounced judgment for plaintiff Belden in the sum of fifty-five dollars and fifty cents. The defendant, the relator here, appealed to the District Court.

The relator further sets forth in her application for a *mandamus* that five days afterward, before the same magistrate, the same plaintiff brought another suit against her for the sum of one hundred dollars for damages, to which she pleaded denying any indebtedness to him.

Judgment was pronounced against her for the amount plaintiff claimed.

She appealed to the District Court from this judgment.

The relator avers that another, a third suit, was brought against her by plaintiff seven days after the second suit, in which he claimed and recovered contradictorily with her in the same court the sum of one hundred dollars for a fee of attorney.

The relator alleged that each amount was due, if due at all, at the date the first suit was instituted and she asserts that separate suits were brought in order to deprive her from a trial by jury.

The relator avers that on appeal she made a deposit of twelve dollars as a jury fee, and prayed for trial by jury.

In this court a rule *nisi* was granted. In answer to the rule the respondent returned:

That no application had been made for a trial by jury before the magistrate court.

That his own court acting as an appellate tribunal not vested with original jurisdiction could not grant to the relator rights to which she would not have been entitled in the court below.

Lastly, it was urged that the complaint of a division of the demands and the consequent three suits, instead of one suit, is one which should have been raised in the magistrate's court.

The prayer for a trial by jury presents the serious question for our determination.

In appeals from the magistrates' courts to the District Courts, the District Court is exclusively a court of appeals. The case comes up *de novo*, it is true, but we take it that the words apply to the issues of the case to be reviewed on appeal. New issues may be raised. They are, however, to be tried by the appellate tribunal without a jury.

In our judgment they are to be reviewed as issues on appeal, and not to be regarded as if originally presented for consideration before the District Court.

The jurisdiction extends to the adjudication by the appellate court without a jury, of the law and the facts arising on appeal.

The right to trial by jury is given in civil cases before the courts exercising original jurisdiction and not in appellate courts.

We are not of the opinion that any court of appeal possesses the power to call in a jury for the trial of a case without some legislative authority. There is no legislative authority to try appeal cases before juries. Syndics of Brooke vs. Weyman, 3 Martin, O. S. 9.

In Bouquevalte vs. Young, 5 Rob. 163, this court said: "It may

noreover well be doubted whether a trial by jury could be asked in he District Court, considered as an appellate tribunal."

There is no longer any doubt upon the subject. It is well settled, n our view, that there can be no appeal to a jury in such cases.

Next in order, the relator raised the question of division of amount of the claims, as made by the creditor, in order that he might bring three suits before the magistrate's court, instead of one suit in the District Court.

The relator charges that the motive in making the division was to enable the creditor to avoid trial by jury. That motive would not be ground to set aside a judgment under our supervisory jurisdiction.

The greatest difficulty which confronts the relator in her attempt to sustain her application on this point, grows out of the fact that her pleadings have not raised the issues now before us for decision, in either the district or the magistrate's court.

There was no timely exception of any sort of improper division of claim filed in one or the other court. The question of law must arise on the record filed below.

The judge of the magistrate's court, or the judge of the District Court has not been called upon by the pleadings to decide what effect results, if any, from such division. This court under its supervisory jurisdiction must pronounce upon the correctness of the judgment or of the ruling of the District Court. There was no ruling made, or judgment pronounced upon the point. We are constrained, under repeated adjudications, to decline to decide a point of law presented in the first place before this court without pleading or any document suggesting that it had received the least consideration below.

The law as relates to trial by jury being against relator's position, no other ground is properly before us for decision.

The rule *nisi* which was issued in this case is discharged, and relator's application for *mandamus* and *certiorari* is denied at her costs.

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No. 12,786.

STATE OF LOUISIANA VS. ROBERT JACOBS ET ALS.

An indictment for the larceny of one bale of cotton in the lint may be amended during the trial, to conform to the testimony the cotton was in the seed. Revised Statutes, Sec. 1047.

The relator avers that another, a third suit, was brought a her by plaintiff seven days after the second suit, in which he cl and recovered contradictorily with her in the same court the s one hundred dollars for a fee of attorney.

The relator alleged that each amount was due, if due at all, date the first suit was instituted and she asserts that separate were brought in order to deprive her from a trial by jury.

The relator avers that on appeal she made a deposit of twelv lars as a jury fee, and prayed for trial by jury.

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In Bouquevalte vs. Young, 5 Rob. 163, this court said: "

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There is no longer any doubt upon the subject. It is well settled, in our view, that there can be no appeal to a jury in such cases.

Next in order, the relator raised the question of division of amount of the claims, as made by the creditor, in order that he might bring three suits before the magistrate's court, instead of one suit in the District Court.

The relator charges that the motive in making the division was to enable the creditor to avoid trial by jury. That motive would not be ground to set aside a judgment under our supervisory jurisdiction.

The greatest difficulty which confronts the relator in her attempt to sustain her application on this point, grows out of the fact that her pleadings have not raised the issues now before us for decision, in either the district or the magistrate's court.

There was no timely exception of any sort of improper division of claim filed in one or the other court. The question of law must arise on the record filed below.

The judge of the magistrate's court, or the judge of the District Court has not been called upon by the pleadings to decide what effect results, if any, from such division. This court under its supervisory jurisdiction must pronounce upon the correctness of the judgment or of the ruling of the District Court. There was no ruling made, or judgment pronounced upon the point. We are constrained, under repeated adjudications, to decline to decide a point of law presented in the first place before this court without pleading or any document suggesting that it had received the least consideration below.

The law as relates to trial by jury being against relator's position, no other ground is properly before us for decision.

The rule *nisi* which was issued in this case is discharged, and relator's application for *mandamus* and *certiorari* is denied at her costs.

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No. 12,786.

STATE OF LOUISIANA VS. ROBERT JACOBS ET ALS.

An indictment for the larceny of one bale of cotton in the lint may be amended during the trial, to conform to the testimony the cotton was in the seed. Revised Statutes, Sec. 1047.

APPEAL from the Sixteenth Judicial District Court for the of St. Helena. *Reid, J.*

M. J. Cunningham, Attorney General, and *Duncan S. Kem* trict Attorney (*P. A. Simmons, Jr.*, of Counsel), for P Appellee.

W. C. Pipkin and *W. T. Holland* for Defendant, Appellant.

Argued and submitted April 9, 1898.
Opinion handed down April 18, 1898.

The opinion of the court was delivered by

WATKINS, J. The defendant was indicted for the murd colored girl under fourteen years of age, and appeals from a of guilty and sentence of death, relying upon three bills of tions which were reserved to the ruling of the court dur progress of the trial.

The *first* bill relates to the declination of the trial judge to continuance of the case based upon two grounds: (1) The i bility of procuring the attendance of an important witness w absent; and (2) that sufficient time had not been allowed cou the examination of the case and the preparation of the defenc accused—the homicide having been committed only a few da to the finding of the indictment on the 25th of February, 18 the cause having been assigned for trial on the 1st of Mar lowing.

The defence was that the homicide was accidental. The su of the defendant's motion is that his witness, Louis Brow temporarily absent from the parish, and for that reason he co have been summoned and was not summoned by the sheri seasonable and proper effort had been made, as is evidenced return upon the summons which had been issued for him.

That he could have testified, had he been present, to his d tions, appearance and demeanor after the homicide, as well a other facts and circumstances of the case, confirmatory and orative of the testimony in the case in his favor.

And it is further to the effect that he was incarcerated in jail without the benefit of bail, as soon as he surrendered himself to the sheriff; and being unable to employ counsel the court assigned counsel to represent him. But that counsel assigned to him were at the time engaged in the trial of other important cases in that court—the District Court being at the time in session—and could not *then* give immediate attention to the case; so that when the case was called for trial, three days later, on the day fixed for trial, they had not had an opportunity of conferring with the accused, and preparing and formulating his defence, and were not prepared to go into the trial of such an important case under the circumstances related.

It appears from the record that the homicide was committed during a Sunday, in the house where the girl lived, and within the hearing and in immediate proximity to several persons.

It appears that it occurred at some ten miles distance from the court house, but that the accused was on his way to the sheriff's office to surrender himself when he was arrested and at once placed in jail.

The indictment of the accused followed a few days afterward; and within four days after that, one of them being a Sunday, he had been tried, convicted and sentenced to the extreme penalty of the law.

It is not denied that the defendant was kept in close confinement between the time when he was first arrested and the trial; and it is not denied that the counsel who were appointed by the court to defend his cause were closely occupied in the trial of other important criminal cases in that court during the greater part of that interval.

The only question about which we feel concerned is, whether—circumstanced as the accused and his case were—the ends of substantial justice demanded a trial so speedily, that is to say, within a week after the homicide, and within three days after the indictment was found.

Had the accused been at liberty under bond so that he could have conferred freely with counsel who were appointed and gone to the scene of action and ascertained what evidence there was attainable in his favor, we would feel less like holding that the trial was unduly precipitate, but in view of the fact that he was incarcerated in jail from the day of the homicide and unable to see and confer with friends, or counsel whom the court had assigned for his defence, it does seem to us that the hardship put upon him was unusually

great—particularly in view of the fact that the indictment
him with murder, that the jury found him guilty without q
tion, and that the trial judge sentenced him to death.

The Constitution provides in the bill of rights that in all
prosecutions the accused shall enjoy, among other things, t
"to defend himself, and to have the assistance of counsel."
Art. 8.

In State vs. Ferris, 16 An. 425, our predecessors said
subject:

"The law securing to (the accused in criminal cases) t
tance of counsel did not intend to extend a barren right
what avail would be the privilege of counsel * * * i
spur of the moment, without an opportunity of studying t
the former should be compelled to enter into the investigati
case."

In the more recent case of State vs. Simpson, 38 An. 24, th
with great deliberation, decided "that the right to be h
counsel, guranteed by the Constitution to the accused, i
empty formality, but an inestimable privilege, and that
should be allowed reasonable time to prepare the defence."

On the faith of those two decisions this court made t
application of the same doctrine in State vs. Brooks, 39 An.
from that opinion we make the subjoined extract, viz.:

"From the foregoing recital it appears that the accused
victed on the ninth day following the commission of the of
which he was indicted, and that the application was made f
tinuance on the *first* calling of the case for trial."

After quoting from the decisions referred to, the Chie
speaking for the court, said:

"Precipitancy, instead of accelerating, at times procrasti
trial of offenders."

We think the principle announced in those cases finds just
tion here.

But, in thus deciding, we wish it to be distinctly unders
we intend no reflection whatever upon neither the trial j
the District Attorney.

Upon other propositions presented and discussed in the b
argument of counsel on either side we express no opinion.

It is therefore ordered, adjudged and decreed that the

the jury and the sentence of the court thereon pronounced be annulled and reversed; and it is further ordered and decreed that the cause be remanded to the court below for a new trial according to law.

No. 12,793.

STATE OF LOUISIANA VS. EUGENE CORCORAN.

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1. This court has no jurisdiction to review the facts on which the verdict in criminal cause rests.
2. A juror can not be heard to impeach his own verdict. Nor can this be do indirectly through a third person testifying to remarks made by a juror after the verdict.
3. The law and motives of public policy alike exclude such testimony.

APPEAL from the Criminal District Court for the Parish of Orleans. *Moise, J.*

M. J. Cunningham, Attorney General, and *R. H. Marr*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

Wm. J. Hennessey for Defendant, Appellant.

Argued and submitted April 9, 1898.
Opinion handed down April 18, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The accused, convicted of robbery, appeals from a sentence of fifteen months at hard labor.

He alleges error in the ruling of the trial court denying his origina and supplemental motions for a new trial, and in the ruling denying his motion in arrest of judgment.

The several grounds urged in the original motion for new trial are predicated upon the contention that certain facts necessary to establish defendant's guilt were not proven. The trial judge, exercising the discretion vested in him by law, refused the application. It does not appear that this discretion has been abused, and it is well established that this court will not interfere with such rulings, unless man-

ifestly erroneous. State vs. Moreau, 50 La. An. —; South
Vol. 22, p. 966.

Nor has this court jurisdiction to review the facts on
verdict rests. State vs. Cook, 42 An. 88; State vs. Sell
145: State vs. Nelson, 32 An. 844; State vs. Deschamps, 4

The ground urged in the supplemental motion for new tr
one of the jurors (naming him), who sat in the trial of
after leaving the jury room, told one Monaghan that he
would have held out for the defendant and not consente
vict him had it not been that, by so doing, he would lose "
or was apprehensive that he would lose "his job"—me
place in service or employment he was then filling.

It is contended that by reason of the bias and extraneou
thus controlling him this juror disregarded and ignored t
of the court, as well as his oath, and the verdict is vitiated

On the hearing of the motion Monaghan was sworn as
being tendered by the accused to prove its averments.

The State objected to the evidence sought to be adduc
ground that if the juror were himself present, and it were
place him on the stand, he could not be heard to impeac
verdict, and still less can a witness be examined as
unsworn statements alleged to have been made by the
effect of which declaration would be to impeach the juror'

The objection was sustained, the evidence excluded and
excepted.

The trial judge gives as reasons for its exclusion that t
tions as to the incompetency of the juror were based on he
dence; that the nature of the juror's employment was not
nor such relationship between that employment and the p
as would justify the inference, conclusion or even probabili
would lose "his job" on account of his action as juror; tha
ness was offered merely to prove the juror had made such
that there was no representation the juror had been tamp
nor were wrongful and corrupting influences averred or off
shown; and that, while the remark of the juror was so
made use of under guise of sustaining a charge of incomp
was plainly an attempt to impeach his verdict.

There was no error in the ruling of the court.

The law must be considered settled squarely against the

of the accused that the evidence of this witness was admissible. State vs. Beatty, 30 An. 1267; State vs. Price 37 An. 218; State vs. Morris, 41 An. 785.

We quite agree with the observation of the learned judge of the court *a qua* that "if a new trial should be granted on this ground almost any verdict could be set aside by securing from sympathetic or timid jurors such expressions as would involve their own competency after the binding obligations of an oath had been removed."

The law and motives of public policy alike exclude such testimony as that here offered.

The motion in arrest of judgment was urged on the ground that the information does not charge the accused feloniously took from the person of the prosecuting witness by violence, or by putting him in bodily fear, the property alleged to have been stolen. It is insisted that this was essential, and that its absence vitiates the information and all proceedings had thereunder.

A reading of the information shows that this complaint is groundless. The charge is that "one Eugene Corcoran * * * in and upon one W. J. Cummings feloniously did make an assault, and the said Cummings in bodily fear did then and there put, and forty-five dollars of the lawful money of the United States of America, one match case of the value of three dollars, one handkerchief of the value of twenty-five cents and one cravat of the value of seventy-five cents, of the goods, property and chattels of said Cummings, from the person and against the will of him the said Cummings, then and there feloniously and violently did steal, take and carry away."

Judgment affirmed.

No. 12,769.

STATE OF LOUISIANA VS. ADAM ROBERTSON.

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1. *A General Averment not Sufficient.*—The allegation that the verdict was contrary to the law, and the evidence does not present of itself question for review or appeal.
2. *Not Improperly Influenced.*—Where there was no ground to suspect (though alleged) that the jury had been improperly influenced, the verdict and sentence must remain as returned.
3. *Sheriff in Charge of Jury.*—Communications between the jurors and the officer in whose charge they were affords no ground for a new trial, where it does not appear that prejudice resulted.

4. *Indictment Contained all Essential Allegations.*—The terms of the indictme
cally charged the offence and brought the case within the provisio
statute.

5. The omission of the words "in the peace of the State" did not v
indictment.

APPEAL from the Sixteenth Judicial District Court for th
of St. Helena. *Reid, J.*

M. J. Cunningham, Attorney General, and *D. S. Kemp*,
Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, App

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Defendant, appellant, not represented by counsel in S
Court.

Submitted on briefs April 9, 1898.

Opinion handed down April 18, 1898.

The opinion of the court was delivered by

BREAUX, J. The defendant was charged with murder.
tried and found guilty as charged, and condemned to su
extreme penalty of the law. From the verdict of the jury a
tence of the court he prosecutes this appeal.

He is not here represented by counsel.

A motion in his behalf was filed in the District Court fo
trial.

The grounds of the motion were that the verdict of the j
contrary to the law and the evidence. That undue influen
brought to bear upon the jury to compel it to find a ve
guilty; that improper communication was had with the jury t
ence a verdict.

The first objection that the verdict was contrary to law
evidence, we take it, was raised as preliminary to the objecti
follow.

Considered as an independent proposition it has always be
that a motion on the single ground that the verdict is con
the law and the evidence does not present question for re
appeal.

Passing to the second ground set forth in the motion, viz.

influence upon the jury, the trial judge in his statement incorporated in the bill of exceptions declared that there was no improper influence brought to bear on the jury; that a large number of persons were present to see the trial of the accused; that they remained in the courtyard after the jury had retired; that the jury room has windows from which the jury could see persons in the courtyard; that, due to the construction of the building, their removal to any other room could not have prevented the jurors from seeing those persons who were in the yard; that it was not suggested, nor was it a fact, that those persons in the courtyard were riotous or disorderly. The record further discloses that they did not hold any communication with the jury; that there was absolute freedom from all interference with the trial, and not the least demonstration; those present conducted themselves quietly and in a most orderly manner; that the accused was fairly tried and convicted. It appears that the sheriff and his deputy were the only witnesses as relates to the jury and improper influence charged. Their testimony supports the statement of the District Judge as above given in regard to the conduct of those present; they were questioned and testified as to the orderly behavior of those present, and the total absence of any influence whatever against the accused.

There was no warrant for the charge of improper influence of persons present at the trial. Nearly always at the trial of criminal cases of great moment in the community persons assemble to witness the trial. Of itself the assembly of persons offers no ground for complaint on the score of prejudice to the accused. The court is not to assume that the jnrors were put in fear by the mere presence of a number of persons. The record does not disclose that the assembled persons were moved by any other desire than to witness the trial.

The evidence does not suggest the least ground upon which injury can be presumed. It was not shown that a word of threat was uttered, or that the least gesture was made while the jury was in the room deliberating.

After a careful consideration of the statement of the District Judge and of the evidence of the sheriff and deputy we arrived at the conclusion that the objection offers no basis upon which to reverse the verdict of the jury.

This conclusion brings us to the next ground urged by motion for a new trial, viz.: communication with the jury.

This charge was leveled against the sheriff; he had been
by the court with the custody and care of the jury by t
The jury retired to the room of deliberation on Saturday a
some time after, about two hours, the sheriff asked the
wished supper. This inquiry led to some conversation bet
and the members of the jury in which he said to them th
they agreed and found a verdict by eight o'clock, they wo
to remain over until Monday morning; eight o'clock it ap
the usual hour of the court's adjournment.

This officer stated that he did not know at the time w
not the jury had agreed upon a verdict.

It does not appear that he was present while the jury
erating.

It is not suggested that he sought, by speaking to them as
regard to the adjournment of the court, in any respect to
the minds of the jurors.

While we must hold that all communications between j
officers of court should be as much as possible restricted, y
constrained to hold that such information as was given in
was not ground for a new trial. In a case presenting a sim
tion it was decided, "where the officer told them that u
agreed they would be detained until the next day a
this, *though improper*, was held not sufficient to avoid th
"since it did not amount to an illegal restraint of the jury."
son on Trials, Vol. 2, pp. 1918, 2556.

We pass to defendant's motion in arrest of judgment p
grounds of objection: that he was not charged with any cri
the laws of the State; that the indictment did not stat
deceased was in the peace of the State.

With reference to the first objection, the indictment cont
essential recital. It charges in the language of the law
defendant at time stated, in the parish of St. Helena, wilfu
iously, and of his malice aforethought, did kill and murder
Carruth.

Nothing else was needed to make a complete and valid in

It has been, as to the second ground of the motion in
pestedly held by this court that the absence of the alleg
the peace of the State" was not ground for an arrest of j

State vs. Vincent, 36 An. 772, and decision cited. State vs. Simien, *Ib.*, p. 924; State vs. Sonnier, 38 An. 962.

This completed the review of every objection and every point they suggested.

We found no ground upon which the accused can be granted a new trial.

There is nothing in the proceedings indicating that the law has not been complied with in every respect.

It is therefore ordered, adjudged and decreed that the verdict, sentence and judgment appealed from are affirmed.

No. 12,788.

STATE EX REL. L. D. FORD VS. S. M. TAYLOR, JUSTICE OF THE PEACE.

A judgment and execution sale which are founded upon a citation and writ of attachment which have never been served in any manner upon the defendant, temporarily absent, will be held void in the exercise of the supervisory power of the Supreme Court by the writ of *certiorari*.

ON APPLICATION for a Writ of *Certiorari*.

C. P. Thornhill for Relator.

Respondent *pro se*.

Submitted on briefs April 7, 1898.

Opinion handed down April 18, 1898.

APPLICATION FOR WRIT OF CERTIORARI.

The opinion of the court was delivered by

WATKINS, J. Relator alleges that notwithstanding he was a resident and citizen of the parish of Rapides, having permanently removed there from the parish of Caldwell, one A. D. McFarland, instituted a suit against him for the sum of four dollars and seventy-five cents in the court of the respondent, a justice of the peace for

the fifth ward of the parish of Caldwell—said suit havi
accompanied by an attachment predicated on the allegation
was about to remove from the State permanently.

He avers that under said writ his property was seized and
only notice of any kind that was attempted to be served
posting of a citation on a church edifice called Palestine, wh
in the vicinity of the court; and that thereupon the respond
the cause, and rendered judgment against him by default in
the plaintiff for the amount of his demand.

That under said judgment an execution was issued, his
seized and sold "without any notice, legal or otherwise, hav
given him;" and he charges "that all the acts and things
the premises by the respondent and his constable were ille
and void, because they had no jurisdiction of his pers
because no citation or notice of the aforesaid proceedings w
him, * * * and he was in total ignorance thereof at t
and until his property had been sold."

He alleges that the judgment being unappealable his only
is by resort to the supervisory writ of *certiorari;* and his p
that the respondent be compelled to send the original pro
up to this court, to the end that their legality and validity b
and on final hearing that same be annulled.

In his return the respondent avers that he produces an
certified exemplification of said record in obedience to the
the court, and he affirms that at the time of the filing of
the relator was a resident and citizen of the parish of Caldw
porarily absent from the parish "doing day labor at Alexand
and was fully apprised of the proceedings had against his
in the above entitled cause *by letters mailed to him by a bro
resided at the time* in the immediate vicinity of the proper
and sold."

The respondent further returns "that relator's failure to
and defend the suit above named is and was upon the ass
that if he failed to appear he would be, under the law,
heavy damages against him and the plaintiff."

The transcript which is appended to the return shows
citation was served by posting same "on the late residence
Ford," the relator; but it does not show *any service whatev*
writ of attachment.

That upon the foregoing proceedings a judgment was rendered against the relator, who was absent, by default; but there is nothing therein recited with reference to the attachment having been either dissolved or sustained.

That soon afterward an execution was issued, and relator's property was thereunder seized, and that the notice of seizure was served by "posting same on the residence of L. D. Ford," the relator.

That, after due advertisement and appraisement, said property was advertised and sold.

Conceding all that is claimed in the return of the respondent it is evident that his proceedings were altogether illegal and irregular; for admitting that the relator's residence and domicile were in the parish of Caldwell, and that he was only temporarily in the parish of Rapides, it became essential that he should have been cited as a resident citizen in order to constitute the subsequent judgment and execution sale legal and valid.

On the contrary, it clearly appears that there was no legal service of the citation or writ of attachment of any kind that was at all effective.

The relator's demand must be sustained.

It is therefore ordered and decreed that the relator's demand be sustained and the provisional writ of *certiorari* made absolute, and that the alleged judicial proceedings which are complained of be annulled at the cost of the respondent.

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No. 12,810.

STATE OF LOUISIANA VS. A. B. FRENCH.

ON MOTION TO DISMISS THE APPEAL.

The State is entitled to an appeal from a ruling of the trial judge on a motion in arrest of judgment, sustaining the motion and setting aside the verdict. The order annulling the verdict was in character final, and if erroneous, caused injury.

ON THE MERITS.

The verdict was not responsive to the charge. It was a special verdict. If the jury chooses to designate the crime found by name, it should be defined by name having a meaning in criminal law, or defined in plain words covering all the essential ingredients of the crime.

No judgment can be pronounced on a partial verdict which fails to find the criminal intent, where intent is an essential ingredient of the crime.

In a special or partial verdict of the jury's selection, all the facts nece
constitute the crime must be clearly stated. If the jury determines
out part of the language charged in the information, they should be pa
not to omit essentials to constitute the crime.

A verdict "Guilty of wounding less than *mayhem*," is not responsive to an
ation charging that the accused has "feloniously, wilfully and mal
inflicted a wound less than *mayhem*," and is not legal.

The court adheres to the decisions in State vs. Bellard, 50 An. —; and
Hearsey, 50 An. —, overruling contrary views.

APPEAL from the Criminal District Court for the Parish of O
Moise, J.

M. J. Cunningham, Attorney General, and *R. H. Marr*,
Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, App

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Farrar & Lemle and *H. N. Gautier* for Defendant, Appellee.

Argued and submitted April 28, 1898.
Opinion handed down May 2, 1898.

The opinion of the court was delivered by

BREAUX, J. The State in this case appealed from an ord
taining a motion in arrest of judgment.

The defendant was prosecuted upon an information contain
counts. In one count he was charged with having stabbe
intent to murder. In the other count with having wilfully and
iously with a dangerous weapon inflicted a wound less than *m*

The verdict found was "Guilty of wounding less than *mayh*

In due time the defendant applied for the arrest of the ju
on the ground that the verdict was not responsive to any
offences charged or counts contained in the information, wh
before stated, the trial court sustained.

MOTION TO DISMISS THE APPEAL.

The defendant in this count moved to dismiss the appeal
reason that the court's ruling, sustaining defendant's motion i
of judgment was not a final judgment.

The judgment or ruling in our judgment operated prejudic

the State, if the position of the prosecution be correct; and, in addition as related to the verdict returned by the jury, it finally disposed of the question involved.

There remained nothing save the sentence. If an error of law has been committed by the trial judge in a matter purely of law, it would, in our view, be prejudicial to the proper administration of justice to let it remain unreversed.

The question is not *res nova*. It received the attention of this court in the case of State vs. Brabston, 38 An. 144.

The defendant concedes that this decision is not favorable to his motion to dismiss the appeal. That decision does not, in our view, stand alone. The question was considered in State vs. Cason, 20 An. 48, in which it was held that the right of appeal on questions of law, in criminal cases, is not so restricted as to warrant the denial of an appeal to the State from a ruling sustaining a motion in arrest of judgment.

The same question arose in the case of State vs. Robinson, 37 An. 675. The court in the last cited case reconsidered the decisions and reaffirmed the right, citing State vs. Ellis, 12 An. 390; State vs. Ross, 14 An. 364; State vs. Taylor, 34 An. 978.

There is no question here of an acquittal by the jury. It was a matter in which the judge alone acted. This distinction has been observed in a number of cases holding that the province of the jury is not infringed upon by the orders and judgment of the court of the first instance, not connected with the facts showing the guilt or innocence of the accused.

The defectiveness *vel non* of the jury's verdict, presents questions of law, and as such they are reviewable when they come up, as in this case, on a motion in arrest of judgment, setting aside the verdict of a jury.

The judge is without authority to annul a legal verdict by arresting the judgment.

The State, in case it be attempted, is not without remedy on appeal.

The appeal is, therefore, not dismissed.

ON THE MERITS.

The defendant avers that the verdict "Guilty of Wounding less than *Mayhem*" is not responsive to the offences charged in the information.

In the first place, it is evident that the verdict was not a verdict, but one that the jury found without special refe the offence charged in either count of the information. verdict of their own selection. They had been instructed court regarding the form of the verdict, as follows:

You may render one of five verdicts.

1. "You may find the prisoner at the bar 'Guilty as ch the first count of the information.'

2. "You may find him 'Guilty of stabbing with a d weapon with intent to kill,' as charged in the first count.

3. "You may find him 'Guilty, as charged in the secon

4. "You may find him 'Not guilty,' or

5. "You may find him 'Not guilty, on the ground of insa

"If you find the defendant was insane at the time of the sion of the act, you should qualify your verdict of 'Not guilty addition of the phrase 'on the ground of insanity.'"

The jury did not follow the instruction. It was within the to find a particular verdict in language of their own, and covered an offence denounced by the statute, or an offe lower degree, included under the terms and condition offence charged, it would have been a sufficient verdict.

Taking an example of the most ordinary sort, the cha murder, the jury may find the defendant guilty of manslaug the charge being burglary, if larceny only be proven, the may be found guilty of larceny; so in all cases of offenc degree of the same class.

But the finding of the jury in such cases must be of a complete in itself. The offence must be completely sta valid judgment can be pronounced upon the partial verdi fails to find the ingredients essential to constitute the crime

To illustrate by another example of a familiar kind: if a j to return in court that an accused was guilty of taking the another without any intimation as to the asportation and appr of the goods, it is useless to state that the finding would Not so, if they were to return that he is guilty of larceny, word embraces all the ingredients essential to constitute t of stealing. Larceny, manslaughter, and other words crimes, have a well defined meaning. They are in themselve nition; no one can be misled, or there need not be the lea

sion when these names are made use of. If the jury undertakes to define the crime, it should be by a name in which there can arise no confusion or ambiguity, or if it is not identifiable by a well-known name, then the description should include the essentials to constitute the crime.

In one case in this State the court went to the extreme of holding that only a general verdict could, under the law, be found. State vs. Jurche, 17 An. 71.

That limit properly, has not always been observed. Special and particular verdicts may be found with the understanding that the name of the crime when it has a name, or the facts when it has not, necessary to constitute the crime, are fully and explicitly stated.

The court can not supply the facts necessary to constitute the crime. 2 Hawkins, P. C. 622; State vs. Blue, 84 N. C. 809.

"The omission of any fact necessary to constitute the offence is fatal." 3 Wharton on Criminal Law, Sec. 3188. Where "intent" is one of the essential ingredients of the crime, it must be found in a special verdict in order to sustain a judgment. The crime denounced in the case before us for decision we have seen includes "intent" as an essential ingredient.

No one unless acting wilfully and maliciously with intent is guilty of inflicting a wound less than *mayhem*.

In our view the verdict was defective; it failed to find the criminal intent. It is defective whether construed as a special or a partial verdict. In a very recent case this court held that it was not permissible to go beyond the words used by the jury in matters essential to the finding that a crime has been committed by the accused. State vs. Bellard, *ante*, p. —, this volume.

In another, also a case recently decided, State vs. Hearsey, *ante*, p. —, this volume, the court extended the rules of practice much further than there is any necessity of extending it in the case here.

The rule applying is sustained by a number of well-considered decisions, notably the cases of State vs. Buzzo, 18 Wallace, 125, and State vs. Burdon, 38 An. 357.

In the former the court said, in construing a special verdict, the intention is of the essence of the crime and is not found by the special verdict; no judgment can be entered on the verdict. And in the latter case cited, the court in substance, with reference to the finding of a jury, said: "What is not found is not supposed to exist."

Citing State vs. Ritchie, 8 An. 512. There are views not with those we have here expressed. The prosecuting offi directed our attention to them, and particularly to the case vs. Mason, 42 An. 715.

For the reasons before stated we can not adhere to the d the Mason case. We are constrained to adhere to dec before cited. We think they are correct in law.

It is therefore ordered and decreed that the judgment from is affirmed.

No. 12,540.

MILTON MCGRAW VS. TEXAS & PACIFIC RAILROAD Co

1. The switching of cars in the night-time on the main tracks of a ra no lights displayed, or other precautions used to warn approachi the obstructed track, resulting in the collision with the obstructi freight train dispatched with no notice or warning of the obstruc deemed negligence in the railroad company, subjecting it to dam by the collision.
2. Nor is the liability of the company at all lessened because the obstructed is within what are termed yard limits, extending eig feet and over which all trains must pass, and such obstructions me trains unless proper precautions are employed.

APPEAL from the Civil Judicial District Court for the Orleans. *Monroe, J.*

Joseph N. Wolfson (*J. F. Pierson* and *T. M. Gill* of Cou Plaintiff, Appellant.

Howe, Spencer & Cocke for Defendant, Appellee.

Argued and submitted January 27, 1898.
Opinion handed down March 7, 1898.
Rehearing refused April 18, 1898.

The opinion of the court was delivered by

MILLER, J. The plaintiff appeals from the judgment his suit for damages caused by bodily injuries he claims to

tained from the collision of the locomotive engine of which he was a fireman pulling one of defendant's freight trains, with a train of cars placed on the tracks by defendants' agents. The petition alleges the collision was due entirely to the gross negligence for which defendants are responsible, and the answer is the general issue, and the averment that the negligence, if any, was that of defendant or his fellow-servant for which defendants are not liable.

The train that collided with the cars placed on the tracks, as we understand the testimony, having the right of way except of passenger trains, was dispatched at a late hour of night from the depot or yard opposite the city to Boyce, Louisiana; proceeding on its route the train consisting of thirty-four cars, encountered the cars placed on the track by the switch engine engaged in transferring cars to defendants' yard, and it is claimed the collision occurred in the yard limits; the engineer's testimony is that his train was running about eight or ten miles an hour; that five of the eight cars with air brakes with which his train was provided had been cut out, of which he had no knowledge until the train had started, and there is no substantial variance in the testimony that the cars blocking the track were perceived but a few moments before the collision, and too late for its avoidance; the quick apprehension of that which must have occurred prompted the exclamation from the engineer: "We are in for it," and he as well as the plaintiff jumped from the engine, he thereby receiving the injuries of which he complains, and the jump, under the testimony, was none too soon. It is claimed by the defendants that the collision occurring in what are termed yard limits, the rule of the company was for trains to stop at the bridge west of these limits, and go through at reduced speed, and the neglect of the engineer, the fellow-servant of plaintiff, it is insisted, caused the accident, but it admits of no dispute that the signal was displayed for the approaching train to cross, that the speed was reduced, and that when the train came on the blocking cars there was no preceding notice or light displayed, or flagman posted to make known the obstruction, and the current of the testimony is that the plaintiff's jump was in the presence of the imminent danger, verified by the quickly following collision. As to the injuries to plaintiff, the testimony of his physician and others is, that his leg was injured; that he was bruised, confined for a few days, received medical attention; but on a careful consideration of all the testimony on this point

we are not impressed with the tendency of the testimony t
permanent injury.

Our attention is directed to the testimony that after the s
brought and plaintiff had testified, he sought defendants t
money, or a position on the road, and made statements he h
tained no injury and would withdraw his suit. We have his
to the contrary, and the lower court was so impressed w
testimony that it declined to permit the plaintiff to go on th
to testify to that which occurred. We have no power to dis
suit because of this episode. If plaintiff has any right to re
depends on facts connected with the accident resting on te
of others, and in weighing that relating to his injuries we
careful to give his statements no weight greater than the fo
gested by the testimony coming from the physicians and oth
nizant of the actual facts.

It is contended on behalf of defendants that this accident
ring within yard limits extending a distance of eight hundr
is to be considered in connection with the alleged rules of t
pany authorizing the switching on the tracks in yard limits
the night-time, of cars detached from the engine, without
signals, or notice of any kind to approaching trains and
instructions to those who must run trains, or to those who pl
obstructions on the tracks, of the coming of the trains, th
eventually come in contact with the cars in the way. The r
tended for in argument is, in effect, that no other protection te
and limbs of railroad employees of trains moving in the nig
through yard limits, is required, to guard against obstruction
tracks placed there by other employees, than the reduced
which the trains must run, or as the witnesses express
trains must be under control. Any other or further protectio
the rule as it is presented in argument, must be found in th
ness of vision to see in the dark an obstructed track, and in
the train in the interval, however short, between perceiving an
contact with the obstruction. The rule thus contended for, kn
claimed, to plaintiff and all employees of the company, it is
placed on him the risk of the accident, under the principle that
vant takes all the risks incident to his employment. Thom
Negligence, p. 927; Bailey, Master and Servant, p. 152. The te
fails to impress us that the rules of the defendant carried the

cance to their employees, of the assumption by them of the risk of night obstructions of the tracks even in the yard limits, with no lights displayed, or notice of any kind of such obstructions so menacing to life and limbs of train men. That the trains should move at slackened speed through yard limits, testified to as the rule of the company, could hardly be deemed to carry the notice that train men required to pass over the tracks in the night-time, must expect to encounter impediments in the way, of a character to endanger their lives, and with no notice of warning of the danger. Nor do we find the testimony supports the rule with the significance attached to it in the argument. As we read the testimony of the defendants' witnesses we derive the impression that it was customary, when the main tracks in the yard limits were obstructed, to flag approaching trains, as we find it put by one of the witnesses "to send flags each way." As to night obstructions there can not be said to have been any custom, for as we find it in effect from another of defendants' witnesses, no such obstruction as cars left on the main track had occurred in the four years of his employment. If customary to flag in the daytime obstructed tracks, manifestly the train men of this extra freight dispatched at night to pass through the yard limits, though at reduced speed, might well deem themselves entitled to notice of the cars blocking their way and menacing their lives. In our view the defence fails that presents the accident that resulted in plaintiff's injuries as one of the risks he assumed incident to his employment.

Again, when the servant is deemed to have assumed the risk of the accident causing the injury, the law supposes the master has complied with the obligations resting on him to secure the safety of the servant in performing his duties. The failure of the master in this respect will leave him without defence on the ground of the servant's assumption of usual risks. 2 Thompson on Negligence, pp. 970, 985. This obligation of the master in connection with the servant's assumption of risks has had frequent illustration, and as respects railroads, may be well applied; we think, to reasonable precautions to guard against obstructed tracks. In this case we find as pertinent to the discussion that no notice is sent by the proper employees not fellow-servants of the plaintiff, to those in charge of the yard, of the coming of the extra freight that encountered the obstruction within an hour from the time it was dispatched at night, to pass over the

tracks; nor was any notice given by those not fellow-ser
plaintiff to those who dispatched the night train, of the cars
on the track. These notices were reasonable precautions not
the plaintiff's duties, and which, it is to be presumed, wou
averted the accident. Further, we have a freight train of
four cars dispatched with but three air-brake cars, insufficie
our conclusion, to arrest in suitable time the train, if inde
accident could have been avoided with a greater number
provided with air brakes. We think in these aspects the neg
of the defendant is also exhibited.

It is claimed that it was the negligence of the engineer with
the plaintiff was associated in the duty of running the engi
caused the discussion. We pass over the authorities cited in t
to show that the engineer was the fellow-servant of plaintiff
law the negligence of one was equally that of the other. Ac
the legal conclusion, the inquiry remains what was the
negligence. The canal bridge, crossed on entering the yard
it is claimed, called for a full stop. We find, however, it
crossed until the appropriate signal was given. It is urged the
ment of the cars through the yard should have been under th
six or eight miles an hour. The testimony of the engineer an
ductor, most reliable, we think, was, the cars were mo
reduced progress, eight or ten miles an hour. The dif
between the asserted rule rate, and the actual movement, if
our opinion, based on the testimony, is not to be deemed a fa
causing the accident inevitable, we think, irrespective of the
which the cars were pulled. In every point of view, we th
negligence of defendants must be deemed the cause of the con
avoid which plaintiff jumped from the engine, and the jump
the circumstances, does not lessen defendants' responsibilit
serious, it might well be, if plaintiff had awaited the actual
that quickly followed.

This record affords no warrant for other than actual da
Under the testimony it is our conclusion the plaintiff received
manent injuries. The pain he suffered, the loss of time dur
period of his confinement, the expenses of medicines and
attention make up the basis for damages. In our opinion fiv
dred ($500) dollars is adequate compensation for his injuries.

It is therefore ordered, adjudged and decreed that the judg

the lower court be avoided and reversed, and it is now ordered, adjudged and decreed that the plaintiff do have and recover from the defendant five hundred dollars with legal interest and costs.

No. 12,506.

HUGO H. FREDERICKS VS. C. H. DONALDSON ET ALS.

The suit brought against a number of creditors claiming liens on the building of the plaintiff is not within the jurisdiction of this court, when each creditor claims less than two thousand dollars. Constitution, Art. 81 as amended, Acts 1882, p. —.

The appellate jurisdiction of this court based on "the fund to be distributed" can be exerted only when the fund deposited subject to the order of the court exceeds two thousand dollars. *Ibid.*

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

Charles Louque for Plaintiff and Appellant; *Solomon Wolff* for G. Villermin, Defendant and Appellee; *Dart & Kernan* for O. A. Mattes Central Manufacturing and Lumber Company, Limited, and R. K. Hackney, Surety, Defendants and Appellees; *Frank McGloin* for A. H. Moise, Liquidating Partner of J. Fred. Randolph, Defendant and Appellee.

Argued and submitted February 8, 1898.
Opinion handed down April 4, 1898.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MILLER, J. The plaintiff appeals from the judgment on his petition against the defendant, the contractor for the erection of buildings for the plaintiff, and against the contractor's sureties, and against the workmen and furnishers of materials, claiming liens on the buildings for work upon and materials furnished for the buildings.

The contractor abandoned the work, and the plaintiff completed the building for less than would have been due the contractor, if he

had performed his contract. When the plaintiff finished tion, there remained unexpended six hundred and eig dollars, the difference between the contract price that wo been paid the contractor if he had not defaulted, and th plaintiff expended to finish the erection. There were liens against the buildings for the workmen and supply m amount of two thousand six hundred and sixty-eight doll plaintiff deposited the six hundred and eighty-eight dolla that amount be distributed to the lien creditors; their liens to be erased; that plaintiff be discharged from all liability, he have judgment against the sureties in the event of any on his part in excess of the amount deposited.

The judgment of the lower court distributed the amount to the lien creditors, and they have acquiesced; the j decreed the plaintiff liable beyond the amount deposited small amounts, one of two hundred and ninety-eight do another of sixty-five dollars, and dismissed the demand ag sureties. In this posture the plaintiff takes the appeal, an by the motion to dismiss.

It thus appears the plaintiff sued numerous parties assert flicting rights to the six hundred and fifty-eight dollars he d The demand of each of these parties was less than two dollars. The plaintiff's demand of the surety of the contra contingent, *i. e.*, in the event the plain tiff was made liabl the amount he deposited. This contingent demand was less thousand dollars.

In no aspect it seems to us can this appeal be maintain suit against a number of defendants each alleging a deb plaintiff for amounts less than two thousand dollars can brought within our jurisdiction merely because the ag claims exceed two thousand dollars. On any appeal b creditors the amount of each claim would be the test of o diction, nor is the test different because plaintiff sued them this form seeks an adjudication on appeal on claims all b jurisdiction of this court. The United States and others v rane and others, 5 Rob. 120; Boulden vs. Hughes, 8 N. S. 2 demand against the sureties as stated in the brief is below o diction. The fund deposited is six hundred and fifty-eigh and the fund "to be distributed" must exceed two thousan

to give us jurisdiction when that distribution is the basis to sustain the appeal. Constitution, Article 81, as amended by the amendment of 1882; Acts, p. 174; Insurance Company vs. Levi *et al.*, 40 An. 135; Renshaw vs. Stafford, 34 An. 1140.

It is therefore ordered, adjudged and decreed that the appeal in this case be dismissed at appellant's costs.

No. 12,588.

MARGARET ROMBACH, TUTRIX, VS. CRESCENT CITY RAILROAD COMPANY.

In an action for damages received from a collision between a cart and a street car, moving side by side in the same course, with a short space between them (one can not strike the other if each remains in its direction). It being evident that the car did not turn, but that the cart was turned so that it struck the side of the car, the presumption of negligence was not against the street car.

To recover it was incumbent upon the plaintiff to prove that the collision was caused by the negligent acts of the defendant. On the contrary, it appears that it proceeded from the incautious act of the driver in pulling his horse to the left.

Held: That the injury was not caused by defendant's negligence and that there is no ground for deciding that the unanimous verdict of the jury and the judgment of the court pronounced thereon were erroneous.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

O. B. Sansum for Plaintiff, Appellant.

Farrar, Jonas, Kruttschnitt & Gurley for Defendant, Appellee.

Argued and submitted April 19, 1898.
Opinion handed down May 2, 1898.

The opinion of the court was delivered by

BREAUX, J. This was an an action for damages received from a collision. Plaintiff sued for damages as tutrix of her minor son, Jacob Rombach, aged about fourteen years, who was injured in an

accident. It appears that his oldest brother was sick and un
deliver ice to customers of the mother. The little fellow
asked of his mother the permission, with another youth old
he was, to receive the ice from the factory and take it to
to whom the oldest brother usually dealt that article o
chandise. The boys were driving the horse and small ice ca
defendant's up-town rails on Tchoupitoulas street, at about h
eight o'clock in the morning. About midway of that street (To
toulas), between Delachaise and Aline streets, in this city, one
defendant's electric cars collided with the ice cart and tilted t
over, breaking one of the shafts and throwing the ice down i
street and breaking the left arm of plaintiff's son. The r
of the cart struck the side of the car on the left, in rear
"grab handle" attached to the body of the car for the conv
of passengers in entering the car. The evidence discloses t
fender of the car projected two and one-half feet in fr
extended on each side of the centre line of the car, as fa
platform in front of the dashboard. The front, or dashboa
as wide as the body of the car, and the platform also was as
the car and projected about three feet from the body of t
The cart measured two feet ten inches from the centre of the
the rear end of the tumbrel or the tailboard.

Previous to and at the time of the collision, the car was run
half speed and the horse was pulling the cart at half trot.

The plaintiff insisted that her cart had almost entirely passe
the track when the motorman turned on the power, increa
car's speed, and thereby caused the collision and the injury; t
driver of the cart heard the gong and the advancing car and
diately turned the horse off the car track, but not quickly en
escape the injuries complained of.

The case was tried before a jury. The verdict was for def
The judge overruled the application for a new trial and gav
ment against the plaintiff. She appealed.

Beyond all question, if plaintiff's cart and horse were
driven up the street and the car people did not give it amp
to move out of the way, the defendant is responsible in dama
the injury, but this, so far as we can discover here, is not the
it had been, the front part of the car would have been the first
in collision with the cart. We have seen it was not the fr

struck the car; but the cart collided with the car some five and a half feet from the front of the car. The evidence shows that the car was of equal width from end to end, including the fender in front. It therefore becomes manifest the outer end of the car and the sides being parallel, after the cart had cleared the track it must have made a backward motion. Had it remained in place, after it cleared the five and a half feet on the side, the car being of equal width from one end to the other, it would have passed without touching the cart. The cart must have deviated. The car and the cart were going in the same direction. One of the wheels was, plaintiff states, on the railroad track. The horse was pulling toward the river. We gathered from the evidence, however, that the horse and wagon were not in front of the car as alleged by plaintiff, but on the side running in the same direction with the car, in a direction slightly oblique from the car; that when opposite to the car the horse turned in the direction of the river and thereby the cart was made to strike the car, as it did. Had the cart been in front of the car, as contended by plaintiff, with one wheel inside of the up-town car track and as witnesses for plaintiff have testified (if its direction was slightly oblique with the car's course) the right hand wheel or the hub would have struck the car. (The wheel and its hub projected a number of inches from the side of the cart.) If, on the other hand, the direction had been more at right angle from the line of the track, the front of the car would have struck the cart.

Five and a half feet of the car had been passed without colliding. Had there been no veering of one or the other there would not have been an accident. The remaining length of the car would have been passed without collision. Had they traveled toward each other the side of the cart would have come in collision with the side of the car. This was not the situation; they were not inclining toward each other. The side of the car was struck by the right hand end of the cart. In what way then did the end of the tumbrel strike the car? The course of the latter (the car) was not to the side, right or left, but straight. The blow must have come from the cart as it changed direction to the left from the car. That this actually happened was made evident, we think, by the print of the blow on the side of the car, and the broken end of the tumbrel of plaintiff's cart. If the driver pulled to the left even a very small distance it would turn the cart diagonally to the car and bring the end in con-

tact with the car. In that case the cart would be the o
force, and not the car, following a direct line.

This view, we think, is sustained by the weight of the te
The distance between the cart and the car running in the sam
tion was very little. The limited space between the tw
moment of the accident does not change the principle w
think should govern. In all cases when the cartman devi
departs from the track, and his cart and the car are
advancing side by side, he is presumably negligent if he ch
turn his cart so as to strike the car, and this whether the tu
his cart be short or long. After the cart is no longe
car's range a turn of its wheels gives rise to the unavoidab
ence that the collision came from the cart's change i
tion. The plaintiff in support of her claim sought t
that a dray coming toward the cart from an opposite directi
moment of the accident so encumbered the street that it p
the driver of the cart from getting away entirely from the c
There was unquestionably a dray near at the moment of the
The witnesses disagree as to the obstruction by this dray.
stated that it was not near enough to interfere with the ca
least. The jury's verdict sustains that evidence. It is pa
within the province of the jury to weigh the facts of the cont
We have frequently heard it said that juries are in their findi
much inclined against corporations. We do not give great
or importance to such utterances, but none the less we are o
that a jury would not hastily conclude in an action for dam
boy in the service in which this boy was engaged, with his
permission, that he was not obstructed or stopped in his cou
reality, he was in any way stopped. As plaintiff in su
appellant from the verdict of a jury to which the cause wa
her motion, she is bound to explain and prove to the court
before she can be allowed to have the verdict reversed. While
that railroads have not a monopoly of their tracks, and that
in their absolute use to the exclusion of vehicles, yet in orde
them for damages their negligence must be proved. It
established to the satisfaction of the jury and of the judge of
trict Court, nor to ours. In analyzing the facts and seeking
prehend just how this accident occurred we found that t
plained collision by the cart with the side of the car, and not

front of the car, was a complete bar to the conclusion that the injury arose from negligence on the part of those who were manning the car.

It is therefore ordered, adjudged and decreed that the judgment appealed from be and it is hereby affirmed.

No. 12,747.

AUGUST HUBERWALD ET ALS. VS. ORLEANS RAILROAD COMPANY.

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The right of action for damages *ex delicto*, under Art. 2315, C. C., does not survive in favor of the children of age.

The right survives in favor of the minor children, or widow of the deceased. The descriptive words of the article do not include the heirs of ages. The right is personal and limited to those indicated by the statute.

The right given to the minor, in whose behalf it (the right to damages) is not claimed or exercised during minority, abates after her majority.

The right is attached to the person and is not heritable. Affirming, Hermann vs. Railroad Company, 11 An. 5; Hubgh vs. Railroad Company, 6 An. 496; Walton vs. Booth, 34 An. 913; Chivers vs Rogers, 50 An. —.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

W. S. Benedict for Plaintiffs, Appellants.

Frank D. Chrêtien for Defendant, Appellee.

Argued and submitted March 26, 1898.
Opinion handed down April 4, 1898.

The opinion of the court was delivered by

BREAUX, J. This was an action for the recovery of damages arising from the death of petitioner's father, Rudolph Huberwald, January, 1896, caused, they aver, by the negligence of the defendant in its operation as a street railway.

Their mother, Malvina Huberwald, died on the third day of February, 1896.

On the 17th of November the children of Rudolph Hu averring that the injury sustained by their father of which survived in their mother, brought this suit. They alleged rights of their mother descended to them by inheritance. A children were of age on the day of their father's death Malvina. The suit was not brought during her minority. D answered pleading a general denial, and especially pleaded mother of petitioner having died a few days after her husba out having sued, her right to damages was not inherite major heirs, and that Malvina Huberwald, who was a mino whose behalf no suit was brought during her minority los majority her right of action. The minor had become of a months prior to the institution of this suit. The court a tained the grounds of exception, made part of the answer. F judgment the plaintiff appeals.

The right of action arising from a *quasi*-offence against on son has always been considered and treated by this co personal action not heritable without legislative sanction.

It is, unless there is provision made to the contrary, a rig personal.

But to an extent at least the law upon the subject is pro It prescribes that every *quasi*-offence giving rise to damages repaired. As long as the article relating to offence and *quas* read: "Every act whatever of man that causes damages to obliges him, by whose fault it happened to repair it" (C. the personal right of the one injured to pecuniary repara recognized by the decisions of this court. It was underst he who caused damage should make indemnification to the o aged, whether it had been done by himself or through som his. But the right under the article quoted terminated with son injured; it was not heritable; in other words, the loss by the widow and children growing out of the death of the and father was not considered compensable from a pecuni of view. These wrongs went unredressed in the Civil Court rection was sought only by criminal prosecution, in case th injured did not survive his injuries.

In two cases, Hubgh vs. New Orleans & Carrollton R. R. C 495; and Herman vs. New Orleans & Carrollton R. R. Co., the question received the close consideration of this court,

the amendment of the statute; and it was held that the killing of a human being was not to be regarded as a direct injury to his family, compensable in money. In the second of the two cases, Herman vs. New Orleans & Carrollton R. R. Co., 11 An. 5, the court said that the question had been argued with great ability in both cases. The elaborate briefs of counsel are copied in the report.

The opinion of eminent jurists were cited in these cases in support of a contrary view. The court, nevertheless, adhered to the first decision, and said that the difficulties created by the learned argument of plaintiff's counsel in the joint case did not justify them in disregarding the well considered decision previously rendered.

The court added " and were the question *res nova* we should feel great difficulty in arriving at a satisfactory conclusion."

The question was before the court again in Chivers against Rogers, 50 An. ——.

The cited cases *supra* were affirmed. Three decisions rendered upon an important issue after elaborate argument of counsel, should we think, have the weight of authority of *stare decicis*, more particularly as there is a decision expressing a contrary view in our books.

In 1885, the section before quoted of the Civil Code was amended in order, to the extent expressed in the amendment, to enable those named in the amendment to bring suit. A limited order of succession was instituted. " In case of death, the right of this action shall survive in favor of the *minor* heirs, or widow of the deceased."

In the case last cited, and in Walton vs. Booth, 34 An. (914), it was held that the right of action could be exercised only by those named in the act. As to those only, the amendment was *damnum injuria datum*. The major children of the deceased (not being named in the statute amending the law) are without right. This was in effect the interpretation of this court prior to the amendment, and it remained unchanged by the legislative action taken in the matter at the time.

This brings us to another question, different in some respects to the one we have just left. It arises from the fact that one of the children was a minor at the father's death. She was, we have seen, of age when the suit was brought. The law appears to have for object the needs of the minor. This court said in one of the cases

cited *supra* that those heirs not expressly included were e
and that the amendment should be strictly construed. Fr
point, we would not be justified in deciding that after m
minor retains the right to sue (although no action was i
"prior to the majority").

Blackstone, Vol. 4, p. 385, states: "That the only crime
one's relations for which an appeal may be brought is that o
him by either manslaughter or murder. But this can not be
by every solution, but only by the wife for the death of her h
or by the heir male, for the death of his ancestor. It is give
wife on account of the loss of her husband; therefore, if she
again before, or pending her appeal, it is lost and gone; o
marry after judgment, she shall not demand execution." Th
growing out of the change of status applies here.

The minor after majority is no longer possessed of the
required of the statute. Moreover the right would assume th
of a property right and not one attached to the person if it r
after the change of *status* from her minority to her majo
would become transmissible, or one over which creditors mi
ercise a right in *nomine debitori*.

From any point of view, in our judgment, the right to be
avail must at least have been claimed judicially at the tim
change of *status* in order that the intended beneficiary may
for the injury.

We feel for those who are left without a supporter and
owing to accident, and are not inclined to a conclusion de
them from the right of ascertaining whether there was ac
negligence.

But we must interpret the law as it is written—*jus dicere et
dare* is the part of the court.

It is therefore ordered, adjudged and decreed that the ju
appealed from is affirmed.

MR. JUSTICE BLANCHARD takes no part in this decision.

No. 12,795.

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f52 484

STATE OF LOUISIANA VS. PAUL ALBERT ET AL.

A confession obtained by a deputy sheriff, under duress, is altogether inadmissible as evidence against an accused person.

APPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Dupré, J.*

M. J. Cunningham, Attorney General, and *R. Lee Garland*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

E. P. Veazie and *C. F. Garland* for Defendants, Appellants.

Submitted on briefs April 23, 1898.

Opinion handed down May 2, 1898.

The opinion of the court was delivered by

WATKINS, J. The two defendants, Paul Albert and Buddy Silvestor, having been convicted of burglary and sentenced to five years' imprisonment at hard labor in the State penitentiary, prosecute this appeal, relying on several bills of exception.

The first bill which was reserved by the accused relates to the ruling of the trial judge in admitting proof of a confession, whereas their contention is that said alleged confession was not a voluntary one, but obtained by means of threats and coercion on the part of officers of the law.

In the course of the reasons which he assigned for admitting the testimony relative to the alleged confession the trial judge said:

"Because in the court's opinion a confession was made, and it was a fair and voluntary one. Mark well, defendants denied having made any confession at all. The officers, on the contrary, prove that a confession was made, and that the same was fairly and voluntarily given, and the court accepts as true their testimony and rejects as unworthy of belief the testimony of the accused parties. It is too monstrous for evidence. Too gross for credulity itself."

The testimony is of following tenor:

Paul Albert stated that, at the time of his arrest, the Millspough, accused him of having broken into the store Herbert during the night previous, but that he denied the That the officer insisted that he did break open the store, him that if he did not tell him the truth about it he would h at the jail; that there was a scaffold already made for him not tell him about breaking open the store.

That, subsequent to his incarceration in jail, the officers out and carried him back to Port Barry, and carried him dow woods, where they told him "they would kill him if he did them about more people who went in the store." That him that if he would say he was there they would turn him

He said the two officers were Mr. Millspough and Mr. That they told him if he did not confess they would go to t night and take him out and hang him. He said that the sh present with them in the woods, and *protested against their*

But he emphatically denied having made any confession to them. He said that he had another talk with those whilst he was in jail, in the presence of the sheriff and party; and that in the course of their conversation, Millsp Andrus showed him the scaffold and told him that they were hang him on it. He said that he was very much frightened

It was admitted by the prosecuting attorney "that the alluded to in the testimony above written *is still standing in yard, and was there at the time (the) above took place.*"

Buddy Sylvester states that after his arrest he was kept in a cell, and when his trial came on Mr. Millspough told before he carried him down to the jailer's room, "Don't l lawyers fool you, but (go) up there and plead guilty." Tha him to go into court and plead guilty, because if he did no would send him up the road or hang him, as Paul Albert had confessed."

That on that day they brought him and Paul Albert sheriff's office and wrote their statements down; and tha very much frightened at the time. That he, at all times having broken into the store; that they pointed out to scaffold, also.

The purport of Millspough's testimony is to the effect th not threaten the accused with violence in order to obt

alleged confessions; but he admits calling them into the jailer's room for the purpose of taking their confessions in the presence of other persons, and that the sheriff continued therein during the time he was interrogating the prisoners *so as to put him on his guard.*

The following interrogation and answers then ensued, viz.:

"Q. You say that Mr. Andrus had cautioned you not to obtain any confession from those parties on the promise of reward, or immunity or threats?

"A. Yes, sir.

"Q. When where those cautions made to you?

"A. When we were talking to the prisoners.

"Q. The day that you obtained confessions from them in the jailer's room?

"A. I don't think the sheriff was there at that time.

"Q. Did he caution you on the occasion that you took the written confession?

"A. Yes, sir.

"Q. When was it that he was cautioning you?

"A. When we were questioning the prisoners to tell us.

"Q. Wherefore that caution?

"A. Being an old deputy he thought we might forget about this, and so put me and Mr. Dosholite on our guard for that reason.

"Q. Had you said anything to excite his fears on that occasion?

"A. No, sir; he was an old hand at the business.

* * * * * * *

"Q. Is it not a matter of fact, Mr. Millspough, that you and those who assisted you would go to one of those parties and tell him that the other had confessed, when such was not the fact?

"A. I can not answer as to other deputy sheriffs, *but it was not my practice.*"

Again:

"Q. How many conversations had you with these parties in jail during the time they were locked up, separately?

"A. Maybe three, four or five.

"Q. Before they made their written statement?

"A. No; including the written statement, etc."

Again:

"Q. Did you not say, that with a view of extorting a confession from Paul Albert, you had tightened the handcuffs on his wrist?

"A. I said I had put them on pretty tight.

"Q. What was the purpose of putting them on tight?

"A. I thought maybe if I put handcuffs on him a little tight he would tell me the truth.

"Q. It was to make him tell you something about the case, was it not?

"A. Yes; to make him tell the truth."

In the course of the interrogation of Andrus the following occurred, viz.:

"Q. You heard the testimony of Paul Albert about the Poplar Grove Woods and about pointing out the scaffold, is there any truth about that?

"A. I don't think that there was a word spoken to Albert *between here and Port Barry* by either Sheriff Dosholite, Millspough, or myself, etc."

There is more evidence of the same character as the foregoing, which we deem unnecessary to detail, and we must say that the whole of it, taken in connection with the declarations of the two defendants, has given us an impression quite different from that it gave the trial judge.

We are impressed with the idea that these several officers of the law—the sheriff and his deputies—were diligently and continuously engaged in the effort to obtain from the accused, by duress or surprise, some incriminating admission which would render their conviction sure; notwithstanding, it may be conceded that the threats of violence were figments of their imaginations, begotten, in great part, of fear.

Their arrest, and being heavily handcuffed and incarcerated in separate cells of the jail, where they were repeatedly interrogated and plied by their keepers with numerous questions, separate and apart from each other, with direct reference to the charges preferred against them, coupled with the injunction that it were better for them that they should tell the truth, is clearly indicative of an undue influence having been brought to bear upon them, for the purpose of eliciting proofs of their guilt. And it is a fact admitted by one of the deputy sheriffs, that one of the defendants was taken from the jail and carried some distance to the place of the supposed burglary, for the express purpose of confronting him with *persons* and facts which would serve to defeat his defence, same being an *alibi*.

The whole course of proceeding, as it is developed in the testimony, was altogether irregular, to phrase it as mildly as the circumstances will allow; and contrary to the usual course of justice. For the purpose of ferreting out crime the law provides a grand jury with inquisitorial power; and for the purpose of bringing criminals to justice, it provides a district attorney whose duty it is to find the witnesses and produce the proof of guilt at the trial. But the law never contemplated that the sheriff should usurp the function of either, much less to obtain incriminating statements from persons in his custody, by the process of "setting traps for the unwary," or by persuasion, duress, or the *power* of his office.

Testimony thus obtained ought not to be admitted in evidence against an accused; and the admission of the alleged confessions, under the circumstances related, is and was reversible error, and the verdict and sentence must be reversed and set aside.

It is therefore ordered and decreed that the verdict of the jury and thes entence thereon based be annulled and reversed; and it is further ordered and decreed that the cause be remanded to the court below for trial according to law.

No. 12,785.

F. L. FERNANDEZ VS. MAYOR AND COUNCIL OF NEW ORLEANS.

Plaintiff, holder of certain judgments against the city of New Orleans, attacks certain items of expenditure found on the city budget for 1898 as being illegal, demands that same be stricken therefrom and that his own judgment be placed thereon in their stead, to be paid by preference in full. Exception of no cause of action disclosed, filed to his petition, sustained.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

Chas. Louque for Plaintiff, Appellant.

James J. McLoughlin, Assistant City Attorney, and *Samuel L. Gilmore*, City Attorney, for Defendants, Appellees.

Argued and submitted April 23, 1898.
Opinion handed down May 2, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The plaintiff is a creditor of the c
Orleans.

He sets forth that in the year 1889 he recovered
against the city for eleven thousand four hundred and
dollars and seventeen cents, without interest, payable
city's revenues for the years 1884 and 1886, which jud
reduced by partial payments to the sum of five thousan
dred and fifty-six dollars and fifty-nine cents.

That in 1891 he recovered a second judgment against
the sum of four thousand five hundred and forty-three
eighty-six cents, with interest and costs, payable out o
revenues for the years 1879, 1881, 1882 and 1884.

That both judgments were duly registered in the c
comptroller of the city.

That he has a still further claim against the city for s
four hundred and twenty-seven dollars, which has been
and also registered in the comptroller's office, upon w
instituted suit in order to obtain an absolute judgment
city for its payment.

He cites Act No. 30 of 1877 as authority for the conten
judgments are payable out of the surplus revenues of
years.

He complains that his judgments would have been paid
revenues of the years in which the indebtedness was c
the City Council had not illegally diverted the funds of su
paying the running expenses of other years, and spec
sums for various years which were, he alleges, so diverte

He also complains that in addition to the sums so di
city had illegally remitted, in various years mentioned, la
due it on interest account.

He avers that because of the diversion of funds af
because of the remitting of the sums due it for interest
it is contrary to law, equity and good conscience to res
seeking payment of his judgments out of the funds of t
decreed in the judgments.

Declaring that no provision has been made by the
three years for the payment of judgments, and that
intention of the Council ever to pay the amounts due him

the right to now have his judgments considered absolute and unrestricted judgments against the city and placed on the city's budget for this and subsequent years until his claims are satisfied.

Representing that on the budget for 1898 are two items (naming them), aggregating fifty thousand dollars, which are illegal because an attempt to use the revenues of 1898 to pay indebtedness incurred in 1897, he asks that the Council be enjoined from doing this; that the items objected to, aggregating the fifty thousand dollars aforesaid, be stricken from the budget of the current year; and that in lieu of the same, he be placed thereon for the full amount of his judgments, with costs.

This, then, is the object of his suit, *the cause* of the present action.

Defendants meet this with the peremptory exception of no cause of action, which was sustained by the court below and plaintiff prosecutes this appeal.

Appellant cites State *ex rel*, Fernandez vs. City, 45 An. 1390 (a former case of his own, being a *mandamus* proceeding, based on these same judgments, unsuccessfully prosecuted), as sustaining and justifying the relief sought in the present action.

But nothing said in the opinion of the court in that case warrants the contention now made that he is entitled to have his judgments, expressly by their terms made payable out of the revenues of other and earlier years, placed upon the budget of 1898 and paid in full from the revenues of that year to the exclusion of all other judgments and claims against the city. Wadsworth vs. City, 48 An. 888 (bottom of page); United States *ex rel.* Siegel vs. Thoman, 156 U. S. 353.

Conceding *arguendo* that the two items on the budget of 1898, aggregating fifty thousand dollars, objected to as illegally placed there, are there without warrant of right or of law and should be stricken therefrom, and conceding further *arguendo* that plaintiff may be entitled to have his judgments considered as not restricted to the revenues of the years mentioned in them, to the extent of being payable out of the surplus of the revenues of other years under the authorization of Sec. 3 of the Act 30 of 1877, where is the authority for holding that he is entitled to be placed by preference on the budget of 1898, and paid by preference out of the particular fifty thousand dollars appropriation which he attacks as illegal? If that much of the revenues of 1898 may be made by law and act of

the City Council applicable to the payment of the judgment
edness of the city, is it not rather to be applied to the pa
the judgments "in the order in which they shall be filed a
tered in the office of the Comptroller," as directed by the co
clause of Sec. 3 of Act No. 5 of 1870—an act cited by plain
self, and the one pursuant to whose direction his judgme
admitted to registry in the Comptroller's office?

It seems to us so, and that when the only relief plaintiff
to get somebody else off the budget of 1898, and to get hi
in their stead, he is well met by the exception that his peti
closes no cause of action.

Judgment affirmed.

No. 12,773.

STATE OF LOUISIANA VS. PLACIDE AUGUSTE ET AL

1. The rule of law requires that the confession of an accused person, so
admitted to the jury, shall have been made voluntary without the
of hope, menace, or fear by any other person.
2. And whether it was so made or not is to be determined upon cons
among other things, of the circumstances under which it was made.
3. The rule is not that, in order to render a statement admissible, the p
be adequate to establish that it was voluntarily made, but it is that
sufficient to establish that *the making* of the statement was voluntary.

APPEAL from the Eleventh Judicial District Court for th
of St. Landry. *Dupré, J.*

M. J. Cunningham, Attorney General, and *R. Lee Garland*,
Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, App

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John N. Ogden for Adam Melançon, Defendant, Appellant.

Argued and submitted April 23, 1898.
Opinion handed down May 2, 1898.

The opinion of the court was delivered by

BLANCHARD, J. An information was filed charging Placide A
B. Sylvestre and Adam Melançon with burglary and larceny.

When the case was called for trial Melançon alone was put upon trial.

Why the other two were not then tried does not appear.

A verdict of guilty having been returned, from a judgment thereon sentencing the accused to five years in the penitentiary, this appeal is taken.

He complains of error to his prejudice in the ruling of the trial judge permitting what the prosecution claimed to be a voluntary confession, to go to the jury.

Evidence of the confession being tendered by the State, in order to lay the basis therefor testimony as to its voluntary character was first offered, and to the end of bringing the matter properly before this tribunal this testimony was reduced to writing, and is annexed to the bill of exceptions.

The three parties hereinbefore mentioned were all arrested at or about the same time. Andrus, a deputy sheriff; effected the arrest of Melançon, manacled him with handcuffs and brought him to the jail, where he was placed in confinement. The other two accused parties were also confined in this jail.

A few days following the incarceration, Deputy Andrus, in company with Deputies Doucet and Millspaugh and the sheriff himself, repaired to the jail and entering the jail office sent for the prisoners. They were brought in and Andrus, acting as spokesman, says he told them he wanted them to tell him the truth in regard to the robbing of Mr. Hebert's store, how they had robbed it, when they had robbed it, how often they had robbed it, and what they had taken from the store. "It was then," he continues, "that he (meaning the accused, Melançon) told me how he, Placide and Buddy, got into the store." He affirms that he did not offer the accused any inducement, or immunity from punishment; that he did not frighten or intimidate him, nor was he frightened or intimidated; and that the confession was voluntary. On cross-examination he admits the accused had not sent for him at the time of the alleged confession, but that he had sent for the accused, and that the accused did not volunteer of himself to make a statement before he was sent for.

It also appears from his evidence, on the cross-examination, that a scaffold or gallows, on which a murderer had recently been executed, had been left standing in the jail yard, and that the pris-

oners could see it in passing to and from the jail. Ask
advised them to make a statement, he answered: "No; I
to tell the truth," and asserts he did not say to him it would
ter for him to make a statement.

Deputy Millspaugh was called as a witness, and, the testi
Andrus being read to him, he declared he corroborated the

The accused, placed on the stand at this juncture, denie
made any confession to Andrus; testified the latter had end
to force him to confess; that he had told him he would be so
did not, etc. He states further that the way Andrus had sp
him frightened him.

The trial judge ruled the confession had been freely and v
ily made, and admitted the evidence offered of the same.

In determining the question presented it will not be nece
give effect to the testimony of the accused.

Considering only the evidence adduced on behalf of the p
tion, it is clear that the statement of the accused, offered a
incriminating confession, was one made under circumstances
ing to *a demand*—the antipode of a free and voluntary confe

Here was a prisoner in custody and under the authority
sheriff and his deputies.

He had been arrested by one of the deputies, handcuf
brought to prison. He is sent for by this deputy a few da
taken under the shadow of the standing gallows, to a roo
jail, and there confronted by this deputy, in the presence
sheriff and two other deputies (one of them presumably th
and told he must tell the truth in regard to the robbery.

It was an inquisitorial proceeding in which the deputy,
doing the questioning, *assumed* that the three accused, the
him, were the guilty parties.

He demanded to know "*when they had robbed the store,*
often they had robbed it." And while it has been held that a
er's confession will not be rejected as evidence merely be
was made in answer to a question which assumed his guilt
ton's Crim. Ev., 9th Ed., Sec. 663), the answers, thus comp
the accused in the instant case, under the circumstances me
can not be received without doing violence to the rule th
fessions to be admissible must be free and voluntary.

The accused had not sent for the deputy to come to him;

given forth no intimation that he desired to see him, or to make a statement to him. There was lacking everything tending to show the making of a free and voluntary confession.

The only conceivable hypothesis upon which this conversation could legally have been admitted to the jury was that it was a free and voluntary confession on part of the defendant.

"The rule of law," says Greenleaf on Evidence, Sec. 219, * * * "demands that the confession shall have been made voluntary, without the appliances of hope or fear by any other person." And whether it was so made or not, is to be determined upon consideration of the age, situation and character of the person and *the circumstances under which it was made.* It must not be obtained by the exertion of any improper influence. 3 Russel on Crimes (6th Ed.), 478; Wharton's Crim. Ev. (9th Ed.), Sec. 673; 2 Taylor, Ev. (9th Ed.), Sec. 8722; State vs. Havelin, 6 An. 168; State vs. Nelson, 3 An. 497.

The circumstances, amounting to menace, at least calculated to produce fear, under which this accused was called upon to tell what he knew about the crime, must be held to be such as to have made his situation so full of perplexities and embarrassments as to deprive him of the character of free agent, and overthrows the implication that his reply to the deputy sheriff could have been the result of a purely voluntary mental act.

The mere fact that a confession is made to a police officer, or other official, while the accused is under arrest in or out of prison, or was drawn out by questions, does not, it is true, necessarily render the confession involuntary, but such imprisonment or interrogation, and the circumstances and surroundings of the accused at the time, should be taken into careful account in determining whether or not the statements of the prisoner were voluntary. Hopt vs. Utah, 110 U. S. 574; Sparf vs. U. S., 156 U. S. 51, 55.

"The law," says Russell in his work on Crimes "can not measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and, therefore, excludes the declaration if any degree of influence has been exerted."

While the admissions or confessions of a prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminatory evidence, extreme caution and care are to be observed in determining that they *are* free and voluntary—a principle firmly

embedded in both English and American jurisprudence. And the rule is comprehensive enough to exclude manifestations of compulsion whether physical or moral, the resultant effect of which, upon the mind, is hope or fear, aptly described to be "an involuntary condition of mind."

With regard to the question of proof to show that a confession was or was not voluntary, the rule is not that in order to render a statement admissible the proof must be adequate to establish that it was voluntarily made; but it is that it must be sufficient to establish that *the making* of the statement was voluntary. See Bram vs. U. S., 168 U. S. 532, 549.

Upon the broad ground that the making of the statement, sought in the instant case to be proven as the accused's confession of guilt, was not voluntary, but done under conditions of menace, or calculated to inspire fear, the conclusion is reached that there was reversible error in permitting it to go to the jury.

It is therefore ordered, adjudged and decreed that the sentence and judgment appealed from be annulled, avoided and reversed, and that the case be remanded for further proceedings according to law.

No. 12,770.

STATE EX REL. MOYSE BROTHERS VS. HON. WALTER GUION, JUDGE, ET ALS.

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A district judge having granted and made a writ of *mandamus* against a justice of the peace peremptory, commanding him to grant a writ of injunction against the consummation of an execution sale, because the defendant had not been notified of the proceedings antecedent to trial and judgment, same will not be disturbed or inquired into by means of *certiorari* and prohibition, if same appear to have been regular and jurisdictional.

ON APPLICATION for Writs of *Certiorari*, *Mandamus* and Prohibition.

Edmond Maurin for Relators.

Respondent Judge and Justice of the Peace for themselves.

State ex rel. Moyse Brothers vs. Judge et al.

Submitted on briefs March 21, 1898.
Opinion handed down April 4, 1898.
Rehearing refused, reasons assigned, May 16, 1898.

The opinion of the court was delivered by

WATKINS, J. The statement of the relator is, that on the 7th of September, 1897, a judgment was rendered in their favor and against the defendant, Joseph Bradford, by Owen Lenares, Justice of the Peace for the fourth ward of Ascension parish, for the sum of one hundred dollars; and that after legal forms had been complied with, and due notice had been served on the defendant of the judgment pronounced against him, an execution was issued, and certain movable property seized in satisfaction of said judgment and duly advertised for sale.

That a few days previous to the time of sale, the judgment debtor, Bradford, presented a petition to the aforesaid justice of the peace praying for a writ of injunction restraining said sale upon the ground that "no notice of the trial had been served upon him;" but that the justice declined to grant the writ, "because the ground alleged for said writ was negatived by said judgment on its face," etc.

That thereupon said Bradford applied to the respondent judge of the District Court for a writ of *mandamus* to coerce said justice of the peace to grant said injunction, and prohibit further proceedings under said injunction, and prohibit further proceedings under said *fi. fa.* and the sale thereunder.

That the respondent granted the writ of *mandamus*, and upon the trial thereof made same peremptory, and commanded the respondent justice of the peace to issue the writ of injunction prayed for.

On this statement of facts the relators herein aver that the action of the aforesaid respondent judge in issuing said writ of *mandamus*, and making same peremptory, is and was an usurpation of authority, and therefore illegal and void, and that said justice of the peace and constable holding said *fi. fa.* are and were not bound to respect them, but should disregard them and proceed with the execution of said judgment and the sale of said property. That the writ of *mandamus* does not lie to compel a judge, or court of inferior jurisdiction to grant an injunction in any case in which he is vested with a judicial discretion either to refuse or to issue said writ; and in this particular instance the relators aver that the petition for

injunction "was in direct conflict with the decree of the cou
the justice of the peace.

On the foregoing representations, relators demand relief
orari and prohibition as to the act of the respondent judge
mandamus to compel the aforesaid justice of the peace and
to disregard said injunction suit, and proceed with said
and sale.

The respondent substantially returns that on the foregoi
ment of the relators' petition he entertained the opinion
respondent justice of the peace was without any discreti
premises, because the law declares that when an execution
proceeded with contrary to law, an injunction *must* issue i
for, and no discretion is given in such case, to the judg
applied to for it—citing Code of Practice, Art. 298, No. 10.

That, as under the law, the sworn allegations of the pe
injunction are to be taken as true, the judgment sough
enjoined was absolutely null and void, however perfect i
might have appeared to have been.

That in his opinion it was the plain duty of the justi
peace to have granted the writ of injunction, because he wa
with no discretion in the premises at all. Evidently an i
was the *only* remedy the alleged judgment debtor had; a
alleged, the proceedings in the justice court were illegal, and
of the trial had been served upon him, the defendant was e
have the proceedings, under the judgment and execution,
C. P. 608.

The assignment by the justice of the peace of the *perfect*
of the proceedings in his court *on the face of the papers* a
sufficient warrant for his refusal of the writ of injunction,
as a novel proposition, indeed. Such a theory being re
would result in stating every injunction out of court, if need

Notwithstanding the point has not been raised in the ple
argument, it has become necessary, that we should consider
or not the respondent judge has legal power to grant th
mandamus under the circumstances, same not having been
in aid of the appellate jurisdiction of his court.

The Constitution confers upon this court the power to
writ in aid of its supervisory jurisdiction. Article 90.

It confers upon the judges of the courts of appeal the
grant the writ "in aid of their appellate jurisdiction." Art

In the Constitution there is no provision on the subject with regard to the district judges; consequently, the law, in that respect, was allowed to remain as it existed before the adoption of the Constitution.

It is worthy of remark, however, that mention of this power was necessary with regard to the Supreme Court, because that instrument, for the first time, conferred upon it supervisory jurisdiction. And it was equally necessary that mention should have been made of the grant of power to the judges of the courts of appeal because there were no such courts in existence prior to its adoption.

Recurring to the power of the district judges to grant the writ, we find that the provisions of the Code of Practice furnish ample warrant for its exercise by them.

They are, that "this order * * * can be issued by courts whose jurisdiction in civil matters exceeds one hundred dollars," etc. Article 836.

"It is only the court which *exercises appellate jurisdiction* over an inferior court that can direct to the latter an order to perform any of the duties belonging to it." Article 839.

It is quite apparent that the judges of the district courts fulfil all the requirements; and it is manifest, that the power of these judges is not limited to causes wherein the writ comes in *aid* of their appellate jurisdiction, but extends to all classes of causes because they are judges of courts which *exercise appellate jurisdiction*, as well as *ordinary civil jurisdiction*.

The province of the writ is to command "judges of inferior courts * * * to *render justice*, and to perform the duties of their offices conformably to law." Article 837. Not in aid of their appellate jurisdiction, but generally.

"The object of this order is to prevent a denial of justice * * * and it should therefore be issued in all cases where the law has assigned no relief by the ordinary means, and when justice and reason require that some mode should exist of redressing a wrong, or an abuse of any return whatever." Article 830.

True it is that a great many cases can be cited wherein *mandamus* will not issue where there is an adequate and sufficient remedy afforded by appeal; but the converse of that proposition is equally true, and it has been decided that in case an appeal from an order refusing an injunction would be either an inadequate or ineffectual

remedy, *mandamus* lies to coerce the granting of injunct
ex rel. Murray vs. Judge, 36 An. 582; State *ex rel.* Railroad
vs. Judge, 35 An. 218.

That rule applies, particularly, to courts of record; b
apply with stronger force to those not possessing any re
those of justices of the peace. On account of their k
records, greater abuses are likely to arise; and hence th
greater need for stricter surveillance over them, and for t
and speedy exercise of repressive measures to prevent
keep them within proper bounds.

We are of opinion that the case presented was one w
within the jurisdiction and competency of the respondent h
we therefore decline to interfere therewith.

It is therefore ordered and decreed that the preliminar
annulled and set aside, the relator's demand be rejected, an
taxed against them.

ON APPLICATION FOR REHEARING.

Relators complain that the respondent made a writ of
peremptory, commanding Owen Lanares, justice of the
grant a writ of injunction, restraining an execution sal
judgment which he had theretofore rendere dagainst Joseph
in their favor; said justice of the peace having declined to
the reason that "the ground alleged for the writ was ne
said judgment on its face."

The ground assigned for the injunction was and is, that "
of the trial had been served" upon the judgment debto
in injunction; and the relators allege, as cause for the wr
tiorari to issue, that "the petition for injunction was in di
flict with the decree of (his) court"—the perfect regulari
proceedings in his court, on the face of the papers, affor
cient warrant for his refusal of the writ.

The drift of counsel's argument is (1) that the remedy o
ant Bradford, if any he had, was by appeal; (2) that his
ing by injunction was a collateral attack upon the judgmen

First—If, as relators allege, the records in the justice c
the judgment therein rendered, negative the defendant's
in terms, could an appeal have afforded an adequate and
remedy?

We need not affirm that it was, or was not, in the instant case; as in the exercise of the supervisory power of this court by *certiorari* it can grant relief only when some illegality or nullity in the proceedings has been pointed out.

The employment of the writ of *mandamus* by the respondent was the exercise of an ordinary, not an extraordinary jurisdiction.

And in State *ex rel.* Murray vs. Judge, 36 An. 578, we said the court "will issue the writ in its discretion, according to the exceptional features of each case submitted."

Consequently, if it be conceded that it was a doubtful proposition whether or not a proper case was presented for the allowance of an injunction, the respondent was of that opinion and made the *mandamus* peremptory; and, on the disclosures made in the record, we do not feel warranted in saying that, in so doing, he abused the discretion which the law accords him.

Second—As to whether the proposed injunction proceeding was a collateral attack upon the judgment which was assailed, is foreign to the issue raised herein, as it neither appertains to the illegality of the *mandamus*, nor to the jurisdiction of the respondent. On the trial of the injunction it might so appear; but the question lies beyond the domain of our supervisory jurisdiction. In this case we are dealing with the judge who made the writ of *mandamus* peremptory and not with the injunction proceedings.

Rehearing refused.

No. 12,636.

Solomon Reinach and Santo Oteri vs. New Orleans Improvement Company, Limited.

A tax sale based on assessments against the recorded owner holding under titles conveying ownership bind all previous owners by whose acts or acquiescence such titles are placed on the public records, thus becoming guides for the assessors.

One who witnesses an act of sale is precluded from afterward asserting title to the property against the purchaser who accepts the conveyance in part on the faith implied by the witness' signature. Bigelow on Estoppel, p. 451.

An act of sale absolute in form, though the real consideration be the indebtedness of the vendor to the purchaser, binds the vendor as effectively as if the price was paid in cash.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

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Benjamin Ory for Plaintiffs, Appellees.

Carroll & Carroll for Defendant, Appellant.

Argued and submitted March 7, 1898.
Opinion handed down April 4, 1898.

The opinion of the court was delivered by

MILLER, J. The defendant appeals from the judgment co
ing it to pay plaintiffs one-half the price of property bought
under the agreement for the purchase on the joint accoun
plaintiff and the defendant.

Under this agreement for the purchase of the property
account, the plaintiffs became the purchasers, but objecte
title tendered, and refused to pay the price. This led to
against the plaintiffs to compel compliance with their purc
which suit the objections to the title were deemed insufficien
court, and plaintiffs were held bound to take the title and
price. Savings Bank in Liquidation, 48 An. 1428. Thus co
to pay, the plaintiffs bring this suit for one half the amount
which they claim defendant is bound by the agreement und
the property was purchased.

The petition avers the agreement with the defendant to
property on joint account, that plaintiffs have paid the pri
the judgment condemning them to take the title, and cla
defendant be decreed to pay one-half the price according to it
ment. The answer is the general issue, with the defences o
in the title, and that defendant, no party in the suit, resulti
judgment condemning plaintiff to accept the title, is not b
that judgment.

We are inclined to think defendant is bound by the j
condemning plaintiffs to take the title. When that
brought the purchase had been made in plaintiff's name
the agreement they were to buy on joint accoun
defendant. Plaintiffs defended the suit for the joint
The suit against plaintiffs was of some months' d
The defendant claims it had no notice of that
the statement of facts it is admitted the president and

of the defendant company would testify they were not notified. On this question of notice in addition to the pendency of the suit for months affecting defendant's liability brought against and defended by the associate of the defendant in the purchase, there is the testimony that one of plaintiffs communicated with the president of the company in reference to the suit and its defence. Against this testimony there is only the admission the president and attorney would testify they had not been notified. Under our jurisprudence *res judicata* prevails although the party resisting that exception was not a party to the record, if in point of fact identified in interest with the defendant, he assents to the defence for both, by the defendant who is sued, and the assent may be implied. Johnson vs. Weld, 8 An. 126. After that defence has failed, it seems to us, under the circumstances of this case, the defendants are not free to dispute their share of the liability arising from their agreement to buy the property on joint account, and after their associate in the agreement has been compelled to pay the whole price of which defendant was to bear one-half.

But we have considered the defences to the title, the defendants contend were not passed on in the suit to compel plaintiffs to accept the title. The property, it is conceded, belonged to J. Q. Bailey, and by conveyances from a number of parties claiming to be his heirs, was sold to John W. Bailey, by acts dated one in 1845 and another in 1859. John W. Bailey conveyed to Warner Van Norden in 1868. Under two assessments against Van Norden, the property was sold for taxes in 1876; then conveyed by the tax sale purchaser to the president of the Louisiana Savings Bank and his acquisition has been adjudged against him, to have been for the bank. Raymond vs. Palmer, 47 An. 786. The plaintiffs hold by sale from the bank. The alleged defects are, that in these earlier conveyances from the Baileys to John W. Bailey, there is no proof of the heirship of his vendors; besides some of the titles are not in authentic form and the signatures are not proved, and further the acts, it is insisted, nominally on sales, are in the common law form of a nominal consideration, and love or affection and hence to be deemed donations liable to reduction in the event that these vendors of 1845 and 1859, should leave forced heirs. Van Norden's title is alleged to be defective, because his wife living in 1876 died subsequently; that Guthrie, the purchaser at the tax sale, acquired for Van Norden,

conveyed to Palmer for the bank at Van Norden's request; claimed the bank held the title not absolutely but only to se indebtedness of Van Norden, hence the ownership continuing it is insisted, at his wife's death, the title to one half vested now in her hair.

We think the defects supposed in the title of John W. Ba vendor of Van Norden, whatever their intrinsic force or we must be deemed removed by the tax sale of 1876. The title previous owners became merged by their own acts and long cence in John W. Bailey. For all purposes of taxation he the recorded owner. The tax sale on the assessments aga bound previous owners as it bound him, unless for defects alleged or proved in the tax sale. Any subsequent purchas successfully urge the tax sale against any claim of the B there were any basis for such claims.

The bank holds under the tax title to Guthrie; Van Nor nessing the act, an estoppel against him from ever disputing veyance. Bigelow on Estoppel, p. 451. It is claimed in the a that Guthrie was only a nominal owner purchasing for Van and at his request conveying to the bank. Whether nomin Van Norden, the owner against whom the taxes are asse bound by the conveyance to the bank. It is claimed, too, that veyance to the bank was to secure Van Norden's indeb Raymond vs. Palmer, 47 An. 786. It was none the less an transfer, and we know no reason why the act does not avail because the real consideration was an indebtedness to the pu This conveyance by Guthrie to the bank was in 1876, and in to the right that Van Norden may have had, his signature t concluded him the same as if he had been the vendor. His w subsequently, and hence never was vested with any title. claim we find in the record of date, 1896, it is true w bind his wife's heir if she had any claim, but practically b wife's death Van Norden had divested himself of title. T claim is an additional though unnecessary ground to main title of the bank, and that of plaintiffs derived from the ban

It is therefore ordered, adjudged and decreed that the d be credited with four hundred and thirty-three dollars a cents deposited by him, and as thus amended the judgme lower court be and it is hereby affirmed.

No. 12,699.

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113 766

GEORGE H. RUSSELL VS. SHREVEPORT BELT RAILWAY COMPANY ET ALS.

It is usual to have a motorman and conductor on a train consisting of a car and trailer carrying passengers.

Approaching a railroad crossing on a steep grade the train of defendant company was not stopped owing to the fact that it was not controlled by the motorman.

The result was that it ran into the passing train of the Texas & Pacific Railway. At the moment of the collision plaintiff, a passenger on defendant's train leaped off and was injured.

The duty was, by the ordinances of the municipality and rules of safety, imposed upon the defendant train to stop at the crossing. It was not stopped.

The ordinary care due passengers was wanting. There was only a motorman and no conductor on the train to properly apply back brakes. There was actionable negligence.

APPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

T. Alexander for Plaintiff, Appellee.

Joel Edward Dean, Wise & Herndon for Defendants, Appellants.

Argued and submitted March 23, 1898.

Opinion handed down April 4, 1898.

The opinion of the court was delivered by.

BREAUX, J. This was a suit by plaintiff against defendants for damages for personal injuries.

Plaintiff, and his son, a minor, were passengers upon the train of the defendant company.

The train was made up of two cars; one a motor, and the other a trailer.

The Texas & Pacific Railway Company track in the city of Shreveport is crossed nearly at right angles by the defendant Shreveport Belt Railway Company, an electric street railway.

About the distance of a square from the intersection of the two roads the incline or descent over which the cars of the defendant company move is abrupt and steep.

The train of the Texas & Pacific Railway Company was on time.

In the evening, while it was still daylight, the train of th ant company, in charge of one man only, the motorman, d without any restraint down the incline to the crossing o roads and ran into the passing train of the Texas & Pacifi Company, moving over the crossing place at the time of the In this collision the front platform of the street cars was cr and the train was greatly jarred by the encounter.

There had been a conductor on these cars. He got off (a tance prior) some distance from the place of the accident the cars in charge of the motorman alone; who only had a experience as motorman.

No fault was found with the Texas & Pacific Railway C passing train.

Petitioner it appears (just before the train on which he w senger struck the Texas & Pacific Railway Company train off, and fell on his shoulders. One of the shoulders was dislocated and an arm bruised.

He underwent medical examination at the trial before and there was external evidence of the injury which th cians in their testimony of record described. After the ac had been under treatment of physicians, who also testified to the injury.

The son of plaintiff, who was sitting in the car with petit not leap to the ground. He was only slightly injured.

The motorman also jumped, just prior to the acciden moment before the collision.

There were passengers who remained in their seats, wh attempt to jump out, who were not injured.

The sheriff was made a party defendant. The record that at the time of the accident the defendant company w seizure, made by a judgment creditor. The operations of were conducted under an agreement with the sheriff.

The judgment under which the seizure had been made, w proper to state in justice to the defendant company, alth fact has no bearing in this case, was subsequently paid, and t erty was released from seizure.

The case was tried by jury. The verdict for the plaintif one thousand dollars.

From the judgment of the court affirming the verdict, the defendant appeals. Before the court plaintiff, in his answer to the appeal, applied for an increase of the amount allowed.

It is clear in our judgment, that defendant did not make reasonable and proper exertions to see before hand and avoid the collision.

The usual signal had been given by the Texas & Pacific Railway Company, of the approach, but this it appears served no purpose; the motorman could not, or did not check or stop his cars. He lost control of the cars, and could not stop or check the sliding of the cars down the incline in time to prevent the collision.

A short time preceding the accident near the top of the hill, at a point where there was already some incline, just prior to the steep grade, one of the passengers having come to her landidg place, rang the bell; the motorman did not stop the car in obedience to her call.

He applied the front brakes and reversed the current, but this did not stop the car. The wheels, by the sudden application of the brakes, were locked, and thereafter the wheels, instead of turning on the rail down the incline to the crossing, slided down.

The passenger who desired to alight was constrained to remain on the car, until a few moments later, when she, about the time petitioner jumped, also leaped to the ground to escape from the danger of the collision.

The evidence discloses that there was no difficulty, or should have been none, in stopping the cars at the place of the accident. The evidence also shows that the brakes were in excellent condition, they were applied with sudden force to the front car, and the effect was to lock them and cause a slipping of the wheels on the rails as just stated.

There was no conductor to timely and properly apply the back brakes to the rear of the second car. The momentum of the trail car thereby added to the trouble. A lad who was a passenger on the trail car jumped to the back brake and tried to help the motorman by applying them. This did not suffice to prevent the collision, nor did it have the effect of relieving the defendant company from the responsibility.

There was, as we take it, absolute necessity for the presence of a conductor to assist the motorman, who had only been a short time in the service of the company. The municipal regulations of the city require, as well as the common rules of safety, the motorman to

stop the cars at the crossings. There was manifestly negli
the part of defendant, and an amount is due for the injury.
car companies must exercise reasonable care to provide s
number of men to properly move and operate its cars.

This brings us to the question of the amount of the damage
should be allowed.

Plaintiff, a few days after having received the injuries for w
seeks to recover damages, served as a juror in a jury case wh
four days.

He did not ask to be excused from jury service and was n
to complain, as far as the evidence discloses, of his injuries
the four days of his service on jury. With reference to jury
and consequent inference, it was urged by defendants that
juries were not as great as contended by plaintiff, who did n
apply to the court to be excused.

We can only say, it is not surprising that defendant made
the service of the plaintiff as juror, and contended upon that
that the injuries were not as great as alleged. A citizen very
thinks that an accident of any sort is not excuse enough for
tion, by order of court, from jury service. Yet there may be
tions. It may be that petitioner is of the number who serve
though not well enough to attend to business of their own.
evidence was not conclusive on this point, we would be
believe that petitioner was an exception. But the evidenc
juries received was ample to overcome all presumption arisi
service on jury a short time after the accident.

It (the injury) may not have been as great as alleged; it
that petitioner was injured and suffered pain. The facts wit
ence to damages are not quite as controlling in this case as th
in the case of Flournay against Shreveport Belt Line, just
down. We therefore do not change; as to the amount of t
dict of the jury and the judgment of the District Court.

The judgment has given effect to the agreement to which
referred; entered into for the protection by the sheriff who w
porarily in charge of defendant's railway.

It is therefore ordered, adjudged and decreed that the ju
appealed from be and it is affirmed.

BLANCHARD, J., recused, having been of counsel.

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117 814

No. 12,609.

THE SOUTHERN WOOD MANUFACTURING AND CREOSOTING COMPANY VS. WILSON DAVENPORT.

Plaintiff, claiming eviction in part, sues on the obligation of warranty in act of sale.

Held: he is entitled, under the facts disclosed, to be reimbursed only the value of the part evicted from, estimated proportionately to the price paid for the whole.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

W. S. Parkerson for Plaintiff, Appellant.

A. D. Henriques for Defendant, Appellee.

Argued and submitted March 24, 1898.

Opinion handed down April 4, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The plaintiff acquired by purchase from Mrs. Susan A. Sampson five lots of ground in the city of New Orleans, in the square bounded by Front, Lyon and Bordeaux streets and the Mississippi river.

The lots were designated in the act of sale as Nos. 6, 7, 8, 9 and 10 on a plat or plan made in the year 1848 by C. A. Hedin, surveyor.

They adjoined each other and all fronted on Front street on the north, and on the Mississippi river on the south.

The three first lots are described as having a width of thirty feet by a depth of one hundred and fifty feet, *more or less*, to the river, and the two last as having the same width by a depth of one hundred and sixty feet, *more or less*, to the river.

It was the same property previously acquired by Mrs. Sampson from Wilson Davenport, defendant herein, by identically the same description, for the price and sum of five thousand dollars.

When Mrs. Sampson purchased from Davenport the lots were vacant. Following her purchase there were erected on the property certain improvements, constituting a wood manufacturing

and creosoting plant, with boilers, engines, cylinders tanks, tools, wharves, etc. These improvements, plant, included in the sale to plaintiff company, the consideratio was five hundred shares of the capital stock of the comp par value of one hundred dollars each.

Just prior to the purchase from Mrs. Sampson, the co been incorporated, the capital stock being fixed at on thousand dollars, divided into one thousand shares of on dollars each.

It was recited in the act of incorporation that five hun (full paid stock) was to be delivered "to Thomas H. owner, for his plant situated on the Mississippi river be deaux and Lyon streets," including the real estate and t the use of the processes, secured to said Sampson by lett from the Federal Government, for preserving and treati etc.

The "Thomas H. Sampson" referred to was the husb Susan A. Sampson, in whom the title to the lots, on whic was located, was vested by the sale from Davenport.

It was she who made the sale of the lots to the compan act of sale recited that it was made "with all lawful war with full subrogation and substitution to all her rights and warranty."

In the sale of the same property previously by Davenp Sampson express warranty is also stipulated.

When the plaintiff company was organized preceding th from Mrs. Sampson, Thomas H. Sampson became presid and L. W. Brown, vice president—the latter accepting th Mrs. Sampson on behalf of the company, while Sampso in authorization of his wife.

Something over two years after the purchase from Mrs the company brought the present action, not against Mrs its immediate vendor, but against *her vendor*, Wilson standing on the subrogation and substitution which she to it of her rights and actions in warranty against him.

The object of the suit is to recover three thousand d Davenport, on the complaint that in December, 1891, pla pany was evicted from a part of the ground which Dav sold to Mrs. Sampson and she to them, being a strip abou

in depth by a width clear across the lots of one hundred and fifty feet.

That which constituted eviction is averred to be this: A considerable tract of alluvion or batture had formed along that portion of the city front. Over this batture parallel with Front street on the north and the river on the south, what is known as Water street was laid out and established in the year 1867 by authority of the then city of Jefferson (now absorbed into the city of New Orleans). This new street crossed the property in question about one hundred and ten feet from Front street.

While laid out on the map and thus designated and established, the street itself was not actually opened and put in use (so far at least as it affected the property we are dealing with) until August 27, 1889, when an ordinance was passed by the council of the city of New Orleans, approved by the Mayor on September 3, 1889, directing the City Surveyor to remove existing obstructions from Water street and to open same, and authorizing a railway track to be laid on the street from Louisiana avenue to General Taylor street.

Prior to this, to-wit: in 1880, and 1881, the council had passed certain ordinances granting rights and privileges in and along the streets on the river front to the Texas & Pacific Railway Company.

Acting under these several ordinances, adopted in 1880, 1881 and 1889, the Texas & Pacific Company laid its tracks in and along Water street, and thus that street became opened for use and traffic as a public street and highway of the city. Louisiana Ice Manufacturing Company vs. City of New Orleans *et al.*, 43 La. An. 217.

This opening of Water street and the laying of the tracks of the railroad company thereon had the effect of dividing the lots which the plaintiff had purchased from Mrs. Sampson, and some evidence was adduced on behalf of plaintiff to show that it impaired the water privileges of the property, which, it was claimed, constituted its chief element of value for the purposes for which the company desired it.

The petition alleges, in substance, that Davenport claimed and had possession of all the property from Front street to the river; that he sold and delivered all of it to Mrs. Sampson; that he warranted title and possession of it all; that there was no indication of any street through it at the time of Mrs. Sampson's purchase;

that neither she nor her vendee (plaintiff company) knowledge of the laying off and dedication of a street th the time of their respective purchases; and that because ing off and dedication Davenport could not sell and conve possession to that portion of the lots covered by the having assumed to do so and his vendee having been must make restitution.

The demand was met by an exception of no cause of ac was ordered to stand as part of the answer to the m defence on the merits is that Davenport had no knowle location of a street through the property at the time of hi chase thereof, nor when he sold it; that if the right to street existed prior to or at the date of his sale to Mrs she was, in law, charged with knowledge of the same and her peril and risk; that if the cause of eviction arose aft chase, he is in no sense responsible for the same; and that ing of Water street, and the authorization to lay railw thereon were public, governmental acts of the city of Ne for which defendant can not be held responsible.

On the issues presented there was judgment below for and plaintiff appeals.

The affairs of plaintiff company appear not to have go In the beginning of 1895 it found itself involved in de funds to meet its obligations. It went into liquidation, wit and Brown as liquidating commissioners. In March, applied to the court for an order to sell all the prop insolvent corporation, movable and immovable, to pay it and other debts.

This order was granted and the entire property was offering for two thousand four hundred and ten dollar Whittaker, agent, becoming the purchaser. Who his pr is not disclosed.

In the application for the sale of the real estate the co ers set forth that since the company acquired it the c Orleans had laid out Water street through it; that th had thus become divided into two parts; and that t should be sold separately. They annexed a plan and aske sale be made in accordance therewith—that is to say, th between Front and Water streets be sold as lots six, se

nine and ten in square eighty, with a front on the two streets of one hundred and fifty feet, by a depth between the streets of about one hundred and eleven feet; and the part between Water street and the river be sold as a certain portion of ground measuring one hundred and fifty feet on Water street by a depth between parallel lines of about eight hundred and seven feet to the river, together with all rights of batture and future accretions. The *projet* of the sale recited that upon this part of the property, viz.: between Water street and the river, is situated the plant of the Southern Wood Manufacturing and Creosoting Company, Limited.

The order of court directed the property to be sold in the two parts as set forth in the plan of the commissioners, and, accordingly, it was so advertised and sold.

These pleadings and proceedings show that the plant of plaintiff company was located on the *river side* of Water street. This being so, it would appear that the water privileges of the factory were not cut off or seriously impaired by the opening of Water street and the laying of the railway tracks thereon. It also appears that whereas plaintiff company bought the lots as having a depth of about one hundred and fifty to one hundred and sixty feet, more or less, from Front street *to the river*, in point of fact the liquidating commissioners sold the property as having a depth from Front street to Water street of one hundred and eleven feet, and from Water street to the river of eight hundred and seven feet, or a total depth of nine hundred and eighteen feet, *exclusive of the fifty feet* constituting Water street.

With the fifty feet of Water street added, the property has a depth, from Front street to the river, of nine hundred and sixty-eight feet. It thus appears that Water street, in passing through the lots, has occupied only about one nineteenth part of their entire depth, and only to this extent has plaintiff company suffered actual eviction.

Conceding that over the batture formed by the recession of the river and attaching as riparian rights to the original lots fronting on the river, the city authorities could lay off and establish Water street, this could not divest the riparian proprietor of the fee of the land occupied by the street, 11 An. 161; C. C. 658, 665. It can hardly be claimed that the city's action established anything more than a servitude, or easement, for street purposes over that part of

the property occupied by Water street, with the resulting
the riparian proprietor to retake possession of, and sub
ground to his purposes, should it ever cease to be used as a

It follows that plaintiff company has not been evicted fro
of the ground occupied by the street, but only from its use
session.

Indeed, the petition itself does not claim more than that
tioner has been evicted from *the possession* of a portion of th
sold by the defendant.

But taking the view most favorable to plaintiff comp
Water street will remain as a street for all time to come—
plaintiff has been evicted, for all practical purposes, of bo
and the possession of the ground it occupies, what, if anyt
entitled to recover of this defendant?

That recovery is, under the circumstances of this case, a
by the law appears clear. C. C. 2475, 2491, 2492, 2500, 250

Though Davenport did not know, when he sold to Mrs.
that Water street had been laid out across the lots can mak
ference. He sold the ground now occupied by the st
delivered possession of it. His vendee has been evicted
express terms of C. C. 2514 "the value of the part from w
evicted is to be reimbursed to the buyer according to its es
proportionably to the total price of the sale."

Plaintiff claims that the value of the part evicted fro
thousand dollars, and there is testimony to this effect by th
Sampson.

But we can not accept this estimation. Sampson bases it
idea of the factory's deprivation of water privileges.
already seen that, by his own pleadings as liquidating com
of plaintiff company, he is cut off from this contention. Be
petition contains no averment of this character. Nor does
that the part evicted from was, *relatively to the whole*, wo
thousand dollars. Nor that the purchase would not have b
but for the inclusion of this part.

From the circumstances and surroundings it is hard to
impression that no injury whatever has been suffered by the
this property by reason of the opening of Water street thro
gives the property two additional fronts, and the laying of
of the Texas & Pacific Railway on Water street gives it rail
ileges, while it still retains its water privileges.

tantial justice will be done by awarding plaintiff a
f the part evicted from, estimated propor-
d for the whole.

that the part lost is, in area, about one-
and one-nineteenth of the price paid (five
hundred and sixty-three dollars and fifteen

adjudged and decreed that the judgment
lled, avoided and reversed, and it is now
plaintiff do have and recover of the defend-
red and sixty-three dollars and fifteen cents,
on from judicial demand, to-wit: April 3,
with costs of both courts.

No. 12,817.

NEWMAN VS. THEIR CREDITORS.

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y rule to show cause whether or not the prelimi-
s for respite were providently issued, and if found
to seasonably revoke the same.

e party advances all the capital needed by another
ess, and which stipulates that in the event he dis-
ent of the business, he may take possession of the
ties, is not a *nudum pactum*.

ich parties make between themselves must control
to law and good morals.

il District Court for the Parish of Orleans.

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r Geo. F. Schminke, Appellant.

---

and *Dart & Kernan* for Edgar Newman,

May 21, 1898.
May 30, 1898.

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rt was delivered by

nuary, 1895, George F. Schminke and Edgar
les of copartnership, formed and established

the commercial firm of Schminke & Newman for the
conducting an electrical construction and supply busines
of New Orleans. The duration of the partnership was f
years, with the right to dissolve at any time by mutual c

Neither partner possessed any capital with which to ins
carry on the business. A small sum was advanced for this
Isidore Newman, Sr., and in consideration thereof it was
by the partners that if at any time they disagreed as to the
the management of its affairs failed to meet the appr
elder Newman, he was to be given a confession of judgm
amount of his advances and have full power to terminate
the copartnership.

It was stipulated that Schminke should draw seventy
and Edgar Newman fifty dollars per month from the
no more.

The firm was successful from the start. Its busines
rapidly and prospered. By July, 1895, it required mor
meet its expansion and the elder Newman was applied to
the 9th of that month the partners entered into another
in writing in which in was stipulated that "for and in c
of Isidore Newman, Sr., having agreed to increase the am
hundred dollars which he originally advanced to the
Schminke & Newman to five thousand dollars, or more,
agreed by said Schminke & Newman that said Isidore N
shall be entitled to one-third of the profits of said partne
the other two-thirds being divided equally between
Schminke and Edgar Newman." A second clause of this
recited that in the event of disagreement between Schm
younger Newman in the management of the affairs of t
ship, the surrender of the business with all its stock, ac
receivable, fixtures, etc., should be made to the elder Ne
called upon by him, and he should assume all the liabilitie
Schminke seventy-five dollars and to Edgar Newman f
respectively, which it was stated should be in full of all t
and claim in the business.

Following the execution of this new agreement, whi
him as a partner in the concern, the elder Newman mad
of capital until the sums so furnished aggregated eighte
dollars. Beyond a little interest paid in the first

capital he had originally advanced, he has received nothing whatever from the business of the firm whose entire capital he had supplied. But the two other partners appear to have extended a liberal hand to themselves.

Notwithstanding the stipulation that the one was to draw from the business only seventy-five dollars per month, and the other fifty dollars, the evidence discloses that in the three years it was conducted preceding the present litigation, Schminke drew out for his own account ten thousand dollars and Edgar Newman seven thousand dollars. These sums thus absorbed not only exceeded the profits of the business, but made it impossible for the elder Newman to obtain his share of the profits, which was one-third.

Not only that, but by their overdrafts the other two partners were, in the absorption of his share of the profits, running up a large indebtedness to him on their personal account, and Schminke, running ahead of the younger Newman on his overdrafts, was becoming, in that way, largely indebted to the latter on personal account.

The elder Newman could not permit this condition of affairs to go on. He sent repeatedly for the younger men, cautioned them about their extravagance and admonished them that unless their overdrafts ceased and they confined themselves to something like the allowances stipulated in the articles of agreement he would be compelled to exercise his right and take possession of the business. The evidence shows his course to have been one of leniency and forbearance. His son, the younger Newman, seems at last to have heeded his father's advice and ceased to overdraw. But not so with Schminke. He continued to overdraw until finally the elder Newman determined to put a stop to the business as then conducted.

He informed Schminke of this purpose and suggested and proposed to him to transfer his interest in the firm to J. K. Newman (another son), who would assume his liabilities to the creditors as well as to the other partners, and pay him one hundred dollars besides. This was what the articles of copartnership and the supplemental agreement of July 9, 1895, authorized Isidore Newman to do in his own behalf. The only substantial difference between what was thus authorized and what he proposed was the substitution of his son, J. K. Newman, for himself.

Schminke asked time to consider and it was given him. He returned with a suggestion that Mr. Newman make him another

proposition looking to the purchase by him (Schminke) of
man's) interest in the concern. The latter readily consent
and proposed that Schminke should buy him out and keep
of the business himself, and to this end he agreed to take a
to what the business was due him, and to make it easy for
to effect the arrangement, he offered to take one-quart
amount in cash and the remainder in one, two and three y
six per cent. interest. Schminke expressed himself as ent
isfied with this and told Mr. Newman he would accept
one or the other of his offers that day, and mentioned th
which he would do so.

Instead of returning at the hour indicated, he repaire
counsel to the court house and there filed the present sui
the creditors of his firm (naming Isidore Newman as o
creditors) for a respite.

In taking so important a step in the firm's affairs he
neither of his copartners and they were in ignorance of
until his return from the court. His evident motive was t
the action which it was the elder Newman's right to take
agreements upon which the copartnership was based.

Discovering what had been done and strongly objecting
younger Newman, the same day, took a rule in the proce
show cause why the preliminary order for respite shou
revoked and set aside. He averred that his partner Schm
acted without authority, that the firm was solvent, did n
respite, and that he (Newman) was then and there ready a
to pay on its behalf all of its indebtedness.

He averred that the action of Schminke was unjusti
taken in good faith, and was injurious to the interest of the
of himself (Newman).

Schminke, through counsel, excepted to this rule as p
and on the ground that the preliminary order for respite
be set aside in the summary manner attempted—the r
mover in rule being by opposition to the homologatio
deliberations and recommendations (when had) of the m
creditors.

There was no force in this exception. It was proper p
test by rule to show cause whether or not the order w
fully and providently issued, and if found not to be so
could seasonably revoke the same.

In his answer to the rule Schminke attempted to justify himself in not consulting his partner in reference to the proceedings for respite by charging him with being a party to a conspiracy to crowd him out of the firm.

The evidence taken on trial of the rule negatives absolutely this allegation.

There was judgment making the rule absolute and revoking and annulling the order and proceedings taken for respite, and from that judgment this appeal is prosecuted.

We find no warrant, either in the facts of this case or in the law, for reversing this judgment.

The contention urged on behalf of Schminke that the agreement of July 9, 1895, is a *nudum pactum* and without legal effect is not tenable. Since Isidore Newman, Sr. was furnishing all the capital required by the copartnership to do business, the stipulation therein made as to his authority over the business and its management can not be held to be unreasonable and improper; and, certainly, the funds he agreed to supply constituted ample consideration for the stipulation that he was to receive one-third of the profits of the business venture. Nor did the force of this agreement cease with the expiration of the limit of the copartnership as fixed in the articles of agreement previously executed by Schminke and the younger Newman between themselves. There was no term fixed in the agreement of July 9, and while the preceding articles of copartnership between the original members of the firm were given, in that instrument, the duration of two years, it is a fact that the firm was not dissolved at the expiration of the two years, but continued right along without any new agreement, and, presumably, under the old stipulations and conditions.

The agreements and covenants which these parties made between themselves must control in all things not contrary to law or good morals, and this is so whether we view Isidore Newman, Sr. as partner or creditor of the firm of Schminke & Newman.

Judgment affirmed.

No. 12,817.

EDGAR NEWMAN VS. GEO. F. SCHMINKE.

Where a copartnership agreement provides that in event of di
between the copartners, a third person (named), who furnishes
upon which the business is conducted, should take possession of t
the firm, one of the parties sued by the other for liquidation is wit
of complaint that the court should, on rule to show cause taken i
ing suit, appoint such third person liquidator.

APPEAL from the Civil District Court for the Parish o
Ellis, J.

Harold W. Newman and *Dart & Kernan* for Plaintiff, App

James B. Rosser, Jr., for Defendant, Appellant.

Argued and submitted May 21, 1898.
Opinion handed down May 30, 1898.

The opinion of the court was delivered by

BLANCHARD, J. This case is the sequel of the precedi
Schminke & Newman vs. Their Creditors.

It was filed in the lower court on the day succeedin
which the first was filed. The two were consolidated
together.

The present suit is instituted for the liquidation of the
the firm of Schminke & Newman. The acts and doings of th
and the troubles and disagreements between them, whi
view of the partner suing, make dissolution and liquidation
are set forth in the opinion handed down in the Schminke &
case. It is not necessary to restate them here.

Plaintiff alleges he does not wish to continue the cop
with Geo. F. Schminke and avers his right to dissolve the

He represents that the firm is solvent, but that de
indebted to the copartnership in an amount in excess of
and share in its assets.

He shows that by the terms of the original articles of
ship and the supplemental agreement of July 9, 1895 (both

to at length in Schminke & Newman vs. Their Creditors), Isidore Newman, Sr., who advanced the capital to conduct the firm's business, is entitled to be appointed liquidator of the firm.

He prayed accordingly, and for the general and final liquidation of the affairs of the partnership.

The court below issued an order requiring defendant to show cause on a day fixed why the liquidation should not be ordered and why Isidore Newman, Sr., should not be appointed liquidator, and directed, meanwhile, that defendant refrain from the performance of any and all acts to the injury of the firm and its affairs.

Defendant appeared and excepted that the proceeding is in law an ordinary action and can be tried only after the expiration of the legal delays allowed for ordinary actions. He objected to its being made, in any part thereof, summary, as was attempted by the rule to show cause why Isidore Newman, Sr., should not be appointed liquidator before the expiration of the delays as in case of ordinary actions. Reserving his exception he answered, denying the right of Isidore Newman, Sr., to be appointed liquidator, denying any indebtedness to the firm, and praying dismissal of the action; but if liquidation of the firm's affairs be decreed, he asked the appointment of some disinterested person to act in that capacity.

Besides the rule to show cause why Newman should not be named as liquidator served upon defendant, there was ordinary citation on the general demand for liquidation and settlement of the partnership affairs.

The exception was not sustained and there was judgment on the rule ordering the liquidation and appointing Newman liquidator. Defendant appeals therefrom.

We do not find this judgment erroneous. The written agreements relating to this partnership contemplated and provided that Newman, Sr., should take possession of the affairs and business of the firm upon a disagreement arising between the partners over its management. The stipulation was that in the event of such disagreement between the partners they would, *when called upon by Newman, Sr.*, surrender to him the business with all stock, accounts, bills receivable, etc.

The disagreement here contemplated did arise, and in consequence thereof one of the partners sued for dissolution and liquidation. As part and parcel of this proceeding he asks that Newman,

Sr., be appointed liquidator. It would seem from the made by the partners, which is binding upon them, N was empowered to take possession of the firm's affa waiting for formal appointment by the court as liquida If this be so, and it can not be doubted, defendant is wit of grievance, without cause of complaint, that the c name him as liquidator on rule to show cause in the sui one partner brings against the other to have liquidatio declared.

The extraordinary right given by the partners to New take possession of the business and affairs of the firm upo ment arising between them was, as was pointed out in in Schminke & Newman vs. Their Creditors, because of t Newman had furnished all the capital upon which the b being conducted. We held in the former case that this ful consideration for the delegation of such authority, an delegation must have its legal effect.

If, then, Mr. Newman could summarily take possess business of the partnership without proceedings in co end, defendant is without interest to object that the co rule to show cause, appointed him liquidator of its affair and security, which appointment he has accepted.

Judgment affirmed.

No. 12,669.

CHRISTIAN KLINE VS. SUCCESSION OF THOMAS B. MURP D. MURPHEY, ADMINISTRATOR.

The amount realized from a sale of the property under foreclosure had been paid out to creditors with the consent of all conc remained in the hands of the sheriff for distribution an amount lower limit of the court's jurisdiction, and the claim of the oppo less than that limit. The court had no jurisdiction.

APPEAL from the Twentieth Judicial District Court for of Ascension. *Guion, J.*

Edward N. Pugh for Plaintiff, Appellee.

Edmund Maurin for A. Wilbert's Sons Lumber and Shingle Company, Third Opponent, Appellant.

Argued and submitted December 29, 1897.
Opinion handed down January 10, 1898.
Rehearing refused April 18, 1898.

ON MOTION TO DISMISS THE APPEAL.

The opinion of the court was delivered by

BREAUX, J. The parties to this litigation claimed a preference over the funds in the hands of the sheriff to be distributed.

The plaintiff, Christian Kline, proceeded *via executiva* in forceclosing his mortgage. The property seized was sold for three thousand five hundred dollars.

We are informed by the sheriff's return on the writ of seizure and sale that the costs of the foreclosure amounted to one hundred and fifty-five dollars; that the claim secured by privilege amounted to one hundred and sixty-six dollars and seventy-eight cents; that he retained in his hands six hundred dollars under an order of court to meet any indebtedness to A. Wilbert's Sons Lumber and Shingle Company, and the remainder of the purchase price was paid to the attorney for Christian Kline, the plaintiff.

The order issued in accordance with the petition of Wilbert's Sons Lumber and Shingle Company, third opponents, directed the sheriff to retain in his hands until further order of the court sufficient of the proceeds of the sale to pay its claim.

The sheriff complied strictly with the order, retained the fund stated and paid the remainder of the funds to those who were entitled to receive them. There was not the least opposition raised to this payment.

The only question remaining for decision is whether the intervenors, Wilbert's Sons & Co. are entitled to the fund and privilege they claim.

The amount of their claim is less than the lower limit of this court's jurisdiction and the proceeds of the sale they claim is also less than that jurisdiction.

The appeal must therefore be dismissed. We have no discretion in the matter.

It is ordered and adjudged that the appeal is dismissed.

ON APPLICATION FOR REHEARING.

BLANCHARD, J. Third opponents, A. Wilbert's Sons Lu
Shingle Company, claimed three hundred dollars with eight
interest from July 23, 1895, and two hundred dollars
rate of interest from September 1, 1894.

They asserted a superior privilege upon certain build
improvements, consisting of stables, sheds, etc., and upon
ground not exceeding one acre upon which the stables a
were erected.

This was part of the mortgaged property.

They asked separate appraisement of this property. It
arately appraised.

They asked an order to the sheriff to hold in his hand
entire proceeds of this property, but "*sufficient of the proc*
satisfy opponent's claim by preference over other creditors

The order of court, accordingly, was that the sheriff reta
hands sufficient of the proceeds to satisfy the demand of t
opponent.

This order the sheriff complied with. He estimated
hundred dollars would cover the claim, retained that sum
over the remainder to the parties in interest.

The only fund tied up by this order was what the sheriff e
was sufficient to meet the claim. The order of court, indi
least, required him to make this estimate, since it directe
retain only an amount sufficient to meet third opponent's cl
making this estimate the sheriff did so at his peril—that is
he had retained an insufficient sum the complainants could h
him responsible for the deficit.

But the crucial fact in determining the question of jur
here raised is, the order of court did not require to be he
and the sheriff did not hold back, a sum sufficient to vest t
with jurisdiction. The fund in dispute, so far as these comp
are concerned, made so by their own pleadings and by the
the court invoked by them, is not the entire sum of the pro
the sale of the mortgaged property, but that part of it onl
the sheriff was directed to reserve in his hands pending th
tion.

There was no appeal by any of the other parties having
est in the fund.

The complainants herein come before the court with a claim of only five hundred dollars, principal, and with a fund reserved in the sheriff's hands, as the result of their own act, of only six hundred dollars. How can it be claimed that this court is vested with jurisdiction *ratione materiæ* ?

In its facts herein stated this case is to be distinguished from Murray vs. Sweeney, 48 An. 760, relied on by counsel for opponents as establishing a different rule. But even there the court stated that the amount of the fund in the sheriff's hands is the test of the right of appeal.

Here the amount left in the hands of the sheriff was less than the lower jurisdictional limit of this court.

Rehearing refused.

No. 12,640.

PAUL LECOURT VS. DEXTER S. GASTER.

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106 546

The civil courts have the power to decide questions of damages though it involves the interpretation of a criminal statute.

To make an officer liable, acting within the scope of his authority as an officer, it must be shown that he greatly abused his authority; that such a mistake was made as a person of ordinary care and intelligence might make, will not amount to such an abuse.

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*.

E. A. O'Sullivan for Plaintiff, Appellant.

Samuel L. Gilmore, City Attorney, and *W. B. Sommerville*, Assistant City Attorney, for Defendant, Appellee.

Argued and submitted March 9, 1898.

Opinion handed down March 21, 1898.

Rehearing refused April 18, 1898.

The opinion of the court was delivered by

BREAUX, J. This was an action for damages against the Superintendent of Police of the city of New Orleans. Plaintiff claimed that

the defendant misinterpreted the law known as the Sund
alleged that the defendant ordered him to close his salo
End every Saturday night at 12 o'clock, and that he, to a
closed his saloon.

He insists that the Sunday law does not apply to his es
it is exempt from the prohibition contained in the act.

He asserts that defendant for some time recognized
open his saloon on Sunday, but that in September, 188
upon himself to order plaintiff to close his saloon.

Defendant's exceptions of want of jurisdiction *ratio*
and of no cause of action were sustained. Plaintiff app
the judgment dismissing his suit.

There is no complaint here of any particular act of un
discrimination in the execution of the law. We take it
made to apply to all alike in the locality in which the def
a saloon. Its proper to take it for granted that no pa
shown. The maxim *omnia rite* applies.

The gravamen of the charge is, that the statute does n
the establishments located and maintained where petitio
place of business.

After an examination of the question presented, and a
considered the authorities, we found no difficulty in arri
conclusion that as relates to trespass and the invasion
rights the civil courts have jurisdiction to hear and
suit for damages.

Damages may arise from an offence (R. S. 985) recov
in a civil court. The civil courts, in these cases, may in
criminal statutes and render judgment for actionable
Having recognized the right of one injured to sue and
action in the civil courts for trespass and wrong upon h
right it remained for us to determine, whether plaintiff's
set forth a cause of action.

The officer owes a responsibility to the public. He is p
the discharge of his functions to have acted in accordanc
until the contrary is made evident. To sustain an action
against an officer, it must be shown that he grossly
authority.

It has been decided, as to him, a mistake such as a pers
mary care and intelligence might make, will not amount to

able abuse. Under his obligation it was defendant's duty to look to the enforcement of the law. The right of action against an officer is limited. It must be shown that the officer did negligently that which it was his duty to do, or that he wilfully and maliciously perpetrated an injustice.

If the error charged, as to plaintiff's business, consisted in a misinterpretation of Sec. 2 of Act 18 of 1886, which reads, "provisions of this act shall not apply to" places of public resort, of recreation, of health and watering places, and in a misapplication of Sec. 3 of the act which reads, "no alcoholic, vinous or malt liquors shall be given, traded or bartered, or sold or delivered in any public place on said day;" we do not believe for a moment that the error (in seeing to the execution of the statute as difficult to construe as this is), gives rise to a cause for damages, particularly if it be not shown that the officer was wanting in good faith in his endeavors to obtain its execution.

In any case it must, in our view, clearly appear that he was not acting within the scope of his authority, owing to a determination on his part to impose upon private rights. Nothing here denotes that the officer contemplated anything of that sort.

We have given this case our attentive consideration, and have arrived at the conclusion that the court *a qua* had jurisdiction; but that a cause of action was wanting from every point of view.

The civil courts have jurisdiction because no one can inflict actionable damages without the risk of being held for reparation.

The cause of action was wanting in addition to reasons already given because the plaintiff made no objection to closing; but closed as we take it, without the least protest. His act has the appearance of acquiescence.

In fine, beyond all this, we infer that the main purpose of the action was to get an interpretation of the statute.

That interpretation to this time does not agree with plaintiff's position, but even if it did, plaintiff, for reasons before stated by us, would have no right of action.

It is therefore ordered, adjudged and decreed that the judgment appealed from be and the same is affirmed.

No. 12,742.

SUCCESSION OF MRS. ELIZABETH C. EARHART.

The provisions of our Code and decisions fixing the domicile of the for the opening of his succession clothe the court of the domicile with isdiction to probate his will, qualify the executors and of other inc the opening of the succession, do not confer on that court jurisd determine the validity of an alleged will disposing of immovable pr another State. Civil Code, Arts. 934 *et seq.*; Code of Practice, Arts. 9 Story Conflict of Laws, Secs. 431, 474; 14 An. 85.

The effect of such a will is for the determination of the courts of the si where the immovable property is situated. Story *Ibid.*; 14 An. 85.

Where in a controversy between heirs in our courts, it appears that the made an alleged will disposing of lands in another State, and that th will has been transmitted to that State for the requisite judicial pro it is proper for the court here to refuse the decree that the deceased testate wholly ineffective to determine the validity of the alleged will lands in the sister State. Story *Ibid.*

APPEAL from the Civil District Court for the Parish of O *Ellis, J.*

Benjamin Rice Forman for Mrs. Virginia B. Ferguson, I Appellant.

Dart & Kernan for Mrs. Readman Ross and Mrs. M Defendants, Appellees.

Bernard McCloskey for F. B. Earhart, Defendant and Appe

Argued and submitted March 25, 1898.

Opinion handed down April 4, 1898.

The opinion of the court was delivered by

MILLER, J. This appeal is by one of the legal heirs deceased, Mrs. Elizabeth C. Earhart, from the judgment lower court on the petition of the heir asserting rights, against the other legal heirs.

The record shows the deceased left movable property, bu movable property in this parish or State; there is testimony to show the deceased died possessed of landed property in trict of Columbia; the legal heirs of the deceased are her c

one the plaintiff and three others made defendants; it is in proof that prior to her death the deceased stated in effect that her will was made disposing of her property in the District of Columbia, and had requested that when she died her will should be transmitted to an attorney in Washington; it further appears that after her death a paper endorsed as her last will was found in her bank box and was sent to the Washington lawyer as she had requested in life. The paper was not offered for probate here, nor was any claim based on it. The testimony is in the record of one of the defendants charged in the petition with taking possession of the property of the deceased, and with suppressing her will, to the effect that the deceased left only a watch an amount of money in part intended for her grandchild, and that the residue was used for the expenses of the sickness and burial of the deceased, and that all her papers were in the box except that sent to Washington.

The petition of the plaintiff filed some weeks after the death of the deceased sets forth that she left children, plaintiff being one of them; that plaintiff is advised that defendants claim deceased left a will, but it had not been produced; that two of the children defendants in this suit had taken possession of property of the deceased; that plaintiff as one of the forced heirs was entitled to her portion of the properly of which deceased died possessed, and to have made an inventory of such property. The prayer was for citations of the legal heirs; that two of them charged with taking possession of the property and papers of the deceased produce any will or paper purporting to be a will, and if a valid will that it be probated; that if no will was made, the deceased be decreed to have died intestate; that if the will was found to dispose of more than the law permitted, it be reduced; that plaintiff be put in possession of two-thirds of the property of the deceased, unless the other heirs accept, and in that event that petitioner be decreed entitled to her proportionate share of the property. The answer of two of the heirs is to the effect their mother left no property in Louisiana, except movables, found in her bank box, denies that respondents have taken possession of any property, avers that deceased left a will made according to the law of Maryland, of which they annex a copy; that it has been filed in the Orphan's Court, District of Columbia, and that respondents are advised the will, not in the form required by the laws of Louisiana, can not be probated here, and respondents make no claim except

for such judgment as the facts warrant. The other defend
the death of his deceased mother; that the plaintiff, respo
two of the defendants are her heirs, and reserves his right
any will to his prejudice.

The lower court in admitting the will in evidence over
objection stated as the ground for the ruling that plaintiff
for the production of the paper, and that the objection
treated as directed to the effect of the paper. The judgm
nized the plaintiff, and the three defendants as the legal h
deceased; decreed that as such they be placed in possess
property of the succession, and as to the alleged will the
reserved the rights of all parties in interest to assert or
rights founded on the paper if it should ever be presente
bate. The plaintiff on this appeal complains of the judgme
there is no decree that the deceased died intestate.

The paper produced in the lower court not in the form r
law for last wills, was not sought to be probated. If any de
been made founded upon it, the objection to its introducti
have prevailed. No will can avail as a muniment of title u
bated, nor can it be probated unless in the form prescrib
Code, Article 1687. Aubert vs. Aubert, 6 An. 104; 1 Henne
p. 467, No. 4. But the petition in this case charged that d
had wrongfully possessed themselves of the papers of the
taken the property she left from her bank boxes and calle
to produce all papers and any paper purporting to be the
deceased. To meet these allegations the testimony of defen
offered to show what they did in reference to the subject
tigation; that deceased had stated her will was in the box;
it should be sent to her counsel in Washington, and that
copy of which was produced had been transmitted to the
accordance with the request of the deceased. This
along with the paper had direct relation to the charges in
tion, and besides the paper was called for by the plaintiff. In
of controversy, we think, the objection to the offer of the
properly overruled, and the paper received not to give it e
will, but because called for and pertinent to the issues as t
ants' action made in plaintiff's petition.

The plaintiff contends that the deceased domiciled here
died, the lower court had the jurisdiction to determine the

dered in the petition that she died intestate. The court had the jurisdiction to recognize and put the heirs of the deceased in possession of the property left by the deceased in this jurisdiction, and that jurisdiction it exercised. The plaintiff is clothed by the judgment with all the rights of the heir of the deceased capable of exercise in this State. C. P. 1003 *et seq.* No decree of the court here could give or take away any right in respect to landed property in another State possessed by the deceased at the time of her death, the title to which depended on any will she left. The validity of such will, and its effect as conferring title to lands in another State were questions for the courts of that State, and beyond the jurisdictional power of our courts. Story's Conflict of Laws, Secs. 474, 431; Hughes vs. Hughes, 14 An. 85. The decree the argument claims should have been rendered, that the deceased died intestate, was entirely beyond the jurisdiction of the court as applied to any will of the deceased designed to affect lands in the District of Columbia. Nor do we appreciate that the decision of this court in Succession of Williamson, 3 An. 261; Miltenberger vs. Knox, 21 An. 399; Clemens vs. Comfort, 26 An 269; in the Succession of Gaines, 45 An. 1246, nor the articles of the Codes cited in plaintiff's argument, tend to affirm the right to the decree contended for in the argument. Succession of Gaines, 45 An. 1241; Civil Code, Art. 935; C. P. 929. The articles and decision fix the domicile of the deceased as the place of opening of the succession, and the Gaines decision in effect decides that a will whether or not in the form required by our law, admitted to probate in another State, is entitled to recognition here, when presented to our courts accompanied with the probate decree of the court of the sister State. The circumstance that the deceased in the Gaines case was domiciled in the State where the will was probated, afterward recognized here, does not affect the question here, of the jurisdiction of a Louisiana court, because the court of the domicile of the deceased, to render the decree that the deceased died intestate. Wherever the domicile of the deceased such a decree would be in excess of the jurisdiction of the Louisiana court, as respects any will of the deceased disposing of lands in another State. In view of the fact that the lower court was apprised by the testimony and the paper itself that the deceased had left an alleged will disposing of lands in another State, and that the paper had been forwarded for presentation to the proper court there, it

seems to us the court properly confined its decree to the
of plaintiff and defendants as children and forced heir
ceased. To have gone further and decreed that she die
would have trenched on the jurisdiction of the proper court
trict of Columbia, to determine the validity of a will affe
there. Such a decree could serve no purpose here or th
our opinion was properly refused.

It is therefore ordered, adjudged and decreed that th
of the lower court be affirmed with costs.

No. 12,656.

PEOPLES STATE BANK VS. ST. LANDRY STATE BA

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52 977

50 526
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50 526
123 466
124 1099
124 1094

When an action is met by an exception of no cause of action leve
in its entirety, it will not be sustained if the plaintiff have a righ
any branch of its case.

A bank to whom its own certificate of deposit has been presented fo
another bank to whom it had been forwarded for collection by
thereof, can not, when it has refused payment and declined to re
tificate to the agency bank, from whom it had obtained posse
presentation for payment, have dismissed an action brought by
obtain either payment of the certificate, or its return to the ag
ception that the plaintiff has no right of action.

APPEAL from the Eleventh Judicial District Court for
of St. Landry. *Dupré, J.*

Kenneth Baillio and *E. D. Saunders* for Plaintiff, Appel

E. D. Estillette, Thomas H. Lewis and *E. B. Dubuisson*
ant, Appellee.

Submitted on briefs February 7, 1898.
Opinion handed down February 21, 1898.

Plaintiff alleged that on or about the 8th of March, 1897
from the Metropolitan Bank of New Orleans a certificate
issued by the St. Landry State Bank, in words and fig
ing, to-wit:

"ST. LANDRY STATE BANK, NO. 31.
"OPELOUSAS, La., March 12, 1896.

"*Certificate of Deposit.*

"Julius Meyers has deposited in this bank five thousand dollars, payable subject to conditions (see agreement) in current funds on the return of this certificate properly endorsed.

"(Signed) FRITZ DIETLEIN,
"*Cashier.*"

That said certificate has the following endorsements, to-wit:

"JULIUS MEYERS,
"HENRY ROOS.

"Pay to the order of Peoples State Bank,
"Metropolitan Bank of New Orleans.
"Endorsement guaranteed. A. C. WUERPEL,
"*Cashier.*"

"Pay to yourselves or order.
"The Peoples State Bank of Opelousas, La.
"J. J. PERRODIN,
"*Cashier.*"

That said certificate was sent to petitioner to present to the said St. Landry State Bank in order to collect the amount called for thereby and said certificate under the agreement annexed thereto was due and exigible on the 11th of March, 1897. That petitioner sent said certificate through its runner together with other items which it had that day before collected to the office of the said St. Landry State Bank in Opelousas, Louisiana, and handed the same to the cashier of said bank for collection. That the said cashier, instead of paying the said certificate, illegally and wrongfully kept and detained the same and refused to give it up, but addressed to petitioner a letter, a copy of which is annexed to its petition. That thereupon the cashier of the plaintiff bank addressed to the defendant bank a letter and received an answer thereto, which letter, with its reply thereto, it also annexed to its petition.

That the action of the St. Landry State Bank was illegal, wrongful and in violation of the custom prevailing between banks in the town of Opelousas and elsewhere; that it had no right to retain said certificate, but was bound either to pay or to return it to petitioner. That plaintiff was bound to obtain the return of the same

in order to remit it to the Metropolitan Bank, or else to
money therefor. That the said bank having illegally and
taken possession of said certificate, was bound for
thereof.

The premises considered, plaintiff prays for judgment in
condemning the defendant bank either to return the certi
agreement thereto annexed, or else to pay it the amount o
tificate, to-wit: the sum of five thousand dollars, with le
est from 11th March, 1895, until paid.

In the letter of the plaintiff to the defendant bank (the
referred to in its pleadings), its cashier mentioned a certai
as having been received by it from the Metropolitan
which he stated accompanied his letter, and declared th
fendant bank would from it see the necessity und
plaintiff was to return the certificate of deposit which
sent it for collection, and which had been handed to
in plaintiff's regular clearings, but which it forcib
held. He made a formal demand on defendant for t
diate return of the certificate, or the payment
amount thereof, announcing and warning it that
bank would hold it responsible for the consequence
doing so. Defendant replied that it was perfectly respo
both the certificate and the deposit which it represented
claimed the ownership of both and would hold the same a
world until legally dispossessed. Defendant refused to r
certificate on the ground that it had become its property
of an agreement bearing date Opelousas, July 31, 1896.
excepted that plaintiff had no right of action, reserving it
answer should the exception be overruled. The court ord
the trial of the exception be postponed until the day of t
the case upon its merits, at which time it was to be taken u
posed of before trial on the merits. That defendant shou
in the meanwhile without prejudice. Defendant answer
ing, first, a general denial. Further answering, defendan
that it was the owner of the certificate declared upon and
of money mentioned therein; that it became the owner th
eral months after said deposit was made, to-wit: July 31
by transfer and assignment made by Isaac Roos, Henry
Isidore Silverberg, Nathan F. Roos and Henry Roos, Jr

ents of St. Landry, except Henry Roos, Jr., who was a resident of he parish of Orleans, said transfer and assignment being evidenced y a written contract executed and signed by defendant and by saac Roos, who acted as agent for his said associates therein; that y the same the said Isaac Roos and his associates purchased from he defendant bank its claim of fifty-four thousand three hundred nd thirty-seven dollars against the late firm of J. Meyers & Co.; the aid Roos and his associates agreeing and promising, as part of the consideration of the transfer, that the defendant should not be held o account for the sum of money deposited in the defendant bank by Julius Meyers, and for which the said certificate was issued, and the said Roos and his associates had authority from Julius Meyers to transfer said assets to defendant. That the possession of said certificate by the Metropolitan Bank was, in reality, possession of the said Roos and his associates and Julius Meyers, and the deposit of the said certificate with said Metropolitan Bank was made by the said parties, directly or indirectly, and that they did so to protect themselves against the fulfilment of their contract with defendant, and with the intent thereby to deprive respondent, if possible, of its rights under the said contract.

That it had the right as against the plaintiff to all the defences which it could make as against the aforesaid parties, because the certificate sued on was not negotiable paper and the plaintiff was not a third innocent holder thereof; all of the aforesaid parties being in collusion to defeat respondent's said contractual rights. That should the plaintiff bank be given possession of said certificate by judgment of court, then, in that event, it had the right to have a judgment rendered in the present suit against the said Isaac Roos and his associates for the sum of five thousand dollars, and defendant had the right also to call them in warranty to defend this suit. Defendant prayed that plaintiff's demand be disallowed and rejected and its suit dismissed, but in the event the court should hold that plaintiff was entitled to the possession of the certificate, it prayed for judgment jointly and severally against Isaac Roos, Henry Roos, Sr., Isidore Silverberg, Nathan F. Roos, Henry Roos, Jr., and Julius Meyers for the sum of five thousand dollars, and that they be cited in warranty to defend this suit. Plaintiff moved the court to strike out of the defendant's answer all of the defences thereon set up and pleaded, saving and excepting the general issue, for the following reasons:

1. Because they are legally irrelevant and inadmissibl
not legally pleadable against the demands of the plaintiff.

2. If not irrelevant and inadmissible and not pleadable, s
inconsistent with the general issue.

3. If same were relevant, admissible, pleadable and
with the general issue and be so held, then plaintiff specially
that there was then pending in the same court another sui
defendants and the parties sought to be made warranto
present suit for the same object as that set forth in the ans
and growing out of the same cause of action, to-wit, the s
St. Landry State Bank vs. Julius Meyers *et al.*, and the
pendens was specially pleaded as to said issues and for the
of this motion.

4. That the issues set up in defendant's answer, saving th
issue, were issues which could not be litigated in this s
necessary parties to such issues were not before the court,
Metropolitan State Bank and Isaac Roos and his associat
in the answer and Julius Meyers, nor could said issues or
brought into this suit as was sought to be done.

5. That as to the demand to call in warranty it sho
granted, as there was no privity alleged to exist between s
and the plaintiff.

The District Court sustained the exception of no right
and dismissed the suit and plaintiff appealed.

The opinion of the Court was delivered by

NICHOLLS, C. J. The certificate declared on shows a
the St. Landry State Bank by Julius Meyers of five thousan
payable subject to conditions, on surrender of the certific
erly endorsed; it shows the endorsement in blank of Julius
the depositor, and also subsequent endorsements placing its
in the plaintiff in this suit. The petition discloses the
stances under which plaintiff received it for collection, and th
which it went into the hands of the defendant. If plaint
the certificate in its hands had simply sued to obtain a
upon it and defendant had filed an exception of no cause o
of action, we would have been called on to determine u
cumstances different from those actually presented by

whether plaintiff's pleadings showed the absence of a right to sue. The court has entirely overlooked that feature of the case which calls for the return of the certificate by defendant to the plaintiff. If the facts alleged in the petition be true, as we are bound to assume they are, plaintiff was clearly entitled to sue to regain possession of the certificate. We are not concerned here, with what the result of the suit on its merits would be on that branch of the case. Plaintiff having received the certificate for collection had come under obligation to account to his principal either for the certificate itself or the money which it called for. If defendant had the legal right to retain possession of the certificate under the circumstances in which it was received, it will have amply opportunity to establish that fact upon a trial on the merits. It can not cut off an inquiry into this question of its right of retention by the exception it has filed.

To reverse the judgment it suffices that plaintiff have a right of action upon any branch of its case. The exception was leveled at the case in its entirety, and, in our opinion, it was incorrectly sustained. We are not concerned with what the effect of our decision may be upon the case of St. Landry State Bank vs. Meyers now before us. We decide issues in each case as they are therein presented by the parties thereto.

It is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed; and it is now ordered, adjudged and decreed that the exception filed by the defendant be and the same is overruled; that the cause be reinstated on the docket of the District Court, and that the cause be remanded to that court for further proceedings according to law, costs of appeal to be borne by appellee.

No. 12,750.

STATE OF LOUISIANA VS. WILLIAM BAILEY.

	50	533
	152	465
	50	533
	105	502
	50	533
	109	351
	50	533
	112	335

Where a juror on cross-examination on his *voir dire* shows a slight inclination to bias against the accused, but on final examination by the court says emphatically that the impression derived from the merest hearsay statements will not influence him; he is competent; besides the accused did not exhaust his challenges and his case in consequence was not prejudiced by the ruling.

This court will not review the refusal to grant a new trial upon the alleged want of sufficient evidence to convict.

The jury returned a verdict under the direction of the court a *qua* record brings to light that the jury, as asserted, disregarded the judge and brought a verdict contrary to the charge. The question which the alleged victim should have offered, as well as question tion of the prosecuting witness and asserted victim, were questio the jury finally to determine and are not revisable on appeal.

Merely cumulative evidence, or evidence to impeach a witness alleged recently discovered, is not ground for a new trial.

APPEAL from the Criminal District Court for the Parish *Baker, J.*

M. J. Cunningham, Attorney General, and *R. H. Ma* Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, *A*

Paul L. Fourchy for Defendant, Appellant.

Submitted on briefs April 28, 1898.

Opinion handed down May 16, 1898.

The opinion of the court was delivered by

BREAUX, J. An indictment was found against the de the thirteenth day of October, 1897, charging him with ha mitted the crime of rape on the first day of September, 18

He was put on his trial on the fourteenth day of Januar

On the same day he was found guilty without capital pu

On the first of February he was sentenced to suffer imp in the State penitentiary for life.

From the verdict and sentence he prosecutes this appea

He reserved two bills of exceptions. The first bill of was taken to the court's refusal to sustain defendant's obj juror.

The facts are that on cross-examination by defendant this juror evinced a slight inclination to some degree of bi the accused, but he stated immediately after in answer that he was not prejudiced. He also stated to the trial jud examination that he could try the case as if he had never before. It is not shown by the record that the defendant his peremptory challenges.

The second bill of exception was taken to the court's refusal to grant defendant's motion for a new trial.

The grounds of the motion substantially were:

1. That the State had not established that the crime charged had been committed.

2. That while the court's instruction was correct with reference to the acts constituting rape, the jury's verdict did not conform with the instruction given.

3. That the complaining witness had not offered the resistance expected of a healthy young woman assailed as charged.

4. That she was not corroborated in any manner.

5. That the accused testified in his own behalf and denied the crime charged, to which fact the jury had not given consideration.

6. That he has since the trial discovered new evidence.

There was no oral argument made on the part of the defendant, and no brief filed.

Taking up the first proposition for our determination, as set forth in the first bill of exceptions taken: that the accused was forced to challenge peremptorily a juror tendered who was incompetent and prejudiced, we, on examination of the testimony on this point, made part of the bill of exceptions, found there was nothing fixed and determined in the opinion of the juror with reference to the guilt or innocence of the accused. The juror testified and made evident by his testimony that his impression was not an impression which would prevent him from rendering an impartial verdict.

Moreover, the defendant had not exhausted his challenge when the panel was filed. It does not, in consequence, appear that the ruling was prejudicial to the defendant, as the juror was peremptorily challenged by the accused and he had not exhausted his peremptory challenges.

Taking up in the second place the first proposition as set forth in the second bill of exceptions, that there was no proof of carnal knowledge against the (alleged victim's) woman's will. This presented a question of fact for the jury.

Their finding, under repeated adjudications, was conclusive.

In the second place the bill of exceptions sets forth that the jury chose to disregard the charge of the judge.

This also presented an issue of fact.

The judge instructed the jury properly, the defendant avers. The

jury, we must presume, properly weighed the facts. T
sions, in this respect, are not reviewable.

Manifestly, if the judge had entertained the idea th
was disregarded, he would have granted a new trial.
reason to find that the jury did not apply the law as exp
court.

The third ground of the motion for a new trial covere
of exceptions is equally as indefensible on appeal: t
proof of sufficient resistance on the part of the alleged v

The jury, to find the verdict, must have believed th
sufficient resistance.

They had been properly instructed in this particular.

It was within the jury's function to finally determine t
There was no error of law; it was a matter of fact only.

We pass to the next question, whether the asserted
corroborated.

From Rice on Evidence, Vol. III, p. 828, we quote:
that the evidence of the complaint 'is confirmed if sh
discovered the offence and made pursuit for the offen
take it that in the opinion of the jury, and of the court,
of complainant here was confirmed. Her evidence was
prove the crime charged. A number of other witness
The evidence disclosed that they testified relative to fac
roborative character. The jury were the judges of the
given to this testimony. The question whether or not t
been proven was a question of fact for the jury. For re
stated, we will not stop to discuss the proposition, that t
of the plaintiff had been rebutted by the testimony of th
but take up the last ground contained in the bill of exce
newly discovered evidence since the trial.

The grounds upon which this bill of exceptions was
defendant had grounds, are not stated. The affidavit an
bill of exceptions of a witness sets forth evidence that
some respects cumulative, and in other respects its effe
to impeach a witness.

Newly discovered evidence merely cumulative is not
new trial. State vs. Hanks, 39 An. 234; State vs. Lam
43.

Newly discovered evidence the effect of which is to

round for a new trial. State vs. Williams,

e in a large measure left to the discretion
usal will not be reversed in the absence of
sed its discretion.
nd decreed that the sentence and judg-
l the same are hereby affirmed.

No. 12,737.

ISIANA VS. USEBE FONTENOT.

character of the deceased when admissible in
d by the accused must be restricted to the general
or peace and quietness; hence, testimony of par-
e deceased are properly excluded. 3 Rice on Evi-

have opened the door for the admission of testi-
of violence, merely because on re-examination the
such acts on cross-examination is asked by the
ad ever heard the deceased had hurt anybody." 1

implication assume that the accused had estab-
rly refused.
er the cuts in the clothing of the deceased indi-
while erect confronting the accused, or when he
he testifying witness, can not be deemed expert

law of self-defence instructing as to the danger
y killing; the obligation of the party assailed to re-
uired and as to the other phases of the law deemed
jury will not be set aside because of the refusal of
he general charge. 10 An. 264; 37 An. 77; 35 An. 970;

nth Judicial District Court for the Parish

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ney General, and *R. Lee Garland*, District
pellee.

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uzie and *P. S. Pugh* for Defendant, Ap-

Submitted on briefs April 9, 1898.

Opinion handed down May 16, 1898.

The opinion of the court was delivered by

MILLER, J. The accused, sentenced for life imprison murder, takes this appeal.

A number of bills of exception reserved on behalf of th are to the exclusion of questions seeking testimony of th ter of the deceased for peace and quietness. It seems t ceded that under the circumstances detailed in the bills was admissible on behalf of the accused that the deceas violent character, but the discussion in this court is as to fo questions propounded on this subject. We think it clear in support of self-defence by the accused indicted for m law permits testimony impugning the character of the dec peace and quietness, the testimony must be confined to h reputation in that respect. 8 Rice on Evidence, Secs. 482, examination of the questions under discussion show the p elicit testimony of previous difficulties of the deceased; o displayed by him in saloons, and relating to other ac accused claimed to be pertinent on the issue of his cha peace and quietness. But on that issue it is not compete in evidence particular acts of the deceased. 8 Rice *Ib* insisted the State had opened the way for such proof. had not sought to put any questions touching the charac deceased, least of all referring to the particular acts the s the questions propounded on behalf of accused. The quest particular acts were put to the witnesses for the State on th examination. On their re-examination on the point th duced by the defence on cross-examination, the District asked the witnesses who had testified to the danger acter of the deceased, whether they had "ever heard that harmed any one." We do not understand that this qu which the District Attorney confined himself, on the iss character of the deceased assailed by the defence, transce limit allowed him in re-examining witnesses on a point br on cross-examination, or entitled the defence to prove acts of violence on the part of the deceased. Nor can we that the testimony of such acts were admissible, becau

proof of the exclamation of the deceased to accused "you have stabbed me." Therefore, in our view, the lower court did not err in excluding the testimony proposed to be given of such acts, and in confining the defence to proof of the general character of the deceased for peace and quietness.

Another bill reserved by the accused is to the exclusion of questions put to a witness who had examined the clothes worn by the deceased when he was killed, the opinion of the witness being sought whether from that examination the cuts exhibited by the clothing were received while the deceased was erect or reclining. The testimony of the State tended to show that the deceased giving the first blow was shoved by the accused, fell back in the arms of one of the testifying witnesses, and, while the deceased was in that position, was stabbed by the accused. It is claimed in the argument for the accused that the cuts in the clothes would have been higher if received when the accused had fallen back, than the cuts would have been if the cuts had been received while the deceased was erect confronting the accused. It was proper for the witness to have described the cuts in the clothing from which the jury could have drawn any inference, the cuts might be deemed to indicate. But the subject, in our view, was not one in reference to which expert testimony was admissible, and hence there was no error in excluding the opinion of the witness. There is another bill reserved to the statement of one of the witnesses substantially, that the accused and deceased were angry, elicited by the question whether they were angry or cool and collected. We think the question referred to the fact, *i. e.*, condition of the combatants, and not to the opinion of the witness, and question and answer were unobjectionable.

There are bills in the record to the refusal of certain requested charges. One instruction required the definition of the overt act of hostility by the deceased to be considered in connection with self-defence urged by the accused. The instruction asked was, that the overt act was a hostile demonstration of a character to create belief of the accused he was about to lose his life or suffer great bodily harm at the hands of deceased, and this belief could have been entertained honestly by accused, though deceased did not strike or come within striking distance of the accused. The Court had charged fully on the law of self-defence and in the course of which had stated, in effect, "to justify killing the accused must have been

in real or apparent danger existing at the time of the killing, killing must have been absolutely or apparently necessary to prot the life or limbs of the deceased, and further the court instructed t by imminent danger was meant such overt actual demonstration makes killing necessary to self-preservation; that it was not nec sary danger should, in fact, exist, but such actual danger as it mi appear to defendant's comprehension as a reasonable man, and apprehension of danger by the accused must be on grounds suffici to satisfy a reasonable man his life or limbs were in peril or gr bodily harm was about to be inflicted on him, or in other words, trial judge put it, that the killing was the *bona fide* attempt to prot the accused from impending danger." Between thec harge asked s stantially, that the overt act of hostility to justify killing must be a character to impress accused he was about to lose his life or su great bodily harm, and that given by the court, we think there difference only of language, not of substance, and in another p of the charge the instruction given was that to constitute se defence the actual striking of the blow is not requisite, nor that assailant should be in striking distance.

We are informed by the bills that the deceased and the accu became involved in a quarrel over a game of cards in a saloon; deceased giving the first blow the accused was shoved back agai the wall; that in turn accused shoved deceased, who fell backw in the arms of one of the testifying witnesses, and the testimony is claimed, tends to show that in that position the deceased w stabbed by the accused, the deceased exclaiming at the moment, ca ing the accused by name: "You have stabbed me." The bills sh there was testimony that deceased was of superior strength and si that he was of dangerous character; that the saloon, the scene the difficulty, had but one door, that opening into the front roo and the testimony, it is claimed, tended to show the way to the d was obstructed.

In this condition of the proof the charge of the Court presen the law of self-defence, and dealt with particularly on the phase the excuse for the mortal stab, when from the nature of the atte the life or limbs of the party assaulted is endangered, and wh retreat is impracticable, or would add to that danger. On beh of the accused the special charge was asked substantially, t proof of the disparity of size and strength of the deceased and

ed, and of the dangerous character of the deceased, can only fered when the *prima facie* case of self-defence is made, and it has been shown the deceased was the attacking party. that "proof of the size and strength of the two men tended ow the dangerous character of the deceased had been offered." nstruction requested, in our view, carried the implication the ac- had made a case of self defence, and we think was properly ed. On behalf of the accused the charges were also requested ostance, that a person free from fault, assaulted by another, who fests his purpose by violence to take the life of the party lted, or to do him great bodily harm, and no retreat on his part acticable, then the assaulted party is not obliged to retreat, but pursue his adversary until secured from danger, and if he he adversary in so doing, the killing is self defence. Again, harge was requested that "knowledge by the accused that ased was violent, dangerous and vindictive and of superior gth was sufficient to form the well-grounded belief of the ed of imminent danger of his life or of great bodily harm, and excuse killing when, superadded to such knowledge, he is ed and when the deceased shows an intent to take the life of ccused or subject him to great bodily harm;" and again, there asked on behalf of the accused, the charge in substance, that if the deceased did not intend to take the life of the accused, nly to beat him, yet if the beating was of a character to imperil or limb, accused was justified in killing the deceased. Some ons of these requested charges, we think, manifestly deal with ffect of the proof stated to have been administered, and of that the jury and not the Court was to determine. A careful exami- n of the charge of the court brings us to the conclusion the law f-defence was fully given. Thus the Court had instructed "that son suddenly assaulted and in imminent danger of life or great y harm, and where such imminent danger would be the apparent quence of waiting for the assistance of the law and with no icable means of escape, kills the assailant, the killing would be defence, and therefore, if the slayer was closely pressed by the ased, retreated as far as he could conveniently or safely in good with the honest intent to avoid the violent assault, and believ- mself in imminent danger of his life or great bodily harm, kills lant, the killing is excusable homicide." The Court further

instructed that a person need not avoid danger by flight, if not "provoker" or aggressor, if in fault he is bound to retreat as far practicable consistently with his own safety, unless prevented by fierceness of the assault, when if to save his life he kills his adversa the killing is excusable homicide; that in case of personal conflict justify homicide it must appear the party killing had retreated as as he could, or as far as the fierceness of the attack permitted, that retreat was not required, where one stands on his own right where retreat would add to his danger," and the court continued the same line its instruction as to self-defence. The charge as giv was not excepted to, and in our view it substantially gives the on the subject. 1 Archbold, 225; State vs. Chandler, 5 An. 489. requested charges present the law in different language, but Court is not required to instruct in the frame prepared by the couns for the accused, nor repeat charges already in effect given. State Roberts, 10 An. 264; State vs. Melton, 37 An. 77; State vs. Ga 35 An. 970; State vs. Boasso, 38 An. 206. We can find no error the refusal to instruct as requested on behalf of the accused.

The bill to the refusal to charge that whether a man is threaten with imminent danger he alone must determine *the necessity* of se defence, we think too broad. The law is there must have been re sonable ground to believe the life of the person assailed is in dang or great bodily harm threatened, with other qualifications unnecessa to be stated, to justify the killing of the assailant. 1 Archbold, 2 State vs. Chandler, 5 An. 489.

Our attention has not been directed to that part of the char respecting malice deemed objectionable. The special charge ask on that point, we think fully covered by the general charge, and insufficiency in it is pointed out to render special instructio requisite, nor does our examination discover any such necessarily.

It is therefore ordered, adjudged and decreed that the sentence the lower court be affirmed.

No. 12,675.

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260

OVIDE LANDRY VS. THE ADELINE SUGAR FACTORY COMPANY, LIMITED.

Where the record is not in condition to close the controversy, unless there is m ifest reason for a different course, the court in the interest of all parties v remand the cause.

CAL from the Twenty-fourth Judicial District Court for the arish of St. Mary. *Allen, J.*

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uffery & Son and *J. Sully Martel* for Plaintiff, Appellant.

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p *H. Mentz* and *Carroll & Carroll* for Defendant, Appellee.

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ed and submitted January 25, 1898.
ion handed down May 16, 1898.

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opinion of the court was delivered by

ER, J. It is insisted this case depends upon and is supported same proof that is applicable to the demand of the plaintiff, '. Delahoussaye, against the same defendant presented on the just decided. The suits of Delahoussaye and the plaintiff, , were brought at the same time; were tried together, and t up as consolidated in one record. The judgment in favor of ussaye is based upon the testimony, in our view, exhibiting the ation of his contract with defendant. Our examination of the has not enabled us to reach the same conclusion as to the con- f Landry made after the communications between Delahous- nd the defendants, which, we think, with other facts, show that ginal contract between Delahoussaye and the defendant was d. We reserve our opinion on the point whether there is the asis of fact to hold that the plaintiff's contract was modified. tes us the litigation may have been conducted on the theory is court would consider the testimony of Delahoussaye, as bing the modification of the contract asserted by him, as applicable to show the modification of Landry's contract. On int we are not clear. We have concluded it is best calculated re the rights of the parties to remand this case that it may before us again on all the issues it presents, with such addi- testimony as the parties may deem proper to offer.

therefore ordered, adjudged and decreed that the judgment of wer court be avoided and annulled, and that this suit be led to the lower court for another trial, the costs to be paid ellees.

No. 12,675.

50 644
52 260
52 1848

RENE F. DELAHOUSSAYE VS. THE ADELINE SUGAR FACTORY COMPA LIMITED.

If in the attempted performance of a commutative contract to transport s cane from the field to the factory and pay the purchase price for cane ag upon, the cane becomes sour and unfit for use caused by a "freeze," to w the cane was exposed owing to deficient means of transportation, the chaser was bound to furnish, he must bear the loss resulting from the free temperature.

APPEAL from the Twenty-fourth Judicial District Court for Parish of St. Mary. *Allen, J.*

D. Caffery & Son and *J. Sully Martel* for Plaintiff, Appellant.

Philip H. Mentz and *Carroll & Carroll* for Defendant, Appellee.

Argued and submitted January 25, 1898.
Opinion handed down March 7, 1898.
Rehearing refused May 16, 1898.

The opinion of the court was delivered by

MILLER, J. The plaintiff takes this appeal from the judgm against him denying damages for an alleged breach by defend of their contract to purchase the crop of cane grown on plaint plantation in 1894.

The contract stipulated the plaintiff was to deliver by rail fift hundred tons, of two thousand pounds each, of good, sound, frozen cane at defendants' factory, the delivery to begin October at about twenty-two tons per day, if bad weather prevented, deficiency to be made up in the week, the defendants to pay eig cents for every cent prime, yellow clarified sugar sells for in New Orleans market, and an additional dollar per ton for the bou paid to defendants.

The testimony shows that the defendants received a large port of plaintiff's crop under the contract, but while the delivery was progress there came a "freeze" on the 25th December. Defe ants continued receiving up to the 12th January, when they decli

y more cane, on the ground it had soured by reason of the
" and the character of the weather that followed. At that
e was left in the field ——— acres of cane, under the tes-
equal to nine hundred and sixteen tons. The plaintiff's
n is, that the written contract as to delivery was changed
lefendants assumed the obligation to furnish the cars of the
requisite to carry the cane from Berard's switch, near, we
plaintiff's plantation, to the factory; that if the freeze
he cane the loss is due solely to defendants' failure to pro-
required number of cars for the transportation from
switch to the factory; that if not injured as he contends,
ts under their contract were bound to receive the cane, and
r view are bound to pay for the nine hundred and sixteen
ne defendants' contention is their contract was not modified,
e plaintiff shows no compliance; that defendants received
ne not soured by the "freeze" and are not bound for any
hat for which payment is sought in this suit, because it was
ood, sound, unfrozen cane required by the contract.

aintiff's contention that the written contract was modified
mode of delivery, rests upon the testimony that prior to any
the defendants assumed to furnish the cars. The plaintiff
her testify that one of the defendants "took it on himself
" one of the witnesses going more into details, thus: "I say
y that the arrangement was that Mr. Sprague, one of the
ts' firm, would furnish the cars; is positive he said, the
factory will furnish you six cars a day, and the witness on his
amination repeats that Mr. Sprague said: 'You will have
cars a day." These statements, made to plaintiff, were
by the expression of his fear that the cars would not be
l. It is urged on us that the statements of Mr. Sprague to
e witnesses testify, were in a roadside conversation, that
s no consideration to change a written contract as to
thereby increasing the burden to the defendant, and it is
o show that the statements referred only to cribbing the
ch we understand to be furnishing the labels indicating the
ns to which the cars were to be sent and preparing the cars
e the cane. Whether the statements were on the roadside,
her place, their significance we think obvious, and on that
ce plaintiff acted. It is impressive, too, that no explanation

or contradiction comes from Mr. Sprague. The cribbing, we g from Mr. Oxnard's testimony, is done by the defendants the cars are placed at their disposition by the railroad pany, and is preliminary to sending the cars to the des tions indicated by the labels, we infer, the defendants furnish. cribbing and forwarding the cars to the points where the is to be delivered for transportation to the factory, are closely nected. When cribbed the cars are put in charge of the rai employees, but their destination, *i. e.*, where to be carrie receive the cane, is determined by defendants. Substantially, we the defendants controlled the sending of the cars, and the pla had the right to depend on them for the transportion of his cr the factory. If we pass from this view, sustained, we think, b Sprague's statements, there is, in our view, strong confirmati the course of the business of the parties. Besides the plain crop, the defendants had agreed to purchase or receive the ca others. It is in proof that cars cribbed by them were sent to points on the railroad. At Berard's switch, cars were collect receive cane there purchased from various parties. All this m ment of cars, we gather from the record, was directed by defend It is no answer to say the cars belonged to the railroad comp they were put at the service of defendants. Again, when pl became impatient because of the delay in transporting his ca was to the defendants he addressed his demands for cars. If had nothing to do with supplying cars, their response would been to that effect. On the contrary their answer accepted the implied by the call. When later he became alarmed for preservation of his crop, defendants assured him they would sa It is urged plaintiff also sought the railroad officials. It is im sive they told him they had nothing to do with the matter, read the testimony right. But whatever the calls on the rai company, does not, in our opinion, detract from the import demands on the defendants as evincing their understanding, a as his appreciation of the contract. It seems to us, too, tha Oxnard's testimony, referring to defendants' relation to transp tion, is corroborative of our conclusion on this branch of the He testifies: "When we had agreed to furnish the cars, w agreed to crate a certain number which would be used for switch, *i. e.*, Berard's. Don't remember positively whether i

eighteen, it might have been. Did not agree to any specific number per day; an estimate would be made as to how many would be crated; would crate that number and reserve them for that service." It seems to us this testimony carries but one significance as to the burden of transportation, and puts it on defendants. It is in evidence that the plaintiff was charged with the cost of the transportation, deducted by defendants in their payments to him for cane. That would seem to be an interpretation of the part of the contract as to delivery at the factory, that is, plaintiff was to bear the expense; but the intercourse with Mr. Sprague, the testimony of Mr. Oxnard and the course of business, leads us to the conviction the plaintiff had the right to depend on defendants for cars for transportation of his cane to the factory. We do not think, to avert the loss of the cane due to the failure to furnish cars, the defendants are now at liberty to invoke a construction different from that the testimony and their own conduct places on their obligation.

The defendants, however, insist that sufficient cars were placed at Berard's switch, and it was plaintiff's fault the cars were not in requisition to carry his cane before it was frozen. In this connection the statement is attributed to him, in effect, that he held his cane back to give the small planters from whom defendants had purchased a chance, and it is insisted he had an interested motive in not shipping his cane. The testimony of the plaintiff is he made no such statement with reference to his crop, the subject of this controversy. We do not find the contention of defendant supported. On the issue of sufficient transportation the current of the testimony is that some days during the period that should have been utilized for the transportation, *i. e.*, before the cane was frozen, no cars whatever were supplied. On other days cars came, but not enough, and at no period, notwithstanding plaintiff's demands, were the cars provided adequate to carry the cane. The plaintiff was the defendant's agent at Berard's switch to receive and send forward all the cane they were to receive at that point. The smaller planters had equal rights to use the cars for the transportation of their cane. It could or should not have been expected that plaintiff should give his own cane any preference. Had he done that, the effect of the cold that it is claimed affected his crop would have fallen on the smaller planters with whom defendants had, we presume, the same

contract relations. Be that as it may, there is no basis on whic
can hold the plaintiff could have expedited the carrying of his
to the factory, and thus avoided the freezing weather, by any gr
use of the cars intended for all. The result of the whole testi
is, that the defendants had to receive more cane at Berard's s
than could be transported in the cars they furnished, and
inevitable result was that freezing weather came before they
complete the transportation. If the weather unfitted the can
use as they contend, all the crops were equally exposed, and if
of plaintiff's had escaped by preferring his cane over transportin
crops of others, others would have suffered. We do not fi
could have saved his crop by that preference, and the cars appe
have been used to the best end practicable under the circumsta

Again, it is claimed the plaintiff should have windrowed his
It is in proof plaintiff consulted defendants on that point. It s
that windrowing after freezing temperature, is not always ado
The defendants stated plaintiff must use his own judgment, but
would not windrow their own cane. If, as we hold, it was
defendants' obligation to transport the cane and failing in this
freezing weather occurred, which as they claimed destroyed
cane, in our opinion they can not escape liability merely bec
plaintiff did not employ a measure of doubtful necessity or use,
which defendants themselves in the exercise of their best judgm
did not adopt for their own crop in the same locality.

We deem unimportant the contention that the cane was unfitte
use by the freezing temperature to which it was subjected. I
obligation to transport the cane to the factory was on defend
and the cane perished in the slow performance of that obliga
they should bear the loss. Their refusal to receive the cane aft
was frozen entitled plaintiff to sue for his damages.

The defence has been presented mainly on the contentions
defendants were not bound to furnish the cars, and if bound
complied. To these aspects and others we have given attentio

We think defendants liable for the cane in the field of the qu
required by the contract, which could have been transporte
defendants had provided the cars and which had been lost to plai

We think it best to remand the case for proof of that loss.

It is therefore ordered, adjudged and decreed that the judgme
the lower court be avoided and reversed, and it is now orde

ged and decreed that this cause be remanded to the lower court
e purpose of ascertaining the plaintiff's loss as stated in this
n and for that loss thus ascertained the plaintiff to have judg-
against defendant with costs.

No. 12,589.

STATE EX REL. MRS. LOUISA HOHN VS. EDWARD FINNEGAN, RECORDER, ETC.

uthorize the fines under the ordinance against the keeping of houses of
etitution or assignation there must be proof of the notice to the occupant
n by the Mayor provided by the ordinance, and proof of the use of the
se for the prohibited purposes. Flynn's Digest of the Ordinances, Sec.
; 36 An., 913; 41 An. 1081.

e, when such fines have been imposed with no proof of the prohibited
and only on proof of the notice, and the relator has been denied the right
ffer witnesses she claims would disprove the charge against her, the sen-
e of the recorder imposing the fines must be set aside. Constitution, Art
Code of Practice, Art. 857.

ourt again affirms that charges before the Recorders for violations of the
or ordinances do not require the precision of indictments, but reasonable
ce of the charge is all that is required. Horr & Bemiss on Municipal
inances, p. 45, Sec. 172, 48 An. 836, 44 An. 79.

APPLICATION for a Writ of *Certiorari*.

. *Sansum* for Relator.

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es J. *McLoughlin* Assistant City Attorney, and *Samuel L. Gil-*
City Attorney, for Respondent.

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nitted on briefs May 7, 1898.
ion handed down May 16, 1898.

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opinion of the court was delivered by

LER, J. The relator seeks by the writs of *certiorari* and pro-
n to review the proceedings before the Recorder of the First
t, resulting in the sentence that Relator pay fines for violating
y ordinances prohibiting assignation houses.

n other allegations unnecessary to be considered, the Relator

charges in effect that she was condemned with no sufficient noti
of the charge, and with no proof required or administered, under th
view of the Recorder of the ordinance under which he claims to hav
acted.

In proceedings before the Recorder for violation of ordinances it
not essential the rules should be observed with reference to th
structure of indictments. It suffices that the affidavit on which th
proceedings are based should with reasonable certainty specify th
offence. In this case the affidavit charges the violation of the ord
nance, giving its number, relating to houses of prostitution and as
signation, and the dates when the violations occurred are state
The affidavit would have been in better form if the Relator had bee
charged with keeping a house of the character prohibited by th
ordinance. No greater particularity could be deemed required whe
the use of the house for the purposes of prostitution and assignatio
is the offence. We think the affidavit conveyed with sufficient cer
tainty the notice of the charge. Horr & Bemiss on Municipal Ord
nances, p. 145, Sec. 172; State vs. Mack, 41 An. 1081; State vs. Dur
bar, 43 An. 886.

The more serious complaint of the Relator is that she wa
sentenced without any proof, save of notice given by the Mayor t
remove from her premises. This furnishes the basis of the argumen
that Relator has been sentenced not for keeping an assignation house
but for non-compliance with the order of the mayor. Th
construction of the ordinance that authorizes sentence on mer
proof of the notice and non-compliance, the relator insist
makes the ordinance exceed the power conferred by the charter o
the council, and also brings the ordinance in plain conflict with th
constitutional guarantees of the rights of person and property.

The ordinance provides that whenever a house of prostitution o
assignation becomes dangerous to public morals from the manner
is conducted, or the character of the neighborhood, and the mayor
informed of it, that it shall be his duty to give notice to the occu
pant of the house to remove, and for the offence of keeping th
house and for each day's persistence in that use after receiving th
notice, the ordinance imposes a fine. Flynn's Digest, Art. 1081.
appears the relator in previous proceedings before the recorde
was fined, then brought the case before us on a *certiorari*, but th
record disclosed no basis for us to review the proceeding. She was agai

d, and that case was brought here by appeal, presenting no ground reversal under the limited jurisdiction we have on appeals in class of cases. From the subsequent sentence for twenty-two days ersistent use of the house for the forbidden purposes, the Relator s relief by the writ of *certiorari* bringing up the record now before The allegation in the petition is that the fines for twenty-two , that is five dollars for each day, were imposed on no proof of use, that no witness was offered to show any such use since the ce of the mayor, and as we understand the petition and argu- t the recorder declined to hear testimony there had been no such The sentences were imposed solely on proof of the notice n about two months before the sentence now under review was osed. Our examination of the record sent here under the *certi-* f exhibits no proof of any use since the notice, though there is offer in evidence of the record of the prosecution before the re- der on the previous occasion when the relator was fined. The then presents the question whether the fines in question can be osed on proof merely, of the mayor's notice, and whether the ator was not entitled to offer witnesses to show no prohibited use r the notice.

nder this ordinance the use of the house for the purposes speci- is the offence, not the failure to obey the mayor's notice. No can be imposed, it is true, without proof of the mayor's notice, it is equally true that the keeping of the house for the prohibited pose must be also proved. Were it otherwise the mayor's notice ld be conclusive of the offence. No such construction can be itted consistently with the protection the Constitution affords to rights of property. Constitution, Art. 6; Corporation of Minden Silverstein & Dittmer, 36 An. 913; State vs. Mack, 41 An. 1081. quite true that the use of the house for the purposes forbidden he ordinance once proved, is presumed to continue until dis- ved. But the difficulty in this case is that no proof whatever of use was administered and proof claimed to negative that use e the notice was excluded. The sentence without proof and the sal to hear relator's witnesses authorizes the relief claimed on present application. Constitution, Art. 90; Code of Practice, 897.

is therefore ordered, adjudged and decreed that the sentenec osing the fines of one hundred and ten dollars, the subject of this

litigation, be annulled and set aside, without prejudice to the ri
the city to seek their recovery in another prosecution to be
ducted in accordance with the views herein expressed, the co
these proceedings to be paid by respondents.

No. 12,700.

THE STATE OF LOUISIANA EX REL. JACKSON HEFFNER ET A
JUDGE OF THE FIRST JUDICIAL DISTRICT OF LOUISIANA.

Two questions are presented First, will the writ of *mandamus* lie in the
presented—that is to say, if issued would it operate as an invasion
judicial discretion vested in respondent judge? Second, is this executo
paying a small fine and serving a sentence of ten days in jail for conte
the authority of this court and of the lower court, in refusing to deliver
property of the succession, which he holds as an officer of the court, to
mitted to go free, and is the power of the court as for contempt exhau

Held First, that the *mandamus* will lie.

Second, that the power of the court as for contempt is not exhausted.

ON APPLICATION for a Writ of *Mandamus*.

Harrison & Aston, *Leonard & Randolph*, and *D. T. Lan*
Relators.

Respondent judge in *propria persona* (*Wise & Herndon*, and *So*
Wolf, of Counsel).

Submitted on briefs December 18, 1897.
Opinion handed down January 10, 1898.
Rehearing refused April 18, 1898.

The opinion of the court was delivered by

BLANCHARD, J. William Heffner died and left an estate.
were no forced heirs. What purported to be an olographic wi
admitted to probate. It devised the estate to certain collateral
to-wit: James Heffner and his children. James Heffner, the b
of the dead man, was named as executor without bond. He w
given the seizin. He qualified and in his capacity as executo
put in possession of the property. Other collateral heirs of the

of kindred (now relators herein) brought suit to annul the
non-compliance with the requirements of the law.
will was annulled. This left the estate to be inherited accord-
law. Jackson Heffner and others (relators) became entitled
of the estate. The annulling of the will vacated the execu-
.
re the final judgment on the will was had, the executor had
ed the succession assets and reduced its property to money.
as cited to account and the amount due the relators definitely
t nine thousand eight hundred and ninety-seven dollars and
-nine cents.
le was then taken on him to compel the delivery of this portion
succession assets.
rule was dismissed in the court below, but on appeal the
nt was reversed, this court holding it to be the case of an
or who, under judicial authority conferred by his letters, had
ed a large amount of property, which by reason of the avoid-
f the will should be turned over to the legal heirs.
case was remanded with directions to make the rule absolute
to order the defendant to deliver to the heirs the succession
ccruing to them"—naming the amount. Succession of Heff-
An. 1443.
judgment was the mandate of this court sent back to the
court for execution.
as entered up below and the order to deliver duly issued to
ecutor officially and personally. He refused or failed to obey
reupon a rule issued to show cause why he should not be
ed for contempt, which, upon trial, was made absolute, the
or, officially and personally, adjudged guilty of contempt and
nned to pay a fine of fifty dollars and to be imprisoned for ten

punishment was inflicted, but without avail. The executor
he fine and emerged from jail at the end of the ten days still
g and failing to deliver, and the order of the court remained
cuted.
reupon a second petition for rule was filed by relators setting
he contumacy of the executor notwithstanding further formal
d made upon him for compliance, and a second order was
ed requiring him to show cause why he should not be pun-

ished for contempt in still refusing to obey the judgment of court.

To this second rule he filed exceptions of *res judicata* and *autr convict*, and pleaded that the judgment on the first rule for conte which had been executed by payment of the fine and undergoing imprisonment directed, operated as an absolute bar to further ceedings against him for contempt for non-compliance with judgment of the court commanding delivery of the estate to heirs.

These exceptions were sustained and the second rule dismisse

This operated as a refusal on the part of the lower court to try proceedings on its merits.

Thereupon the application now under consideration was filed praying this court for its writ of *mandamus* to compel the l judge to reinstate and to try and determine the same accor to law.

The allegation is made that it is the ministerial duty of the l court to enforce the mandate of this court; that relators have legal right to the enforcement of the same; that, to that end, tempt proceedings may be taken as often as defendant, on demand, persists in his refusal of compliance; that the action of lower court in dismissing the second proceedings for contemp based on a construction of law palpably erroneous; that relators obtain relief by no other means, and that the refusal to proce this way is a denial of justice and deprives relators of the remedy adequate or available to meet the case.

The respondent judge answers that his judgment dismissing second rule for contempt was rendered in the exercise of his jud discretion and the same can not be reviewed by process of *ma mus;* and that he has complied with the mandate of this cou the Succession of Heffner, 49 An. 1448, and sought the executio the judgment by punishing the executor to the full extent of powers vested in his court.

He takes the position that the refusal to pay on the second de does not constitute a second and distinct offence; that as there been but one order issued by the court, there can be but one obedience of it; and that as this disobedience has already been ished to the full extent of the sentence authorized by law, the p of his court is exhausted.

questions are by these issues presented for our determination:
ill the writ of *mandamus* lie in the case as presented—that is
f issued, would it operate as an invasion of the judicial discre-
ted in respondent judge; second, is this executor, after pay-
all fine and serving a sentence of ten days in jail for con-
f the authority of this court and of the lower court in refus-
eliver up the property of the succession, to be permitted to
and is the power of the court as for contempt exhausted?
the first, a distinction is recognized between cases where it
nt by *mandamus* to control the decision of an inferior court
e merits of a cause, and cases where it has refused to go
merits of the action upon an erroneous construction of some
of law or of practice preliminary to the case upon its
And while the decision of the court upon the merits of the
ersy will not be controlled by *mandamus*, yet if it has erro-
decided some question of law or practice presented as a
ary objection, and upon such erroneous construction, has
to go into the merits of the case, *mandamus* will lie to com-
proceed. High on *Ex. Rem.* Sec. 151.
well settled that *mandamus* lies in all cases to compel an
court to proceed to the trial of a cause, and to set it in
where its refusal to proceed amounts to a denial of justice.
251; 34 An. 74, 1177; C. P. 830.
hat must be held to be an erroneous construction of a ques-
law and practice, the court *a qua*, in the instant case, dis-
the proceedings on exception. It was tantamount to a
to try on the merits a matter at issue, upon which depended
cution of a judgment of this court. The machinery of the
ecessary to such execution was stopped by the dismissal of
eedings. The order of *mandamus* now sought is necessary
hat machinery in motion again. Without it there would be a
r indefinite postponement of the only mode accessible and
e for the execution of the judgment directed by this court to
red in the succession of Heffner, and necessary for the just
ent thereof.
for this court which rendered the judgment to take cogni-
f the manner of its execution, when the proper manner of
g it is to be determined. C. P. 629.
ending application can not be viewed as an effort to *control*

the decision of the lower court upon the merits of the cause, l
plain case where the inferior court, upon an erroneous constru
of law and practice, refuses to take any action at all upon the m
of the proceedings presented, and where such refusal to ac
denial of justice. In such a case *mandamus* will lie to compe
court to reinstate the case and to proceed with its determina
and such order is not one that invades the judicial discretion o
lower judge. 34 An. 76, 1177; 41 An. 43; 20 An. 521; 6 R. 9
La. 369.

This view is strengthened by a consideration of the powers
ferred upon this court by Art. 90 of the Constitution.

As to the second question, which involves the powers of the
in proceedings as for contempt, it is well settled that disobedien
orders for the payment over of moneys, or the delivery of pro
by officers of the court, especially those holding in a fiduciary
city, are punishable by such proceedings. Rapalje on Conte
Secs. 15, 17, 130.

And which are commonly resorted to. *Ib.*, Sec. 35.

The refusal or neglect of a guardian, executor, administ
trustee, or receiver to account or deliver over property
ordered by the court, is a contempt for which he may be comm
C. P. 131; 36 An. 356; 21 An. 297; Rapalje, Secs. 33, 130; W
vs. Williams, 36 Miss. 331; Brown on Jurisdiction, p. 324 and
67 Iowa, 73; 69 N. Y. 536; 23 Blatch. 552; 27 Fed. Rep. 198;
Mass. 230; 51 Cal. 442; 55 Cal. 193.

The prevalent statutory and constitutional guarantees ag
imprisonment for debt are ordinarily held not to be infringed b
commitment to jail of such parties in contempt by reason of a
bedience of orders regarding the payment of money in their han
the delivery over of property. State *ex rel.* Audibert vs. Sl
47 An. 335; Encyclopedia of Pleadings and Practice, Vol. 4, p
citing 41 Ga. 466; 59 Ga. 523; 88 Ga. 361; 23 Minn. 411; 13
(Pa.) 430; 44 Pa. St. 247; 59 Wis. 24; 60 Mich. 167; 1 B
(Ind.) 166; 37 Mo. App. 562.

An executor ordered to deliver up succession property is not
considered a mere debtor, nor do the heirs of a succession
merely as creditors. Such was the ruling of this court in the su
sion of Heffner, 49 An. 1443.

wer of the court to punish for contempt is exercised for two
:

indicate its dignity for disrespect shown to it or its orders.
ompel the performance of some order or decree of the court
is in the power of the party to perform and which he refuses
Am. and Eng. Ency. of Law, Vol. 3, p. 797.

can make no difference that the party can not presently
the act commanded where it appears his incapacity arises
fault of his own, or where it is a case of non-performance,
of his acts wilfully done, or where the contempt consists
ecedent act, by which the accused rendered performance
e. *Ib.*, p. 784 (note); Wartman vs. Wartman, Taney, C.
apalje on Contempts, Sec. 17; 49 An. 1443.

general observations lead to the consideration of the case
ely in hand.

is executor is viewed by our law as an officer of the court
e denied. 38 An. 861; 49 An. 80.

d the property and funds of this succession under the man-
he court, and he was peculiarly subject to its orders with
to the same. 2 An. 87. Being an officer of the court, and
his possession of the property from the court in his capacity
or, he is in contempt of its authority in refusing or failing
der the same to the court, or upon its order. 36 An. 552.

that the court had authority to issue an order for the
of the property, which being disobeyed and the executor
for such disobedience, the authority of the court is at an
no further proceedings as for contempt can be taken upon
demand made on him to comply with the order and his
would put the court in a sad predicament indeed. It would
inge its dignity, lessen the respect it should always com-
nder its order to its own officers nugatory and impair its
s generally. See 31 An. 119.

it necessary before taking the second proceedings in con-
at the court should issue another order or render another
commanding delivery. It would be useless and futile to
to issue such orders or judgments. One such judgment and
nfficient, and the offence of the executor is *repeated* when,
punishment for contempt, a demand is made upon him and
refuses compliance. Separate convictions may be had

against the same party for commissions of distinct contempts c
ring in the same proceedings. Ency. of P. and P., Vol. 4, p. 8

Under Code of Practice, Art. 131, the courts of this State are
power to punish *all contempts* of their authority, limiting the fi
fifty dollars and imprisonment to ten days, "*for each offence of
kind.*"

And Art. 308 prescribes that if one against whom an injunct
directed violate the same or refuse to obey, he may be impri
for not exceeding ten days which sentence *may be repe
inflicted until the mandate of the court is obeyed.*

There is no conflict between these two expressions of the law
An. 945.

The words in the first article "for each offence of that kind,"
those of the second article, "which sentence may be repea
inflicted," etc., are interchangeable terms. Under the provisi
the first article, without the special direction of the second, pu
ment by imprisonment for violations of injunctions can be repea
inflicted until the order is obeyed. So, too, a fine may be im
for violating an injunction, under the terms of Art. 131, though
308, relating specially to injunctions, is silent on the subject. S
945. The two articles are laws in *pari materia* and to be cons
together. C. C. 17. There was no intention on the part of the
maker to draw a distinction between contempts in violati
injunctions and contempts in violating any other order of court

This court said in the Schoenhausen case, 47 An. 701:
penalty of ten days' imprisonment was fully authorized.
defendant has served his imprisonment of ten days. For
further violation of the preliminary or modified injunction, he
be punished *as the occasion arises.*"

So, in the instant case, the law justified the imprisonment o
days and the fine of fifty dollars inflicted on the executo
refusing to obey the order of the court. He paid the fine
suffered the imprisonment, but still refused to obey upon fu
demand made for compliance. Thereupon *occasion arose* for a
ond infliction of the sentence for contempt. It was "another of
of that kind," as contemplated by C. P. 131. As correctly obse
in the Schoenhausen case, "the law means punishment fo
offence at the outset, and punishment afterward for the repetit

If the first sentence of fine and imprisonment and the under

punishment thereof is to be the end of the matter, then indeed it be easy of accomplishment for dishonest representatives of sions, or minor heirs, to appropriate the estates or funds passo their hands, suffering but small inconvenience for their act iation. The law never contemplated this result.

are constrained to hold that it was upon an erroneous conon of a question of law and practice that respondent judge ed to go into the merits of the second contempt proceedings ted to him and dismissed the same.

therefore ordered that the writ of *mandamus* applied for be peremptory, that the petition and order for rule to show cause y the relators on October 9, 1897, in the Succession of William r, No. 4885 on the docket of the District Court of Caddo parreinstated, and that proceedings in trial and determination f on the merits be had according to law.

JUSTICE BREAUX—I dissent.

No. 12,774.

OF LOUISIANA EX REL. WILLIAM HENRY STUART VS. HON T. C. ELLIS, JUDGE, AND CELINA M. BURKHARDT.

e obtained a judgment of separation from bed and board, but did not apply alimony prior to the judgment.

dgment of separation from bed and board, proceeding by rule for alimony g an accessory to the principal demand is permissible.

is due during the marriage. The marriage ties are not dissolved by the ree of separation from bed and board.

APPLICATION for Writs of Prohibition and *Certiorari*.

. *Flynn* for Relator.

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eon Belden for Respondent.

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mitted on briefs March 21, 1898.

ion handed down April 4, 1898.

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still exist.
If no reco
rce at the e
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to find out if there will not be a change for the better, and
ly avoid the necessity of forever dissolving marriage ties
should never be dissolved, save when there is ample evidence
ne marriage, instead of being a blessing, is the reverse.

ing the twelve months of moral trial, an application by rule to
cause why alimony should not be paid may well be considered
idental to the suit in which was rendered the judgment for sep-
n from bed and board. The proceeding until the divorce is in
ter provisional, and may include a rule for alimony as needful
ry out the object of the law in allowing the separation from bed
oard.

conclusion being that the proceeding by rule was permissible,
s to a consideration of the next objection raised.

objection is founded upon the hypothesis that the plaintiff hap
ht whatever to alimony; after her demand had been granted
judgment of separation from bed and board entered, that all of
ghts to date had been passed upon. That now the allowance
nony would in effect amend the judgment which had been
red without granting alimony. It is clear in our judgment
the relation of husband and wife exist, after the demand of
tion from bed and board, and until the matrimonial ties are
d or a reconciliation had taken place, the right to alimony is
inuing right. It was not terminated, ended or destroyed by
dgment silent upon the subject. Plaintiff was entitled to
ate allowance for support and maintenance during the twelve
s.

have found no decision after some search bearing directly
he point now before us for determination.

n original proposition, without the assistance of any decision,
court, interpreting the articles of the Civil Code upon this
t, we arrived at the conclusion that alimony was allowable to
ff.

particular point not having been previously presented here,
mpared the articles of our Code on the subject of alimony and
that they correspond with those of the Code of France
hat subject.

Court of Cassation interpreting these articles determined cor-
as we think that it is not a new demand after judgment; that
t concluded by the judgment, but an accessory of the principal

demand. Fuzier and Hermann, Code Civil Annoté, Vol. 1, p. No. 62.

The commentators are positive in their comments.

In case of the separation from bed and board, says Baudry-Laca erie, p. 369, Vol. 1, in his work entitled "Droit Civil," a consi jurisprudence recognizes the right of alimony between the spo for the reason that the decree, unlike the decree of divorce, doe absolutely dissolve the marriage ties.

Under another heading of the same book, this jurist reaffirms the right, despite the decree of separation, remains to claim pension.

From Laurent, Vol. 3, p. 302 (Droit Civil) we translate: spouses separated from bed and board owe aid to each other du the marriage, and consequently until the decree of divorce is nounced.

We have not anywhere found different views expressed. Our v accord with the cited cases and the opinion of the illustrious Fr jurist. In consequence it only remains for us to affirm the judgu of the District Court.

It is therefore ordered, adjudged and decreed that the rule ni vacated and discharged and the demand of relator for prohib and *certiorari* rejected at relator's costs.

No. 12,746.

562 024

EDWARD WHALING VS. JOHN WELLS.

Action sounding in damages for malicious prosecution.

Dismissed by court below on exception of no cause of action, on the groun the ruling of the committing magistrate, remanding the accused, or pl him under bond, for trial before the District Court instead of discharging was evidence of *probable cause*, and this appearing from the petition i cluded recovery.

Reversed and remanded, the court holding that the commitment to appe trial is but *prima facie* evidence of *the existence* of probable cause.

APPEAL from the Civil District Court for the Parish of Orl *King, J.*

W. J. Waguespack for Plaintiff, Appellant.

Whitaker for Defendant, Appellee.

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nitted on briefs March 25, 1898.
ion handed down April 4, 1898.

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opinion of the court was delivered by

CHARD, J. This is an action for malicious prosecution. Dam-
e laid at ten thousand dollars.
substantial averments of the plaintiff are:
in March, 1896, defendant caused his prosecution on the
of breach of trust and embezzlement, with intent to cheat and
l, under Sec. 905 of the Revised Statutes.
the affidavit was made before the recorder's court of the city
Orleans, from which the writ of arrest issued.
he was brought before the recorder, sitting as a committing
rate, and was committed to appear before the Criminal Dis-
ourt of the parish of Orleans under a bond of five hundred
which he was unable, at first, to furnish and was lodged in
ish prison, where he remained five days when he was released,
meanwhile procured a bondsman.
subsequently, the District Attorney filed an information
him on the charge referred to, based upon the affidavit made
defendant.
he was tried before a jury on this information; the charge
ound to be frivolous, and the prosecuting officer himself
ed the jury to return a verdict of not guilty, which they did
leaving their seats.
the defendant knew the affidavit made against him (plaintiff)
se; that he had no probable cause for making same; and that
secution was wantonly wrongful, illegal and malicious, done
sole purpose of vexing, humiliating and injuring plaintiff.
ndant appeared and filed an exception of no cause of action,
vas sustained and the suit dismissed.
tiff appeals.
a familiar rule of practice that for the purpose of the
an exception of no cause of action, all the allegations of the
are taken as true.

We think the allegations of this petition disclose a cause of a

The trial judge did not state the grounds upon which he sus the exception, but we gather, from the briefs of counsel, that because of the action of the recorder in committing the accused fo instead of discharging him, and from this it was held that *pr* cause was shown, and this appearing from the petition, it pre recovery.

We do not think the allegation in the petition, that the Re committed the accused to appear before the Criminal Court, a cient showing of *probable cause* for the initiation of the prosec to justify the ruling that the complaint disclosed no cause of a

The commitment to appear for trial was *prima facie*, not clusive, evidence of probable cause. A. and E. Ency. of Law 14, p. 67.

It has frequently been held that the *discharge* of an accused son by a committing magistrate is *prima facie* evidence of the of probable cause and shifts the burden of proof on the defe sued for malicious prosecution. Brown vs. Vittur, 47 An. Bornholdt vs. Souillard, 36 An. 103; Plasson vs. Lottery Co., 3 116.

The same reasoning justifying the conclusion reached in cases sustains the converse of it, viz.: that *the commitment* b magistrate is but *prima facie* evidence of *the existence* of pro cause.

It is therefore ordered, adjudged and decreed that the judg appealed from be avoided and reversed, and that the cau remanded to the lower court to be proceeded with according t —costs of appeal to be taxed against defendant and appellee.

No. 12,733.

SUCCESSION OF MANUEL FERNANDEZ AND MRS. MARIA MATEA ROSA, WIDOW OF MANUEL FERNANDEZ—CONSOLIDATED.

The administrator of the wife's separate estate is without authority to hav munity property sold, particularly as it does not appear that it was for th pose of paying debts of the community

The settlement of the wife's estate (different from the husband's) does not l a settlement of the community; and therefore the executor of her es without warrant for assuming control of property held in community.

s had not been notified, and do not appear to have consented to the sale community interest inherited by them from their father's estate.

AL from the Civil District Court for the Parish of Orleans. *éard, J.*

B. Rosser, Jr., and *Mark R. Newhauser* for Dative Testa- Executor, Appellee.

Zengel for Mrs. Widow Antoinette Janvry, Defendant in ppellant.

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ed and submitted March 25, 1898.
on handed down April 4, 1898.

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pinion of the court was delivered by

UX, J. This was an appeal from a judgment rendered to Mrs. Antoinette Janvry to accept title of property adjudi- her.

lefendant in rule admits that she became the adjudicatee of perty, but she refuses to take the title tendered: because it is gal title.

bjection to the title is grounded on the fact that the prop- scribed in the application for the sale was owned, as to one- Widow Maria Matea de la Rosa, and the other half by the on of her predeceased husband, Manuel Fernandez. He (the d) died in 1876.

ccession was opened the same year, in the late Second Dis- urt. His widow became the executrix of his testament, and inventory taken.

emained in possession of this property; it was community y.

ied in 1896, intestate. Her succession was opened for settle-

quently, the successions were consolidated under an order of

eirs of the two successions are the same. In the petition to property, the testamentary executor of the estate of Mrs.

Maria M. de la Rosa alleged that in order to execute the provi
and bequests of her last will, it was necessary to sell the real e
belonging to the estates of Mrs. Maria Matea de la Rosa, an
property of the late Manuel Fernandez.

The property, was not sold to pay debts. The heirs of the
Manuel Fernandez are not before the court and were not cited.

From a judgment condemning the adjudicatee to accept the
tendered, the defendant in rule prosecutes this appeal. It is cle
our view that the consolidation of the estates did not have the
of vesting the executor as relates to the sale of the property
greater rights than he would have had without the consolidation

The succession of the husband, we have seen, had been op
many years prior to the death of the wife.

It was said at bar, in argument, that she was the usufructua
the community. At her death the usufruct came to an end. Fo
purpose of the sale of the property and the settlement of the suc
sion, it, the usufruct or possession of the late Widow Fernandez
not any more vest the executor with seizin than did the order
solidating the two estates. The heirs became the complete ow
of one-half of the property. The executor of the succession o
wife was without authority to divest them of their right as own
the property inherited by them from their father, who had died
years prior to their mother's death.

The succession of the father was separate from the successi
the mother. The executor of the latter was not by his lette
executorship entrusted with any other settlement than that of
Fernandez. The question of representation (*ex necessitate rei*)
not arise. The succession of the husband can be, and shoul
settled as a succession of itself. There is no necessity for a
settlement through the agency of the executor of the wife's e

It would be different if the executor represented the husb
estate; the husband is the head and the master of the commu

He has administration of its property, and controls its revenu

The wife, only has a residuary interest at the dissolution o
community. She owns no particular property of the comm
until payment of the debts. She may, if she chooses, at its d
lution, renounce it entirely. It is different with the administr
of the husband's succession. His estate is bound for the debts
tracted while he was master of the community.

community is a part of the mass of his succession. Lawson ipley, 17 La. 249.

court said in Succession of McLean, 12 An. 224:

is thus evident that the administration of the succession of leceased husband involves with it the administration of the unity."

in our view clear that executors, administrators and the creditors e community, who may represent creditors, have an interest in ng to the payment of debts of the community. But the suc- n of the wife is not involved as in case of the succession of usband with the administration of the community in which she o interest as an owner until the debts are all paid.

manifest that the administration of the husband's succession ves the administration of the community. Durham vs. William, , 32 An. 962. This view was affirmed in Berthelot vs. Fitch, . 391. A similar view was expressed in Succession of Lamm, . 312, in a carefully prepared opinion.

s rule on the other hand does not recognize that the executors dministrators of the wife's succession have the same authority. as been clearly decided that the settlement of the wife's suc- n does not involve the settlement of the community. The r received, as relates to the latter only, the most careful con- tion of this court in Verrier vs. Sheriff, 48 An. 724. The fol- g is an excerpt from the opinion: "This administration in- s the right of the wife's succession representative to take any ll necessary proceedings against the surviving husband for the tion of any indebtedness of a community to her separate ; but it does not confer upon him the power to make sale of rty of the community for that purpose in her succession."

power which this court decided did not exist, in the case which we here just quoted, is the power which the plaintiff in ere seeks to have recognized.

Hewes vs. Baxter, 46 An. 1284, we held that the community rty did not at its dissolution enter into the possession of the tor of the wife's succession.

cedents sustain the position that the settlement of the hus- 's succession involves the settlement of the community; and the executor, or the administrator of his estate for the purpose s settlement represents the community.

But precedent does not sustain the position that the settlemer the wife's succession involves the settlement of the community.

The decisions as relates to the latter case are clear enough leave no ground for question.

The differences as set forth in the decisions upon the subje owing to the fact that the interest and responsibility of the husb as head of the community, is greater in some respects than the wi and in consequence when it is dissolved by death the authorit the executor to represent the succession of the husband is re nized as greater, and as having broader scope than the authorit the executor of the wife's estate as relates to the community.

The affirmance of the judgment appealed from would give no to the property.

The heirs not being represented, and not being in any res parties, would remain unaffected by our decree.

It is therefore ordered, adjudged and decreed that the judgn appealed from is reversed, annulled and avoided; that plaint rule be dismissed.

38
51

No. 12,664.

E. K. CLOVER vs. JOE GOTTLIEB.

1. After being put *in mora* by written demand, followed by the filing of a su rescind, the offer to execute by the obligor of a contract comes too late.
2. Charges in defendant's answer of violation of the terms of the contract by p tiff, and basing thereon reconventional demand for rescission and for dam is inconsistent with offer to perform made previously.
3. One seeking relief through rescission of a contract must first offer to restor adversary to the situation he was in at the time the contract was entered

APPEAL from the Fifteenth Judicial District Court for the Pa of East Baton Rouge. *Brunot, J.*

J. A. Addison for Plaintiff, Appellant.

Thomas J. Kernan and *Saml. G. Laycock* for Defendant, Appel

Argued and submitted December 28, 1897.

n handed down January 24, 1898.
ring refused April 18, 1898.

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pinion of the court was delivered by

HARD, J. In April, 1896, plaintiff and defendant entered agreement, evidenced by an instrument under private e, by which the latter engaged to sell to the former a tract containing two hundred and twenty acres near the city of ouge, known as the "Howell Place."

rice stipulated was five thousand seven hundred and twenty Fourteen horses, to be taken at one thousand dollars, were livered to the seller. On March 1, 1897, there was to be a yment of seven hundred and fifty dollars, and another of dred dollars on January 1, 1898. The remainder of the price e paid in one, two, three, four and five years from January

ayer agreed to ship the horses (which were in Illinois) to the once, and in the event of his failure to meet the cash pay- seven hundred and fifty dollars on March 1, 1897, they (the were to be forfeited to the seller as liquidated damages for f contract.

stipulated that the buyer was not to interfere with the on the place during the current year 1896, but that he was the use of all other lands and timber not rented for the year d to have full possession by January 1, 1897.

er stipulation was "that the rent of the two hundred and acres for the year 1896 shall be paid to the said Gottlieb as ment on the purchase price."

greement to sell was to be effective until March 1, 1897, formal act of sale was to be executed, provided the buyer seven hundred and fifty dollars stipulated for on or before

this contract was made Gottlieb was not the owner of the he proposed to sell. Whether the buyer was aware of this oes not appear.

days later, on April 20, 1896, Gottlieb secured from the Barrow & Mercier, in writing, an agreement to sell to him,

or to any one he might indicate, the property which had been object of his previous agreement with plaintiff.

The agreement by Barrow & Mercier stipulated to sell "at time before March 1, 1897, for the sum of three thousand three dred dollars," of which seven hundred and fifty dollars shou paid in cash when the sale was formally consummated; the bal in one and two years. Should Gottlieb pay the seven hundred fifty dollars by March 1, 1897, he was to have the rents of the place 1896. He stipulated for the right of using the lands not rented 1896 and the timber thereon, and also that he was to have a com sion of five per cent. on the agreed price, whether buying for him or for another.

Neither of these agreements to sell and buy were registered in conveyance records. It does not appear that plaintiff was informed of the existence of the one executed by Barrow & Me to the defendant, and up to the time this litigation began there been no formal transfer of the title to the latter. It still stood in name of Barrow & Mercier.

Pursuant to the agreement between plaintiff and defendant a l horses were shipped to the latter, who received them in May, took possession and sold them.

On the 1st of January following, the time when full possessi the Howell place was to be given to plaintiff, he was not put in session, and, so far as the public records showed, defendant hi had at the time neither possession nor title.

Several times prior to the institution of this suit verbal de for possession was made by the plaintiff and his attorney defendant without avail, and then, on the 16th of January, 18 formal demand in writing for possession was made.

This was followed two days later by the present suit filed Jan 18, 1897. The next day defendant called with witnesses on pla and formally tendered possession and full compliance with the t of the agreement.

Plaintiff replied that it was too late; that the matter would to take its course in the courts.

While the suit had been filed the day before, it seems that se of citation had not actually been made upon defendant at the It was made later the same day.

When defendant tendered possession to plaintiff on Januar

he said nothing whatever to him in regard to the horses which been delivered by plaintiff; no claim was made at that time by dant that the delivery of horses was short or insufficient, and emand then or prior thereto was asserted to make good this age.

; until developed in the defence of this action was it insisted plaintiff's delivery of horses was not up to contract require-, and, therefore, was cause for non-compliance by defendant his obligati on to deliver possession of the place on January 1,

laintiff was deficient in his delivery of horses, he was not put fault by defendant in reference thereto as a condition prece-to the claiming of damages or rescission of the contract.

e shortage of one horse was accounted for by the fact that one phreys, claiming to act for defendant, traded in Illinois, before orses started southward, three of the Clover horses for two of er lot. Defendant admits that he raised no objection to this Humphreys when informed of it.

other horse died in transit. Plaintiff claims to have accounted s value to defendant in paying the freight on the shipment of s; that the freight bill was a charge against defendant, but that ly called upon defendant for its amount less the estimated value dead horse—he (plaintiff) paying that much of the freight bill lf.

fendant, on the other hand, insists that under the contract the nt on the horses was to be paid by plaintiff, and we are inclined nstrue the agreement that way.

en the horses reached Baton Rouge there was a contention to ffect that one horse was short still, and it was searched for, his appears to have been abandoned by defendant, who took ssion of the horses (thirteen head in all, counting two colts), them and sold them, and never thereafter applied to plaintiff ke good any supposed shortage as to number and quality of als delivered under the contract.

s being so, it does not lie in the mouth of defendant to assert, did in his testimony, that he did not receive this delivery of s as a discharge of plaintiff's contract obligation in regard to.

ving delivered the horses, and the same having been accepted

by defendant, plaintiff was not to be considered in default unle
failed to meet the payment of seven hundred and fifty dollars,
March 1, 1897. Should he fail to meet that payment, then, u
the terms of the agreement, defendant was to retain the hors
liquidated damages.

The next step under the contract, after delivery of the horse
plaintiff, was to be performed by defendant. He was to de
plaintiff full possession of the tract of land on January 1, 1897.
failed to do this and was put in default therefor, both by wr
demand and by the institution of this suit, seeking rescission of
contract because of non-execution of its stipulations by defend

After this demand and after the filing of the suit, the offe
execute by defendant came too late. 24 An. 236; 8 R. 161; 20
292; 38 An. 773; Toullier, Vol. 6, p. 253, No. 246; *Ib.*, No. 255.

Defendant meets the suit with charges of violation of the term
the contract by plaintiff, asks its rescission because thereof, and
damages.

This is, in effect, a reconventional demand.

The inconsistency of this pleading with the offer to perform m
just after the suit was filed is apparent.

Besides, a party seeking relief through rescission of a cont
must first offer to restore his adversary to the situation he was in be
the contract. 1 Hen. Dig., p. 1020, No. 19.

Defendant could not keep the property and the horses also.
latter were to be forfeited to him only in the event plaintiff faile
meet the payment due March 1, 1897, which time had not
come around.

Before it did, defendant, by failure to keep the engagement
possession of the land, produced a condition justifying this suit
rescission.

We hold that plaintiff's right to sue for rescission legally ex
at the time the suit was filed, and that he, not defendant, is ent
to the judgment of rescission.

This carries with it the right to have an accounting with defen
for the horses delivered to him.

The question arises, does defendant owe plaintiff the pric
which he agreed in the contract to take the horses (one thou
dollars), or does he owe him merely the horses themselves, or

as ascertained by what they were worth on the Baton Rouge
et?

think the ends of justice best subserved by holding the latter.
h parties ask abrogation of the contract *in toto*. We will grant
th as to the tract of land and as to the stipulated price of the
s.

is will leave defendant holding possession of eleven horses and
olts belonging to plaintiff.

t the horses having been disposed of, defendant must account
heir value.

find from the evidence that nine horses and two colts sold for
undred and sixty-five dollars. Two horses appeared to be still
nd when this suit was tried below. They may not be on hand
so we will estimate them at fifty dollars each, the least price
hich any of the horses sold.

thus find six hundred and sixty-five dollars as the value of the
s, from which must be deducted ninety-six dollars paid as
ht by defendant on the shipment of horses, held to be a charge
st plaintiff and not against defendant.

is will leave a balance of five hundred and sixty-nine dollars due
tiff. We do not think defendant entitled to credit for expenses
ed on account of the keep of the horses, etc. The use of the
s and interest on the money for which they were sold would set
ch claim, even were it a just one.

is therefore ordered, adjudged and decreed that the judgment
aled from be annulled, avoided and reversed, and it is now
red and decreed that there be judgment in favor of plaintiff
st defendant, canceling and rescinding the agreement to sell
in lands situated in the parish of East Baton Rouge, entered
by the parties hereto on April 15, 1896.

is further ordered and decreed that the plaintiff, E. K. Clover,
ave and recover from defendant, Joseph Gottlieb, the sum of
hundred and sixty-nine dollars, with five per cent. interest per
m thereon from the date of the filing of this suit in the lower
t, together with costs of both courts.

No. 12,809.

W. T. PEGUES, TAX COLLECTOR, VS. O. P. RAY.

50 574
52 606

1. A commercial drummer, or canvasser, who goes out on the road soliciting orders for his house, whether it be located in or out of the State, and who takes with him samples of the goods or wares his house deals in, is not a "traveling vendor" within the meaning of Sec. 13 of Act No. 150 of 1890.
2. A business house, located in one of the towns or cities of the State, taking out the necessary licenses there, may send its drummers or canvassers out, with samples, to take orders in other towns and parishes without becoming subject to the payment of a State, parish or municipal license in such other towns and parishes.
3. The negotiation here of sales of goods which are in another State for the purpose of their introduction in this State is interstate commerce.

APPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

J. W. Parsons (*Charles Wheaton Elam* of Counsel) for Plaintiff, Appellee.

Wise & Herndon for Defendant, Appellant.

Argued and submitted May 17, 1898.
Opinion handed down June 13, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The Wrought Iron Range Company, a corporation domiciled in the city of St. Louis, Missouri, is engaged in the business of the manufacture and sale of cooking stoves and ranges.

It sent agents to Shreveport, Louisiana, engaged a warehouse or place of business there, and shipped hither in carload lots its wares.

The ranges thus consigned to the Shreveport house were shipped in original packages, remained in such packages, and as sales were effected or orders received for goods they were delivered in the original packages to the purchasers.

A State license for the occupation of retail dealer in stoves and ranges was taken out at Shreveport.

The company sold goods at retail in the house at Shreveport and put drummers in the field to canvass the parishes of that section of the State.

ndant herein, O. P. Ray, was sent to De Soto parish and
him were several canvassers, who were dispatched through
ish to solicit orders. As orders were taken they were sent in
at Mansfield, the county seat of the parish, who forwarded
ne to R. F. Dixon, the general manager of the company at
port, and he would fill the orders by shipping the goods in the
packages to Ray at Mansfield, and on their receipt Ray
load the stoves, without breaking the packages, on his
wagons and deliver the same to the parties giving the

nd the drummers under him were in the parish temporarily

drummers, or soliciting agents, each used a wagon with a
nd its attachments therein as an exhibit or sample of the kind
lity of goods they were drumming for. No stoves were sold
e wagons of the canvassers.

took orders only for subsequent delivery by other parties in
loy of the company.

rge stock of the ranges was kept in the warehouse at Shreve-
t new supplies were ordered by Dixon from the manufactory
ouis as needed.

usiness was started at Shreveport in 1897. Ray and the
ers under him began soliciting orders in De Soto parish in
y, 1898, and by the twentieth of the month thirty-four orders
n taken.

ax collector of De Soto parish demanded of Ray the pay-
a license tax and took the present proceeding to enforce its
t.

proceeding is summary in character under the provisions of
of Act No. 150 of 1890, which authorizes action by rule to
ause within five days why the license claimed should not be
c.

petition of the tax collector, mover in rule, sets forth that
endant is a traveling vendor of stoves and ranges, selling and
ng his wares throughout the parish as agent for the Wrought
ange Company of St. Louis, Missouri, and that as such he
license of two hundred dollars to the State and parish, which
n demanded and refused. He asks judgment making the

rule absolute and condemning defendant to pay the license penalties, etc.

The statute under which the tax collector proceeds is Sec. Act No. 150 of 1890, and is as follows:

"That all traveling vendors of stoves, lightning rods and shall pay a license annually of two hundred dollars in each pa the State."

Defendant resists the payment of this license on the groun that he is the agent and representative of the Wrought Iron Company, which is authorized to conduct a mercantile busin the city of Shreveport; and, if this defence be not good, (2) th attempt to impose this tax upon him is an interference with state commerce and repugnant to the third paragraph o eighth Section of Art. 1 of the Constitution of the United Stat

The trial judge held that defendant and the canvassers und are peddlers, and not merchants in the ordinary sense of the that they are "traveling vendors," within the meaning of the ute, notwithstanding the warehouse, or place of business, or of supplies at Shreveport; and that having such establishment State, their goods, when shipped here, become liable to the ta of the State.

From a judgment against him defendant prosecutes this appe

A commercial drummer, or canvasser, who goes out on the soliciting orders for his house, whether it be located in or out the State, and who takes with him samples of the goods or wa house deals in, is not a "traveling vendor" within the mean the statute quoted.

"Traveling vendor" is synonymous with "peddler." A t ing vendor is a peddler on an enlarged scale. The term see convey that idea. Nevertheless he is a peddler because he c wares which he sells and delivers at the same time, going from to place for the purpose.

Webster's dictionary defines a peddler as "a traveling t one who carries about small commodities on his back or in a c wagon and sells them."

Bouvier's Law Dictionary says:

"A peddler is a person who travels about the country with chandise for the purpose of selling it."

And Anderson's Dictionary of Law declares him to be "a p

vels from place to place and carries about with him on horse- in a vehicle articles of merchandise for sale."

veling vendor, then, is one who carries about with him the of merchandise which he sells. That is to say, the identical ndise he sells he has with him and delivers at the time of sale. ocation is quite different from that of the drummer, who car- samples of his wares as exhibits, and takes orders for the elivery of merchandise of their kind and quality, or of simi- and quality.

tatute under consideration imposes no license on the drum- h his samples taking orders, while it does on the traveling of certain kinds of goods.

ws are to be construed strictly. Defendant and the can- under his orders were all employees of the Wrought Iron Company. This company was the vendor, the parties to its salesmen. They took the orders and transmitted the the company, who shipped the goods to fill the orders. In g orders they did not carry about with them the goods sold. The evidence is the reverse. It is true, in two s orders were taken for ranges where delivery was made on e day. But this is explained by defendant's statement, that had previously taken several orders for ranges, which he ant) had ordered from the Shreveport house to fill, but two parties were, on inquiry, found to be irresponsible, and, in ence, delivery to them was refused, and having the two n hand at Mansfield, they were delivered immediately to two arties, whose orders were substituted for those declined. even in these instances, the drummers who took the orders have the ranges with them, and the delivery was made parties. In all the other cases of orders taken, a period of ys for delivery was stipulated for, though, as a matter the delivery was made much sooner, for the distance is not Shreveport, where the stoves were in stock, and the traine o and fro each day.

oes the fact that because defendant, as agent of the selling , undertook to deliver the stoves in his wagons at the f the purchasers necessarily bring him within the definition veling vendor." The facts, as disclosed by the evidence, do e out that kind of a case.

The crucial facts are, the orders were taken by the drumme merely had samples of the goods sold, these orders were fille the Shreveport house, and the goods were shipped to the d Mansfield. From there they were, pursuant to agreement ported by defendant's or the company's wagons to the place nated.

It can not be said, under these circumstances, that the rang incorporated into the general mass of property in the pa De Soto prior to their delivery, so as to make them subject t tion there in the hands of the company's agents.

They only became so incorporated after delivery to the parti chasing. See McClellan, Tax Collector, vs. Pettigrew, 44 La. A

It may be that the stock of these goods kept at Shreveport incorporated in the general mass of property of that pari became subject to taxation there. But that can not avail p who is tax collector of another parish. A tax was imposed at S port, a State license to do business was taken out there, a presumption is that the company's stock of goods went assessment rolls there for ordinary *ad valorem* taxation.

A business house located at the city of Shreveport, taking necessary licenses there, may send its drummers and canvass with samples to take orders in other towns and parishes becoming subject to the payment of a State, parish or mu license in such other towns and parishes. If it were otherw enterprising practice of sending drummers out from the larg would be broken up, thousands of persons thrown out of e ment and trade, and commerce greatly impeded.

If it be true, as intimated by our learned brother of the cour this house at Shreveport was only a warehouse for the sto goods, and its existence and maintenance there did not ma company, and defendant, its employee, merchants in the or sense of the word, then must these goods, kept in the original ages, be held objects of interstate commerce in the strictest s that term, stopping merely at Shreveport on their way to a d destination contracted for by persons engaged in introducing State articles of goods manufactured in another State.

The negotiation here of sales of goods which are in anothe for the purpose of their introduction in this State is interstat merce. And this court said, through Mr. Justice Watkins,

Hardware Company vs. Sheriff, 39 La. An. 858: "If the per-
ught to be taxed, or of whom a State license is required, be
ho is merely passing through the State, or one coming into it
e temporary purpose of selling by sample goods to be imported
another State, or if the goods, the sale of which is thus nego-
, are imported into the State from another State and not yet
e a part of the mass of property therein, neither the person nor
rty have become subjected to the taxing power of the State,
y State law imposing such a license tax is repugnant to the
l Constitution and void."

principle thus announced is sustained in a long line of decis-
y the Supreme Court of the United States, beginning with the
and leading case of Brown vs. Maryland, 12 Wheat. 419, where
luminously stated by Chief Justice Marshall himself, and ex-
g down to Brennan vs. Titusville, 153 U. S. 289, among which
ons should be especially noted that of Robbins vs. Shelby
y Taxing District, 120 U. S. 489.

conclusion is defendant is not subject to the license tax sought
mposed, and, accordingly, it is ordered, adjudged and decreed
e judgment appealed from be annulled, avoided and reversed
aintiff's demand be rejected at his costs in both courts.

No. 12,777.

WILLIAM DREWS ET ALS. VS. FRANK B. WILLIAMS.

g a Member of a Partnership.—The injunction against a partner of a com-
cial firm had the effect of enjoining the partnership.

tnership, though not made a party defendant, save to the extent that the
ner enjoined may have represented the firm, had a right of action to
ver damages occasioned by the injunction.

tion.—The date the injunction was sued out is not the date from which
cription of claims for damages caused by continuing acts begins to run
prescription begins to run from the time the damage was committed by
ontinuing acts, and not from the date of the injunction.

Merits—Costs of "Float" of Saw-logs and Cost of "Pull-boating."—The differ-
in the costs of floating "saw-logs" in the swamp in shallow water and
ll-boating" them was inconsiderable. The amount was not shown with
degree of certainty.

ndered—Damages therefor.—The sap-wood of a tree circled and deadened
value after a time. The injunction prevented their removal after they
been deadened, and in consequence, after years, caused loss in value.
sap rot is deducted in commerce.

After having considered the items of damages, the court reduced by one-h amount allowed by the judgment of the District Court.

APPEAL from the Twenty-fourth Judicial District Court f Parish of St. Mary. *Allen, J.*

Edward Simon and *Branch K. Miller* for Plaintiffs, Appellan

D. Caffery & Son for Defendant, Appellee.

Argued and submitted May 3, 1898.
Opinion handed down May 16, 1898.
Rehearing refused June 28, 1898.

The opinion of the court was delivered by

BREAUX, J. Plaintiffs sued the defendant to recover da growing out of an injunction which was dissolved on the groun it had been illegally granted on defendant's application.

The defendant Williams, in March, 1893, brought suit again plaintiff, Gus Drews, in the District Court for the parish of St. claiming swamp lands described in his petition. Drews recon and obtained a recognition of his title as owner of the land.

About the time that Williams brought suit in St. Mary pari these lands, he obtained an injunction from the District of Assumption, enjoining Gus Drews and his employees from tre ing upon the lands of which he claimed ownership. These were situated in Assumption. Gus Drews was a resident parish of St. Mary, where he was sued. Williams allowe injunction to remain in force some time after it had been d that he was not the owner of the lands.

Drews, in May, 1896, some time after he had obtained a jud in the parish of St. Mary, recognizing his title, proceeded cont torily with defendant Williams, and obtained a judgment diss the injunction and dismissing the suit brought in the pa Assumption.

The suit now before us for decision was brought by the comm firm of Drews & Son, of which William Drews and Gus Drew

embers, against Williams, by whom Gus Drews, the owner of nds, had been enjoined as before stated. It appears that m Drews owned a saw-mill, and that Gus Drews supplied the vith saw-logs. The operations in the swamps (of which Gus was the owner) and at the mill was carried on for the com- benefit of the partners. They were under an agreement en father and son; partners in so far as related to the trees on nd.

the purpose of supplying the mill (in accordance with their ct of partnership) with saw-logs, Gus Drews had made provi- cut down and remove a number of trees from the swamps mill of one of the partners (William Drews), operated as stated.

was enjoined, we have just stated, from cutting down and ing the trees, and to that extent the partnership was deprived atever profit might have been made if Gus Drews, one of the rs, had not been enjoined.

his defence to the demand for damges growing out of the tion suit the defendant, Williams, pleaded the exception of no of action, and in the alternative he pleaded a general denial. defendant also pleaded the prescription of one year.

upport of his exception of no cause of action counsel urged he defendant in the injunction suit was Gus Drews, and that ff, William Drews & Son, a partnership, is a body distinct from embers of the firm; that Gus Drews alone had been enjoined, at it was incumbent upon him, and not the partnership of m Drews & Son, of which Gus Drews was a member, to comply he injunction.

upport of the second ground of defence (the plea of prescrip- he contended that the prescription began to run from the time he defendant was prevented from cutting and removing his r, if not from that time, from December 2, 1895, the date the tion was dissolved by the effect of the judgment rendered in of Drews against Williams, recognizing the former as the of the land from which he had sought to remove trees when ed as before stated.

ing to a statement of the facts on the merits of the case it rs that a number of cypress trees that Drews & Son intended and float on the land of Gus Drews had been deadened.

The plaintiff alleges, substantially, that there was a float in 1893; and that they would, had they not been prevented by the injunction, have that year floated a large number of trees; that the cost of floating is one dollar and twenty-five cents a thousand, and even less, while the cost of "pull-boating," a means of getting saw-logs when there is no float, is four dollars a thousand. The evidence is conflicting; the witnesses disagree in their statements—to float timber in four and five feet of water costs, all say, about one dollar and twenty-five cents. In shallow water it costs much more. Some testify that it costs even as much as three dollars a thousand. On the other hand the "pull-boating" work may vary materially. Some witnesses say it costs as much as four dollars and fifty cents a thousand, and others less than three dollars a thousand.

It appears that during the time that the injunction was being litigated, these trees, because of the rotting of the sap, caused by the "deadening," had lost value, which plaintiff claimed amounted to six hundred dollars. The evidence disclosed that about four hundred trees were "deadened" in January, February and March of the year 1893. That timber "deadened" when the sap is up in winter will resist sap rotting better than when the sap is down in the spring and summer, that is, when it is below the circular incision made to kill the tree.

In the former case the evidence is conflicting; one and two years was the time fixed within which the tree will not begin to sap rot; in the latter case three and four years. The amount deducted for sap rot varies; the largest deducted being, it is said, one quarter, and even a third of the value of the trees. In addition plaintiffs aver that before the injunction was issued plaintiffs made "trails," pathways and other preparations for the expected removal of the timber. That the injunction had caused this work to be useless, constituting, plaintiff contends, a six hundred dollar item of damages. Another item claimed, in amount five hundred dollars, was for camps established in the swamps where it was proposed to work, and a "pull-boat" taken to the place, the use of which was prevented by the injunction. Other items of damages were claimed, amounting in all to six thousand six hundred and seventy-five dollars.

The judgment of the District Court overruled the exceptions; rejected all of plaintiff's demands, save the items constituting damages to the amount of six hundred dollars.

From this judgment the defendant appealed

PLEA OF NO CAUSE OF ACTION.

The exception of no cause of action covers the position set forth the defendant that plaintiff here is a different person in law from as Drews, defendant in the injunction, and that the partnership d no right of action for damages, if any grew out of the suit enining Gus Drews, and which did not enjoin the partnership.

It is true as asserted by the defendant that in his suit, in which he Assumption parish enjoined Gus Drews from removing trees, he d not in name enjoin the partnership. None the less, in our dgment, his injunction must have been depended upon to preent the defendant in the injunction suit and his firm from cutting own and removing the timber from the lands he claimed as his, nd upon which he asserted, in his suits against Gus Drews, that he Drews was trespassing.

It can not be denied, if the defendant Drews in the injunction had ttempted to violate the injunction, plaintiff Williams would have ad the right to have him brought up before the court for contempt, nd had he urged in his defence that he was not a trespasser and was not in contempt because there was a partnership growing out of an agreement between him and his son, we do not think that the court would have sustained the plea. We think he would have been considered in contempt personally and as a partner.

The plaintiff in injunction and the defendant here is not in a better position. To the end of minimizing the damages he can not sustain a position which the defendant in the injunction suit would not have been able to sustain. The defence here has not more grounds than would have had Drews in answer to proceedings for contempt had he violated the injunction.

In our view the rights and liabilities of the members of the plaintiff commercial partnership were the same as the rights and liabilities of the partnership in matter of the trespass alleged. The injunction addressed to one of the partners had the effect of enjoining the partnership. If it had the effect of enjoining one of the members of the commercial partnership it necessarily enjoined both. The decisions to which our attention was invited do not establish a rule applying in every case involving partnership rights and liabilities. We are not of opinion that always and in every case the firm a is legal entity, separate and distinct from its members as contended by the defendant.

From Lindley on Partnerships, American Edition, p. 6, we q
"With partnerships the case is otherwise; the members of the
not form a collective whole, distinct from the individuals comp
it; nor are they collectively endowed with any capacity of acq
rights or incurring obligations. The rights and liabilities
partnership are the rights and liabilities of the partners, an
enforceable by and against them individually. *Si quid so
debetur singulis debetur et quod debet societas singuli debent.*"

In cases such as the one before us, we think that the righ
liabilities of the partner enjoined involved the right and liabili
the firm. It follows, if the firm be damaged by the injunctio
firm had a right of action. "The violation of the spirit, thou
strict letter of the injunction may not have been disobeyed, is
regard of the injunction." High on Injunction, Sec. 1444.

This brings us to the

PLEA OF PRESCRIPTION.

The action is direct for the alleged injury, and is not an acti
the injunction bond. The question relates to the prescription
year. The action was brought for an alleged *quasi*-offence res
in injury. The time when the prescription commenced to run
controverted question here. We have seen that the writ was
in March, 1893.

The defendant in injunction was continually prevented
removing the trees from the time it was issued until it was diss
In our opinion he is entitled to damages for deterioration o
value of the trees circled and deadened. This damage to the
has no date during the injunction from which to determine pre
tion should run.

If there was injury to the trees it increased as time el
There were other losses incurred of a continuing nature. The
tiff had established lumbermen's camps, which he lost becaus
hibited from removing them. It is not shown when the
became known. As we take it, they were on the grounds wh
injunction was issued, and were not on the grounds when the i
tion was dissolved. It devolved on the defendant, by whom
plea of prescription was interposed, to show when the cam
destroyed or lost in order to sustain his plea. Prescriptio
from the day the damage was sustained (C. C. 3502), but the p

rove that the damages were incurred the year preceding the tion of the suit. De Lizardi vs. The New Orleans Canal and g Company, 25 An. 416

writ was dissolved only in May, 1896. Prior to that time ff in injunction took no steps to have it dissolved. The fact e petitory action had been decided in favor of the defendant reconventional demand did not render it less imperative on rt of plaintiff in injunction to discontinue his injunction suit have the injunction dismissed. He had invoked the machinery ice to maintain a right and possession; it was for him to y abandon the proceeding and not for the defendant in injunc- assume that he was no longer commanded not to cut and e the trees.

take up the merits for determination.

advantages of a "float" is made apparent, it is true, but it is ade evident that during the high water season of 1893, the " was ample enough to have been much less expensive than boating" the saw-logs. The difference in costs between the not established with certainty. Moreover, the loss incurred ntiff was not shown. It may be that the delay resulted in a instead of an injury, but be that as it may, the injury, if vas injury, we infer from the record, was not considerable. resulted in delay without injury.

second item of damages claimed was caused, it was alleged, "sap-rotting" of the trees which had been deadened or in expectation of a "float."

evidence discloses that trees circled in winter resist the decay than those circled in summer. The former resist the decay r four years, the latter only a year or two, it appears.

trees of plaintiff were deadened in January, February and In the latter month the sap (*sevre*) is already active in its nents. If the sap-wood (*aubier* in French) be severed at me (March) it stands to reason that the sap-wood will decay arlier date than in winter when the tree is not elaborating its d nature is at rest. We are not informed of the probable r of trees deadened in any particular month. The evidence es that usually one-fourth and sometimes one-third of the of the tree is deducted after the sap has rotted or decayed.

prescription pleaded does not apply to the whole claim. Trees

that resisted the sap-rot four years were not injured more than year prior to the institution of defendant's suit.

The next item was for cutting roads and trailing. They, the and trails, it appears, were not completely destroyed and can b stored at no great cost. We have also considered the other ite damages. Plaintiffs have met with some damage, nothing as pared with the amount claimed and not as much as allowed b learned brother of the District Court.

We think the sum of three hundred dollars is compensation en for all damages.

It is therefore ordered, adjudged and decreed that the amou the judgment appealed from be amended by reducing the amou the judgment from six hundred dollars to three hundred dollars. amended the judgment appealed from is affirmed at appellee's c

ON APPLICATION FOR A REHEARING.

Appellants in their application for a rehearing aver that the absence of any appeal by the defendant and of a prayer here fo amendment of the judgment.

Our decision having reduced the amount of the judgment o District Court, we sought (after the application for a rehearing been filed) for an answer by appellee praying for an amendme the judgment. We found no answer.

We, as relates to an appeal by defendant, found a bond of ap duly signed, but it is not supported by an order of appeal.

A bond of appeal without an order of appeal can not be of effect.

This being the case, we are constrained to change to some ex the conclusion at which we arrived in our original opinion.

The law in this particular is controlling. No amendment re ing the amount of the judgment is permissible.

This is so clear that the amendment can be made without gra more than a *pro forma* rehearing.

The amount involved is small and the question plain.

It is therefore ordered, adjudged and decreed that our ori decree be amended, and that the amount now allowed is six dred dollars with interest, and that the judgment of the Di Court is in every respect affirmed. And that all costs of appe paid by appellants; in every other particular the rehearing ap fer by appellants is refused.

No. 12,724.

50	587
e106	78
50	587
113	362
50	587
e123	525

LLEN M. BRASHEAR VS. THE ALEXANDRIA COOPERAGE COMPANY, LIMITED; OPPOSITIONS TO RECEIVER'S ACCOUNT.

hen there is no written contract for the wages of laborers or with those who repair or furnish materials, claiming privileges on immovables for such wages, repairs or materials, the registry of such privileges must be made within the period fixed for registry computed from the dates when the wages become due, the repairs completed, or when the materials are furnished. Constitution, Art. 176; Civil Code, Arts. 3186, 3249, 3272; R. S., Sec. 3093; 27 An. 243.

ortgages, in the usual course for cash advanced the debtor, are not within the scope of our law, presuming the fraudulent preference from the mortgage granted within three months preceding the debtor's insolvency. C. C. 1981; Revised Statutes, 1808; 37 An. 595.

he director claiming under a mortgage in his favor by the corporation, can not compete in the distribution of the proceeds of the mortgaged property with the corporate creditor to whom on the same date the mortgage note is delivered to the director the directors authorize the mortgage on which the corporate creditor advances his money to the corporation. 47 An. 1487; Taylor on Corporations, Sec. 759.

f the director can not enforce to the prejudice of the corporate creditors the mortgage in his favor cy corporation, neither can the transferee.

APPEAL from the Tenth Judicial District Court for the Parish of Rapides. *Hunter, J.*

Robert P. Hunter and *H. H. White* for Receiver, Appellee.

John C. Blackman for A. M. Brashear, Opponent, Appellee.

John C. Ryan for Samuel Warshauer, Opponent, Appellant.

Julius F. Ariail for Lone Pine Saw-mill, Opponent, Appellant.

Andrews & Hakenyos for First National Bank of Alexandria, Opponent, Appellant.

Argued and submitted February 9, 1898.
Opinion handed down March 21, 1898.
Rehearing refused May 2, 1898.

The opinion of the court was delivered by.

MILLER, J. This appeal is by creditors of the defendant cor tion, opponents, some of them to the account filed by the recei the corporation, and by others placed on the account complain the judgment of homologation.

It appears from the record that the defendant corporation m mortgage on its property to raise money and provide for its The mortgage notes were delivered to the directors, except transferred for cash, furnished by the transferee, and some o notes given to the directors some were transferred by them. S quently, the corporation closed its factory, due to pecuniary em rassment, and on the 12th of April went into the hands of a rec Its property was sold, and in due course of administration he fil account. On that account law charges, amounting to six hu and nineteen dollars, are ranked first, and to these there is no tention. Next in order of payment the receiver places labor cl *i. e.*, of laborers working on the factory; then creditors who nished materials for such repairs or who repaired portions o machinery; and the account then ranks the holders of all the gage notes as entitled to share the residue of the fund in the of the receiver. The oppositions are to the claims of the labo the furnishers of materials for repairs, and to the creditors cla amounts due for such repairs, and the privilege accorded them o account is denied, on the ground the claims were not recorded period designated by law. The oppositions seek to exclude from ment all the mortgage notes, on the ground they were given directors, and void, whether held by them or transferred. The cre who furnished money for one of the mortgage notes is opposed, o ground of the alleged unlawful preference given him within months of the alleged insolvency of the corporation, and he, in opposes the distribution to the holders of any of the notes giv the directors; finally, there is an opposition by a creditor left o account, for the recognition of his debt and denying the prefe claimed of payment of certain judgments duly recorded pa directors under payments by them with subrogation to the rig the judgment creditors.

The judgment of the lower court maintained the privileges o laborers, that for repairs and the claims of the furnishers of rial men and it maintained the mortgages asserted for all the

gnized the debt of the opposing creditor left off the account, enied him any preference, and in other respects maintained count as filed.

appeals are by the note holder who advanced the money to rporation on the faith of the note and mortgage; by other nolders including the directors, and by the creditor claiming ition of his debt.

law requires all privileges on immovables to be recorded. recorded within the prescribed period, it is declared, they revious mortgages. This period is seven days from the date contract or private writing evidencing the debt, or affidavit debt when there is no writing. Const., Art. 176; Civil Code, 186; Acts 1877, p. 59. In the case of laborers engaged in ng machinery, or other employments requiring the services class, there is not usually any writing evidencing their claims. ls against the letter and policy of our law that such privileges be of indefinite duration. The courts must give that reason- onstruction to the registry of privileges on immovables as will the purpose of the Constitution and laws without imposing essary or burdensome conditions on the creditor. The date the wages of the laborer becomes due, entitled to a privilege immovable, easily determinable by the mode of payment by ek, month or day; and the date when repairs are completed erials furnished when privileges on immovables are asserted ch repair or supplies, in our view, are the dates from which ayment is to be computed for registry of such privileges. , Art. 176; C. C., Arts. 3274, 3186; Acts 1877, p. 59; R. S. City of New Orleans vs. Stafford, 27 An. 423.

right of a director to acquire mortgages against the corpora- as been the subject of discussion in other courts. We are not ed, in this case, to deal with exceptions. The general rule is t the competition of the director as a mortgage creditor of the ation with the creditors of the corporation. The rule has its cations, but is based on the fiduciary relation of the director corporation, and on that relation he stands to creditors. We casion to apply this exclusion in 47 An. 1481, Cahill vs. Slaugh- se Co., Ltd. We have in this record the proof that on the late, December 21, 1865, six notes are executed by the corpora- all delivered to the directors, except one issued to D. M.

Brashear for cash advanced by him to the corporation on the f
the note and mortgage. It seems to us, on obvious justice, no
tor can participate in the proceeds of the mortgaged propert
the creditor thus advancing his money. Taylor on Corpor
Sec. 759; Cahill vs. People's Slaughterhouse Co., Ltd., 47 An

The mortgage of Brashear is opposed as a fraudulent prefe
and the fraud, it is urged, is to be presumed because the co
closed its factory and must be deemed to have been insolvent
7th of March, 189-, the mortgage having been executed
the preceding three months. We find no occasion to det
whether the alleged actual insolvency of a corporation is
deemed the equivalent of the insolvency of an individual re
to in the Code, and understood to mean the cession of his pro
R. S., Sec. 1808; Bauduc vs. His Creditors, 4 La. 246; Seix
Citizens Bank, 38 An. 424; State National Bank vs. New O
Brewing Association, 49 An. 934. It is quite clear that the tr
tion between Brashear and the corporation was not a prefe
within the prohibition of the law. The law protects all mor
given, as this was, in the usual course, for money advanced
creditor. Civil Code, Art. 1966; R. S., Sec. 1808; Black vs.
ardson, 37 An. 595. In our opinion, the creditor is entitled t
for payment in preference to any demand on the notes gi
directors and next after privileged debts.

Two of the notes issued to the directors are held by trans
It is claimed they are entitled to the mortgages whatever the
arising from the fact the mortgages were to directors. The g
rule is the mortgage vicious in its origin remains so although
ferred. We find no occasion to deal with exceptions to th
The corporation as we read the record had no part in transf
the notes. If as we hold, the mortgage by the corporation in
of its directors can not be enforced to the prejudice of the cr
of the corporation, in our opinion the transferee of the di
stands in no better position. The rule of the commercial la
protects the *bona fide* holder for value of commercial paper do
extend its protection to mortgages.

The record shows two judgments against the corporation re
as mortgages and paid under subrogations by the directors.
not appreciate that the principle restraining the dealing betwe
corporations and the director, by which he claims to acquire

ences over other creditors, has the least application to deny his right of subrogation to the right of the corporate creditor whose debt is paid by the director.

The record does not give us the basis on which we can adjust the rights of the parties. For that purpose with the determination of the questions as herein announced we will remand the case.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed; that the receiver file his account, distributing the funds in his hands to the payment first to the law charges as ranked on the account before us; next to labor claims and debt for materials furnished and repair to the factory, if recorded within the period herein designated, then to A. M. Brashear the amount of his mortgage debt, the residue to the directors for amount of the judgments paid by them, and finally any surplus to go to ordinary creditors and that the appellees pay costs.

No. 12,734.

CITY OF NEW ORLEANS VS. JOSEPH L. LE BOURGEOIS ET ALS.

The only judgment that can be rendered against the plaintiff absent when the case is called for trial, unless there is a reconventional demand, is one of nonsuit. C. P., Arts. 536, 491; 3 An. 660; 4 An. 165; 36 An. 288.

If the reconventional demand is filed after the term begins, and on the day fixed for trial the plaintiff being absent, he should be notified, especially as under the rules of the court when issue is joined after the term begins the adverse party is entitled to notice; the spirit of the rule, at least, and obvious justice requires notice to an absent plaintiff of the issue made on the very day of trial in plaintiff's absence changing the character of the action.

No such notice being given, and the cause tried and judgment given against the absent plaintiff on such changed issue, there is the basis to annul the judgment and reinstate the case for trial. C. P. 607; 6 R. 123; 3 An. 646.

APPEAL from the Twenty-first Judicial District Court for the Parish of St. John the Baptist. *Rost, J.*

J. F. Pierson for Plaintiff, Appellant.

W. S. Benedict and *Robert G. Dugué* for Le Bourgeois, Defendant, Appellee.

Argued and submitted February 24, 1898.
Opinion handed down March 21, 1898.
Rehearing refused May 2, 1898.

The opinion of the court was delivered by

MILLER, J. The city appeals from the judgment dismissi
suit to annul the judgment obtained by defendants in the su
titled Dufossat *et als.* vs. Fontenot *et als.*, and in favor of de
ants on their reconventional demand.

In 1841 John McDonogh and another sued for slander of ti
property of which they averred ownership. In the chang
title in the lapse of years since the suit was brought, in 189
ownership appears to have become vested in the city of Ne
leans succeeding to the one-third interest of the original pla
McDonogh, and Joseph LeBourgeois, the defendant herein
1892, the city, by appropriate pleadings, had introduced itse
sole plaintiff and the defendant as sole defendant. Thus th
stood for a partition and on answers, in our appreciation, tend
the general issue, but with no demand in reconvention. There
been attempts on both sides to bring to trial this long pending
gation, and finally it was fixed for the 20th January, 1895. On
day the counsel for the City having another case fixed, sent an
davit for continuance, and relying on the affidavit, did not a
the trial. The opposite counsel, conceiving there was no oblig
on defendants to continue, insisted on the trial. On the d
trial thus urged by the defendant, his counsel filed a reconvent
demand, claiming to be decreed the owner of half the prop
and on the same day or a day or two after, judgment was ren
accordingly, and in the absence of plaintiff's counsel. This su
annul the judgment followed.

The extended discussion in this court of the plaintiff's rig
have the judgment annulled, has had our full attention. But
decision is controlled by the view we take on one phase of the

It will be conceded that the Code of Practice giving the reme
annul judgments, is not restrictive. The jurisprudence on this
ject is not intended to sanction negligence or the laches of the
gant or his counsel, or to afford a remedy for that indifferen
want of diligence that sacrifices the suitor's rights. But our c
have not hesitated to afford relief against judgments irrespecti

e of inattention or neglect, when the circumstances under
he judgment is rendered show the deprivation of the legal
the litigant who seeks relief, and when the enforcement of
ment would be unconscientious and inequitable. C. P., Art.
rris vs. Bristoe, 3 An. 646; Chinn vs. First Municipality, 1
; Swain vs. Sampson and Keen, 6 An. 799.

he day of trial and of judgment, the suit, if we are correct
ppreciation of the record, stood on the general issue, at least
conventional demand. In that position there could be no
t against the absent plaintiff, except one of non-suit. To
tection we think plaintiff was entitled by the very text of
. Article 536. The defendant on the day of trial changed
e tendered by the petition, and made the reconventional
practically converting the suit into a petitory action with a
ntional demand. Of that issue the plaintiff had no notice.
were no rule of court on the subject, we should feel the
f maintaining the judgment. But the rule, as we under-
is that of all causes put at issue after the term begins, notice
given to the adverse party. Now, while this suit was at
hen the term begun, the issue on which it was determined
made until the term opened; then was made and decided
tiff's absence. We think obvious justice and the spirit of
, if not its letter, entitled plaintiff to notice, and this
of proceedings entitles the plaintiff to the relief sought.
ts. 491, 536; Coiron vs. Millaudon, 3 An. 667; Adams vs.
, 4 An. 165; Phillips vs. Cassidy & Powell, 36 An. 288.

it seems to involve a large interest. In reference to that
at least to the extent of the adverse judgment, the City
no hearing or opportunity of defence. Our decree simply
that opportunity, and the delay can work no injury com-
o that which the litigant sustains whose rights are adjudged
hat notice and means of defence, on general principles, the
es to all.

erefore ordered, adjudged and decreed that the judgment
wer court be avoided and reversed, the judgment in City
ourgeois referred to in the petition be and is hereby annulled
aid suit be reinstated for trial, and that defendants pay

LLS, C. J., recused.

No. 12,736.

STATE OF LOUISIANA VS. UDEON BELLARD.

The exclamation of by-standers at the time of the commission of a claimed in the bill of exceptions "to characterize the act" under tion are not, at least as a general rule, admissible as "*res gestæ*," an case were properly excluded. Roscoe on Criminal Evidence, p. 22; 48 An. 1407.

The verdict of "striking with intent to kill" will not support the sen striking with a dangerous weapon with intent to kill. R. S., Secs. 79 Act No. 44 of 1890.

Under the charge for striking with a dangerous weapon with intent t murder, the jury can not convict of assault. Acts Nos. 43 and 44 of 1 790, 791 *et al.*; 48 An. 1061.

In an indictment for striking with a dangerous weapon with intent to k fices that the intent is qualified by the words "wilfully, maliciously a malice aforethought." 33 An. 921; 36 An. 386.

APPEAL from the Eleventh Judicial District Court for the of Acadia. *Dupré, J.*

M. J. Cunningham, Attorney General, and R. Lee Garla trict Attorney (*P. A. Simmons, Jr.*, of Counsel), for Appellee.

E. P. Veazie and *E. S. Pugh* for Defendant, Appellant.

Argued and submitted February 26, 1898.
Opinion handed down April 18, 1898.

The opinion of the court was delivered by

MILLER, J. The accused sentenced for "striking with i kill," under an indictment for striking with a dangerous wea intent to kill and murder, takes this appeal.

One of the bills of exception reserved on behalf of the presents the question whether the verdict "of striking wit to kill" supports the sentence prescribed by the statute th court deemed applicable, defining the offence of striking, th stabbing or cutting with a dangerous weapon with intent Acts 1890, No. 44. This act as well as Act No. 43 of 1890 a 790, 791, 793, 794 of the Revised Statutes, deal with the

phases of shooting, stabbing, etc., with intent to kill or murder, but "with a dangerous weapon" is part of every definition of the offence. The verdict in this case entirely omits "with a dangerous weapon," and is a specific finding "guilty of striking with intent to kill." The serious question is, can we sustain this verdict as conforming to the statute under which the lower court pronounced sentence; in other words, can we supply "with a dangerous weapon?" In a recent case of an indictment under Act No. 43 of 1890, where the verdict was "guilty with intent to kill," we held "guilty" was qualified only in respect to the intent; that is, there was a verdict of guilty of the charge, but a special finding as to the intent. Thus construed, the verdict conformed to Act No. 44 of 1890, which substitutes "intent to kill" for the more serious "intent to murder," used in Sec. 791 of the Revised Statutes and Act No. 44 of 1890. In this case we can not, in any reasonable interpretation of language, refer "guilty" to the crime charged of striking with a dangerous weapon with intent to kill or murder, for the finding is "guilty of striking with intent to kill." We are forbidden in construing the verdict to go beyond the words used by the jury, giving to the words their natural significance; that is, in this case, we can not read the verdict as guilty of striking with a dangerous weapon, when the verdict is simply "guilty of striking." 1 Archbold Criminal Law, p. 608; State vs. Patza, 3 An. 512; State vs. Davis, 20 An. 354; State vs. Burden, 38 An. 357. In our opinion the verdict does not support the sentence.

In view of the new trial that must occur, we deem it proper to express our views on the questions raised by the other bills. It is insisted the court erred in excluding questions to show exclamations contemporaneous with the shooting and coming from the group around the participants in the difficulty. The exclamations, the bill informs us, "characterized the act, showing it was not done by the accused, but by others." The questions were excluded on the ground the exclamations of third persons were not admissible as "*res gestæ*." While there are expressions in some of the text writers that seem to favor the admissibility of the statements of third persons as constituting *res gestæ* when accompanying the crime under investigation, it must be conceded the general rule is against the admissibility of such statements. Certainly, in this case we find no basis to recognize an exception to the general rule. The

case of Lord George Gordon put by Professor Greenleaf, cite
argument, was his indictment for treason, and to illustrate the t
son, it was essential to show the character of the mob he hea
On that view the cries of the mob were permitted to be sho
That case does not at all support the general proposition that
statements of mere bystanders when a difficulty occurs, resultin
shooting, killing or other alleged offence, are to be admitted as
timony. The exclamation of a participant contemporaneous w
the event to which it refers carries its appropriate weight; w
comes from a looker-on, "characterizing the act," as the bill in
case puts it, is apt to express merely his belief, or his sympathie
prejudices. His testimony, if he has any actual knowledge, is att
able, and reason prompts he should be put on the witness st
Greenleaf, in stating the case of Lord George Gordon with o
instances, affirm, the general rule "that rejects all hearsay rep
by persons not produced as witnesses." Greenleaf, Vol. I, Secs.
124; Roscoe Criminal Evidence, p. 22 *et seq.* Our own jurisprude
is on the line excluding such statements. In one case on the cha
similar to that here, the exclamation at the time of the shoot
identifying the accused, and made in his presence, was admit
In another case the statements of the third person manifestly c
veying his opinions and narrative, were excluded, but the deci
carries no implication the statements would have been admissi
if not opinions and statements of a past occurrence. State
Ramsey, 48 An. 1407; State vs. Desroches, 48 An. 480. We th
the current of our jurisprudence, notwithstanding expressions
some cases exhibiting peculiar features, indicating a contrary t
dency, is against the admissibility of the testimony sought to
introduced in this case and the ruling of the lower court on
point we hold to be correct. State vs. Moore, 38 An. 66; State
Oliver, 39 An. 470; State vs. Riley, 42 An. 996.

Other exceptions relate to the refusal of instructions asked
under the charge in the indictment the jury might return a ver
of assault, or of other offences supposed by the argument to
included in the greater offence charged. R. S., Secs. 793, 796,
We considered this question, or rather a question of similar ch
acter, quite recently. We reached the conclusion against the p
tion assumed on behalf of the accused in this respect. We adh
to that decision. State vs. Robertson, 48 An. 1067.

other contention presented by the bills is that the indictment
ective in not qualifying the striking, as well as the intent, by
ords "wilfully, feloniously and of his malice aforethought."
ine of authorities citied in this connection refer, we think, to
ntire omission of such words, or to the question of equivalent
rt where one only of these words is used. State vs. Williams
. 776; State vs. Breen, 42 An. 644. Here the pleader has used
ord feloniously in qualifying the act and the appropriate words
ark the intent, thus: did feloniously strike with a dangerous
on A B, with intent feloniously and of his malice aforethought
l and murder him, the said C D. In our view it is unnecessary
roduce twice the words supposed to be necessary—first, to
y the striking and then to qualify the intent. The rule that
ommon law elements of the crime must be used when the com-
law designation of the offence is used in the statute is
ved in this case. The common law designation of the offence
s in connection with the intent, and there the pleader has
oyed the words wilfully, feloniously and of his malice afore-
ght. Our own decisions have sustained the indictment in this
State vs. Bradford, 33 An. 921; State vs. Frances, 36 An. 336

s therefore ordered, adjudged and decreed that the sentence of
ower court be avoided and reversed, and that the accused be
for another trial and to abide the result thereof.

No. 12,696.

E OF LOUISIANA VS. JAMES KELLY, ALIAS WILSON, ALIAS RAYMOND.

testimony before the jury tending to show the accused, charged with lar
ny, was found in possession of the property recently stolen and failed to
count for that possession, it would be erroneous to charge the general rule
t to convict on circumstantial evidence alone, the evidence must consis
h guilt, and exclude any reasonable theory of innocence, without charg
also that the law presumes guilt from one circumstance, *i. e.*, the possess
n of property recently stolen and no account by the accused for that pos
sion. Roscoe, Criminal Evidence, p. 18; 1 Greenleaf on Evidence, Sec. 34.

ourt again affirms that requested instructions not a full exposition of the
applicable to the case, but requiring explanation and qualification, are
operly refused 35 An. 769, 775; 36 An. 84; Thompson on Juries, Sec. 23.

The charge will not be deemed to trench on the facts which announcing to jury a legal presumption on which they can act, is qualified by the caution the fact is proved, giving rise to the presumption. Const., Art. 166; Rev Statutes, Sec. 991.

APPEAL from the Criminal District Court for the Parish of leans. *Moise, J.*

M. J. Cunningham, Attorney General, *R. H. Marr*, District Att ney, and *John J. Finney*, Assistant District Attorney (*Paul W. Ro sell* and *P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

Chandler C. Luzenberg for Defendant, Appellant.

Submitted on briefs January 29, 1898.
Opinion handed down April 4, 1898.
Rehearing refused May 2, 1898.

The opinion of the court was delivered by

MILLER, J. The accused, sentenced for larceny, takes this appe

Exceptions were reserved on behalf of the accused to the exc sion of testimony that the accused was charged before the recor with the theft of the property from a party other than the per alleged in the indictment to be the owner. The testimony merely hearsay to the effect that the property was claimed bef the recorder by an alleged owner, not the owner specified in indictment, but the person making the claim before the recor was not produced as a witness, nor was there any testimony to supp his claim of ownership. The ruling, then, was merely the exclus of hearsay, and was manifestly correct.

Another bill was reserved to the charge of the court, that thou no inference unfavorable to the accused was to be drawn from fact the accused did not testify on his own behalf, "but this did relieve a person from accounting for stolen property found on hi In signing the bill the judge states that his charge was oral; tha the short extract in the bill the court is made to assume that sto property was found on the accused, but the judge states he charg substantially, after excluding any unfavorable inference from

accused did not go on the stand, "that on the other hand, forbidding such inference does not relieve him from account- factorily for the possession of stolen property, if that fact n established either by his own or other testimony. The relies on the provision of our law that the judge shall not nt on the facts, and the line of authorities forbidding any nt, direct or indirect, trenching on the facts. Revised Stat- c. 991; Constitution, Art. 168; State vs. Swayze, 30 An. 1328; s. Asberry, 37 An. 124; State vs. Brown, 41 An. 410; State ins, 47 An. 578. But the important feature which distinguishes rge from instructions deemed violative of the law restricting l judge is the hypothetical clause "if the fact," *i. e.*, the ion, "has been proved." In this view, the charge announced presumption, with the caution to the jury against the applica- the presumption unless the fact on which it rested had been 1 Greenleaf, Sec. 34.

ther exception reserved is to the refusal of the instruction ed on behalf of the accused, that in cases depending on cir- ntial evidence to justify the inference of guilt, the inculpatory nst be incompatible with the innocence of the accused, and le of explanation on any other reasonable theory than that of t. The charge it will be perceived tends to restrict the view ry to the general force of circumstantial evidence, but omits erence to that presumption the law attaches to one circum- when proved. If possession of property recently stolen is torily proved, that circumstance, *i. e.* of possession, gives the presumption of guilt. As we read the bill there was ny to show that possession. The State claims it was proved t evidence that when the arrest was made the accused threw package which was recovered, and identified by the owner stolen from him. Whether this was established, it was the n of the jury to determine, but with testimony of that ten- dministered, the charge would have been misleading. Pos- of stolen property is but a circumstance, but that circum- when the property is recently stolen and not accounted for, a presumption of guilt. In the posture of the testimony he instruction was asked and refused, it would have been us to charge in effect that all the circumstances must be in- ible with innocence, and consist only with guilt; for on the

single circumstance alone of possession with the other qualifi
the law founds the presumption of guilt on which the jury
At least, the requested charge required such explanation an
fication as authorized its refusal. 1 Greenleaf on Evidence,
Roscoe Crim. Evidence, p. 18; State vs. Riculfi and McC
An. 775; State vs. Jackson, 35 An. 769; State vs. Chevallier,
84; 2 Thompson on Juries, Sec. 2349.

It is therefore ordered, adjudged and decreed that the sent
the lower court be affirmed.

No. 12,748.

STATE OF LOUISIANA VS. BILLY HICKEY.

The court again affirms that testimony of threats of violence by the
against the accused, without proof of overt acts to carry the thr
execution, is inadmissible. Wharton's Criminal Evidence, Sec 757,
An. 71, 37 An. 443, 489.

APPEAL from the Second District Court for the Pa
Bossier. *Watkins, J.*

M. J. Cunningham, Attorney General, and *A. J. Murff*,
Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, App

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J. A. W. Lowry for Defendant, Appellant.

Submitted on briefs March 12, 1898.

Opinion handed down April 18, 1898.

The opinion of the court was delivered by

MILLER, J. This appeal is from the death sentence for mur

We have no brief on behalf of the accused, but hav
withstanding, examined the record to determine whether it s
the sentence.

We find a bill to the admission in evidence of an outcry of
son present when the fatal shot was fired. There was no

atever as to the killing of the deceased by the accused, and this cry, merely an exclamation, naturally evoked by the shot and lying only the undisputed fact of the shot, can have no influence the jury; besides, the testimony of the exclamation was brought by the line of examination on behalf of the accused.

The other bill reserved is the exclusion of testimony to prove eats by the deceased against the accused. The statement of the rt in signing the bill, is that not only was there no overt act of tility of the deceased to authorize the testimony of the threats, but t the shooting was without any provocation or ground of appre-nsion of any hostile act by the deceased. Under our jurispru-nce the court was entirely correct in excluding the testimony.

t is therefore ordered, adjudged and decreed that the sentence of lower court be affirmed.

No. 12,674.

[50 601
[122 544

CCESSION OF WILLIAM L. SHAFFER; OPPOSITIONS OF THOMAS J. SHAFFER, THOMAS J. SHAFFER, TUTOR, MISS SUSIE SHAFFER, AND MRS. ABBIE CROSS, INDIVIDUALLY AND AS TUTRIX OF HER DAUGHTER, CARRIE CROSS.

dgment or order probating a will can be attacked on the final homologation of an account, all parties in interest and the issues involved being before the court.

writings on two sides of a broken envelope did not form a continuous connected will. On one side is a written list of claims, which list is not signed or dated; on the other, the words "These notes go to my wife," without designating the notes intended. Not sufficiently certain to give it effect.

legacy of notes does not lapse when the only purpose, in accepting new notes in-tead of the old, was to make them more secure as to their payment, and they were substantially the same as the canceled notes.

egacy from a designated fund is not extinguished if the fund is replenished and is a continuous existing fund.

ticular legacies may speak with reference to the future, if it be evident that the testator expected amounts given to be deducted from sums to be realized in the future.

gacy in one will is not revoked by a subsequent will in which the testator substantially disclaims any intention to revoke.

ause in a will giving the usufruct to one person and the ownership to another, at the death of the usufructuary, is not a prohibited substitution. There was no trust created and no property taken out of commerce.

rds of recommendation to a legatee is not a bequest, and is not an illegal condition.

Succession of Shaffer.

ON REHEARING.

When the testamentary disposition in favor of two or more legatees to be pa from the fund specified deemed by the testator to pay all legatees, but whic when he dies, proves insufficient, the rule of proportional distribution betwe the legatees will not apply when the terms of the disposition plainly manife the testator's intention that his wife, named first, shall be paid by preferen from the fund. Civil Code, Arts. 1712, 1835.

APPEAL from the Eighteenth Judicial District Court for the Pari of Terrebonne. *Caillouet, J.*

L. F. Suthon for Executors and Mrs. Shaffer, individually, Appe lants.

D. Caffery & Son for T. J. Shaffer, Opponent, Appellant.

Howell & Martin for Mrs. Carrie Cross, individually and as Tutr of her minor child, Carrie, Opponent.

Argued and submitted January 25, 1898.
Opinion handed down February 21, 1898.
Rehearing granted April 4, 1898.
Submitted on rehearing on briefs, April 25, 1898.
Opinion handed down May 16, 1898.

The opinion of the court was delivered by

BREAUX, J. This litigation grew out of the application of th executors of the last will and testament of the late William Shaffer for the approval of their account showing the assets of th estate; the debts and the dispositions of the various legacies as pro posed to be paid by the petitioners.

The deceased left no forced heirs, and there existed no communi between him and his wife.

He left three wills, olographic in form. They are dated respec tively, February 10, 1894; March 7, 1894, and May 4, 1895.

In the first will he disposed of the greater portion of his estat and therein makes known that he has a remainder in cash and note which he bequeathed to his wife and other legatees.

In the second will he bequeathed to his wife the cash in bank an

sed of certain mortgage notes, and declared that he did not
d to revoke the first will. The paper probated as a will subse-
t to the two first was written on an envelope, sealed, which was
at the end.

the one side, the sealed side, the following was written:

"These notes all goes to Mrs. William L. Shaffer in case o death," followed by the words "May, the 4–95," and the sign of the late Mr. Shaffer.

On the other side of the envelope are written the names of se makers of notes due, or the name of the plantations on whic

bore mortgage; opposite each name the amount of the indebt-
was placed.

these documents were probated.

oppon nts agree in contending that the document of May 4,
which was probated as a will was an absolute nullity for the
that the words written on the envelope do not form a will;
lacked the essentials of a will. That they do not designate
tes the testator had in view to give by will; that the words as
stated referred to notes formerly in the envelope and not to
t of notes written on the reverse side of the envelope; that
re not identified with the asserted testamentary disposition.
the opponents are in accord in asserting that this paper was a
memoranda, and not a will, they plead other grounds.

nas S. Shaffer, who was a brother of the deceased and one of
al heirs, specially opposed the proposed distribution of four
which he alleged had not been bequeathed to Mrs. W. L.
r and should not be given to her as proposed in the account;
e notes orig'nally bequeathed had been paid before the death
testator and those it was proposed to deliver were not the
bequeathed. He opposed the delivery of a note designated as
te of Belle Brooks, and opposed the claim made by the widow
-half of the proceeds of the crop of 1895. He also opposed a
to her of eight thousand dollars, for the reason that the funds
which he had directed it to be taken had been expended, and
e fund from which it was proposed to pay the amount could
drawn upon for the payment of that amount. He also opposed
im made by Mrs. W. L. Shaffer as a legatee of a half interest
crop of 1895, and others named as legatees of one-sixth
t of that crop, for the reason that the crop for the year 1895
not have been bequeathed in a will written in 1894.

Abbie Cross, individually and as tutrix, was also an opponent,
g that the estate is solvent, and she, in consequence, is en-
to the whole amount bequeathed to her.

Susie Shaffer is another opponent. She sets forth that the
of the will in which she is interested has been ignored and
ims its interpretation.

re were other oppositions and supplemental opposition filed to
we will refer later.

executors moved to strike out from the oppositions all issues

arising from the alleged invalidity of the wills on the grou
these wills, after they had been probated, could not be coll
attacked.

The court overruled the motion, and ordered the legate
made parties. When the oppositions were heard all pa
interest were before the court.

The court *a qua* rendered judgment, reformed the tableau
tribution in conformity with the views expressed in its opini
as amended, ordered the distribution to be made.

From the judgment opponents appealed and here complai
interpretation placed upon the valid wills.

The executors, also, have appealed; they complain of th
ment annulling the last will probated—*i. e.*, the will of May

The first question for our determination arose on the m
counsel for the executors to strike out issues indicated by hi
grounds were: the wills having been regularly probated, t
not be attacked as null by way of opposition to an account pr
for homologation; that the opponents had a direct action to
if the will was null.

Of what use: was the question which suggested itself w
point was stated in argument.

A subsequent examination of the authorities has not led us
clude that our first impression was erroneous. The issues ha
regularly formed by the appearance of all the opposers.
parties were plaintiff or defendant in so far as they had an
in the questions involved. The succession will be closed by t
account and the issues on the oppositions as effectively disp
as if they had been tried and decided in a direct action.

The action here, in a certain sense, is a direct action. Mo
the proceedings probating the last will probated were *ex pa*
not such as required a direct action for their annulment,
addition the will is attacked on the ground that it is an a
nullity. If it be void, as alleged, the nullity may be here urged,
dictorily with all the parties, not one of whom asserts that
question could be raised in a direct action that is not at i
these proceedings. This court said in Rachel, Tutor, vs. Ra
R. R. 117, that the probate of a will did not have the effect c
"that it can not be considered as a judgment binding on the
tiffs" who were not parties.

e rules relating to the proving of wills were considered in Fuen-
s Gaines, 25 An. 92, as a preliminary proceeding necessary to
settlement of estates which are not conclusive, citing numerous
ions.

e learned counsel representing the executors asserts that our
e law may be searched in vain to find a case where the validity
will duly probated was ever attacked by way of opposition to
ccount; that the uniform practice has been a direct action of
ty with all the parties in interest before the court.

ere we find all the parties in interest before the court, and the
n is in nullity. The direct action practically is a matter of mere
e of the action.

our judgment this is a stronger case for hearing the causes of
ty than any of those cited. Succession of Von Hoven, 46
920.

THE WILL OF MAY 4, 1895.

is paper has the appearance of having been made piece-
, without connection to indicate with any degree of certainty
was the intention of the testator. Neither writing, that en-
ed on the upper part or that written on the sealing side of the
lope, is, in our judgment, a will. The writing on one side of
envelope is not dated, and the writing on the other side does
identify the notes the testator intended to will and bequeath.
not possible to determine whether the testator intended to
eath the notes imperfectly listed on the back of the envelope,
e notes placed within the envelope and sealed, if there were, at
time, notes enclosed in the envelope. The theory of the coun-
or the executors is that the notes described on the envelope
r were in it, and there could not possibly have been anything
e envelope when the writing was made thereon, because the
ng could not have been as smooth and clearly written as it was.
were at first inclined to accept that theory; a further examina-
revealed that the lines drawn lengthwise on the back of the
lope—columns drawn to make the figures—extend the length
e envelope. There are traces left indicating that the lines
nded to and over the end torn when the envelope was broken.
being the case the inference is unavoidable that there were
s enclosed in the envelope that were withdrawn from it after it
been sealed and at the time when its end was torn.

It is a matter of uncertainty whether the testator in the s memorandum referred to the list on the back of the envelo to the notes enclosed. When the envelope was found it had no in it. We give no importance to the fact that the will was wr on an envelope. If the writing were in its entirety dated, wr and signed by the testator, the envelope upon which written w not, in our view, of itself, give rise to a valid objection. The of identification of the thing is the objection fatal, as we thi the validity of the writing as a will.

NOTES SECURED BY MORTGAGE ON ELLENDALE.

We are brought to the objection urged by opponents agains legacy of notes to Mrs. W. L. Shaffer designated as above. were secured as to their payment by a mortgage on a plant known as Ellendale.

The notes were signed by Miss Nellie McCollam, Alex. McCo William McCollam and Ed. McCollam, as makers. The first n maker died and her property was inherited by her co-makers o notes, who were her brothers. Another of the makers died aft sister, Miss Nellie, leaving as his heirs minor children. The h of the notes: Wm. L. Shaffer, the testator in the wills befor desired a new arrangement, and for that reason the property offered for sale by public auction—*i. e.*, the mortgage was closed. The purchaser subsequently, in accordance with an a ment entered into prior to the sale, sold it to Messrs. Alexande Ed. McCollam for twenty-three thousand dollars, represente four notes of five thousand seven hundred and fifty dollars which were turned over to W. L. Shaffer. They are the claimed by his widow as legatee.

In order to safeguard the interest of the minor heirs of W McCollam, deceased, these purchasers, A. and E. McCollam, cuted a counter letter. The witnesses who have testified upo subject said that the amount of the debt remained the same an debtors practically the same.

But the opponents contend that the debtors were different; the first McCollam notes foreclosed had nothing whatever in c mon with the second (those executed after the foreclosure), that they were secured on the same plantation. Unquestionab the plantation after the foreclosure had been sold to third per

strangers to the transaction, upon notes, their legal *status* have been different. Here they were in effect the same s. The readiness manifested by the creditor, Wm. F. Shaffer, ept the signatures of two of the makers on notes secured by age, indicates plainly enough that he looked particularly to rtgage. In our judgment his object was to remove the paper d from a signature representing minor's interest, and at the ime, against the remaining makers of the notes, secure after sure other notes with mortgage and vendor's privilege.

numerating the values given to Mrs. Shaffer he names "the lam paper March 1, 1894." It is before us as the McCollam less two signatures, before mentioned. There was no change, we have stated. In that which may be considered a change not discover that it arose from a wish and intention not ude this claim in the legacies, nor in our view, was such the of the new arrangement, even if considered without regard to ention of the testator as made evident by the facts.

thing had not perished. There is a destruction of the sub- of the thing bequeathed when it has undergone a complete dical transformation. Thus, the commentators have illustrated ject by reference to lumber bequeathed which before his (tes- death was changed into a sailing craft; the substance had per- nd the legacy had lapsed; the legatee had no right to the The change of the accessory or collateral form, which modi- thing without altering its nature—for example, the change of able land into a vineyard, would not cause the legacy to lapse; the change the thing retains the same juridical nature. For reason it would be the same of changes which would leave to its form and its name. The legacy of a boat would not lapse e mere fact that it had been repaired so many different times ere would not remain one plank of the original construction; the change it is always the same boat. Baudry-Lacantinerie, p. 447.

claim still exists against the debtors.

legacy falls if the thing bequeathed has totally perished." 700.

reservation arises from some act which supposes a change " C. C. 1691. We would not feel justifiable in assuming that tator intended to change his will, from the fact that he sought,

39

as we are led to conclude, new arrangement with the view to
security for payment of his notes. In the case of Succes
Batchelor, 48 An. 278, we said that "the legacy perishes wh
extinguished by one of the causes which puts an end to the
tion. If a claim be paid it no longer exists, and there is an
the particular legacy."

Here, in our view, the testator did not put an end to the
tion. Beyond all this, it is made evident by the terms of t
that the testator did not desire to collect this claim at ma
that he wished it to remain as an investment for his wife, to
he, in his will, gave direction to collect the interest and ren
notes.

THE NOTE REFERRED TO AS THE BELL FARM NOTE.

One of the opponents, Mrs. Cross, individually and as
assails the bequests made to Miss Bocage on the ground t
legacy is a prohibited substitution and *fidei commissum*.

The will as relates to the legacy in question reads: "Now,
a note of Miss Bell Brooks for three thousand dollars, first m
on Bell Farm. The owners of Bell Farm, so long as it is f
Brooks and family, will pay you the interest yearly during yo
time; and at your death the said note will go to my god-chil
Bocage." The "you" addressed was his wife.

The proposition is not disputed, that the testator may gi
usufruct to one and the naked ownership of the same prop
another legatee. From our point of view this was precise
intention of the testator. He did not leave the note to h
He gave her the interest yearly. At her death the ownersh
be with Miss Bocage. Such a legacy is allowed by law. A
question was decided in Succession of Barker, 10 An. 28.
cession of Law, 31 An. 456, 461, as in the case before us for de
the testator had bequeathed the usufruct to one legatee, an
(the legatee's) death the property to vest in another legat
court sustained the legacy. From the standpoint of that deci
have not here discovered any trust or prohibited substitution
legacy to Miss Bocage.

EIGHT THOUSAND DOLLARS CASH IN GENERAL FUND.

The will bequeathing this amount was dated in 1894. It
fifth of a fund designated as a general fund reserved from t

eeds of a crop made for account of joint owners, to carry on the lantation jointly owned by them, the year succeeding.

The following is the clause of the will assailed: "Now I have 8000 (eight thousand dollars) in cash, in the general fund, for running my one-fifth. To this amount I will in full to my wife, to be paid at the end of the year, with one-half of my portion of the net proceeds of the crop," on the ground that the testator confined his bequest to the general fund for 1894. That by "at the end of the year" written in the will a particular year was intended—that is, the year in which the will was written, and that the general fund referred to was spent during the year of the writing of the will; and that the general fund of the succeeding year, which is carried upon the account as a legacy, was new and different, which had also been exhausted and expended at the date of the testator's death.

It is true that this fund was expended each year to make the crop and that the proceeds of the crop would be drawn from in order to replace this amount in the common fund for the next crop. In 1895, in accordance with an agreement of the common owners, the amount was reduced to thirty-two thousand dollars, and the portion of the late Mr. Shaffer in this fund was the amount carried to the credit of his widow in the account, to-wit, six thousand four hundred dollars. This fund during a number of years never went out of existence. It was well known to all those who were familiar with the transactions of the joint owners of the plantation in which the testator had an interest. The illustration of the water-craft, quoted *supra*, we think applies here. It was not the identical cash, but the "fund" known as such. It had not been changed to another substance or to anything else. The *corpus* remained and is susceptible of complete identification by reference to an interest in a well-known "common fund." In the Batchelor succession case, 48 An. 278, the note bequeathed had been collected and canceled and there remained nothing save the cash realized, which was in the possession of Mr. Batchelor, under circumstances, as we thought, denoting his intention not to bequeath amount realized by him in the note.

With reference to this legacy the opponent also contends that the testator confined his bequest to the fund for 1894; that in directing that the fund should be paid "at the end of the year," the particular year, 1894, was intended.

The interpretation usual in the matter of wills preclude our reading

in the will, a particular year, in the absence of words denot
a particular year was intended.

But it is urged in argument that the testator expected deat
the first of the month following; that in apprehension of d
gave instruction to his legatee to extend a note to which he s
refers; which fell due the month following.

This alone is not such an indication of apprehended d
would justify us in concluding that he desired to limit the p
of this legacy out of the fund of 1894. We take it that direct
given by him in case of his death, to extend payment of
notes. The clause of the will before us does not give rise
inference that he necessarily meant payment should be mad
the fund of a particular year. We do not think we are aut
to add, by construction, the year "1894" to the bequest ou
general fund. Had he been so inclined he could easily hav
the particular year. The clause is separate and contains a c
disposition. It can not, in our view, be limited or enlarge
meaning by reference to another clause directing the exten
payment of certain notes.

In our judgment this legacy is a specified legacy whi
not lapsed, and being a particular legacy of an existing
it does not conflict with other legacies which disposes of
cash.

"The legacy of the property I possess in such a place is a
ular one." 5 Toullier, 487, 524. The nature of the legacy
varied because a sum of money is bequeathed. A legacy
hundred reals which I have in such a box is good for so muc
testator has there." Church vs. Miller, 5 N. S. 102.

Upon this process of reasoning, in our view, it follows a le
be charged to a designated fund, which was made up from
year from the proceeds of a common crop, is effective to the
remaining of the fund at the date of the testator's death.

THE CROP.

The account is opposed on the ground that the crop of 1
year of the testator's death, was the crop bequeathed and
crop of 1895, which the executors proposed to distribute. T
testator having willed the proceeds of the crop of a pa
year, the proceeds of the crop of the year in which the

en was intended. The necessity presents itself at this point terpreting two clauses of the will, that would be conflict- f opponent's theory be correct; both clauses containing eitions of crops would relate to the one crop of the year in n the testator made his will. We do not gather from the whole of the will that the testator could have fallen into the error absurdity of bequeathing the same property to two different ns in clauses of the will one immediately following other—*i. e.*, crop in one clause and revoke it in the next.

our view the article cited by the opponents in support of their ion, part of which reads: "A disposition, the terms of which se no time neither past nor future, refers to the time of making ill" (1722 C. C.), does not apply for the reason that unless the or was grossly inattentive and guilty of an absurdity, he must referred to the crop of 1894; by the use of the words "includ- y portion of the present crop" in one paragraph and to the of subsequent year, in the paragraph referring as we take it to roceeds of a subsequent crop.

ough he may have been indifferent in the written use of words vinces anxiety to dispose of all of his property and nothing in ill creates the impression that he was wanting in the care and rn that the prudent owner usually bestows upon his own. over the expressions of the will manifest a strong desire to y provide for his widow, to whom he gave the bulk of his for- It is not at all probable that he intended, particularly as to o give her property in one breath and take it away in the next. use of a will should be, we think, interpreted if possible so as l have effect. C. C. 1713.

rms used by the testator "must be taken in the sense in which believed he understood them." 6 Toullier, No. 312.

LEGACY TO A NIECE, MISS SHAFFER.

e conditions following this legacy are somewhat confusing and elligible. The name of the testator's wife is first mentioned as tended legatee, but immediately after the testator directs that, ng at the date of his death, Miss Katty Shaffer shall, instead of ife, receive the legacy. The language of the will is as follows: w I have one note of T. S. Shaffer for two thousand dollars, first gage on one-fifth interest in Crescent Farm. I also will this

note to my wife, with the understanding that if Katy Shaffer is that she will get both the principal and interest." If it was the tion of the testator to establish, in regard to this legacy, an or succession, as presumably it was, Mrs. Shaffer is not the first order of succession, but Miss Kate Shaffer. The latter was th designated to receive the principal and interest from the succe which carried with it the note bequeathed. The words used with it the meaning that Miss Shaffer, if living, was to recei note, and not Mrs. Shaffer.

DISTRIBUTION OF A FUND STATED IN THE FIRST WILL.

The clause opposed reads:

"Now, I have, in cash and other notes, which will amount t (including my portion of the present crop) fully $20 to $ twenty-five thousand dollars.

"Now, I will to my wife out of this, fifteen thousand dollars in or its equal. I will *then* will to Mrs. Abbie Cross and her da the sum of five thousand dollars.

"*Now the balance* I want my wife to take and have it so d among T. S. Shaffer's children." (Italics ours.)

The grounds of opposition are that the amount of a cash under a second will should be deducted from the legacy as written covered by the first will. In taking up this question fo cussion and determination, we in the first place, find:

In the will of March 7, which is the second or last valid wi testator gave it as his intention not to "invalidate" the firs We did not discover that the intention by the use of the wor quoted was only to guard against any possibility of cancel destroying the anterior will as a whole, but that it was expres the intention to give specially an amount of cash which he bank without abrogating or making null any of the legacies will of an anterior date. He expressly directed that this cash be paid to his wife, and added that his will did not "invalidat previous will, but gave her possession of the cash on hand believe it was his intention to add this legacy of cash in bank legacies previously made. This item of cash he evidently int should go to her, and it was, we think, properly placed to her But it appears that the amount remaining is not large enough the two legacies (under another clause of fifteen thousand dol

Shaffer and five thousand dollars to Mrs. Cross and her daugh-
The question (because of the insufficiency of the designated
before us at this point is whether this legacy to the wife should
d in full, or whether the amount should be divided *pro rata*
en these two legacies; the wife and Mrs. Cross, under Art.
irecting that a proportionate division be made of particular leg-
among the legatees of "sums of money unless the testator has
ely declared that such a legacy shall be paid in preference."
s ours.)

meaning of the word "then," as used by the testator, must
ine his intention.

one having some appreciation of the value of property will
rately use a word in disposing of it different from its meaning
teral sense as he understands it.

ause of the predisposition in serious matters to employ the
r words we traced "then" to its original, and, as we judge,
r meaning. The word has more meanings than one. We
t to make the different meanings clear by the following:

e expresses the meaning "time," at the time, *ibi; eodem tem-*
Says Ainsworth in his dictionary: It may also express time
quent: after that; *unde; postea; deinde.*

as also another meaning without application here. The corre-
ing French word is *alors* and *ensuite*, observing about the same
nce in meaning as in Latin. We here made use of the fore-
definition for the reason it is concise and is the basis of the
n definition of the word "then." In the Century Dictionary
efinition is the same as just stated. If the word be taken
ordinary or popular signification the same difference in mean-
rises. To illustrate: To A is given fifteen thousand dollars;
to B five thousand dollars, out of one fund. The fund not
enough for both, should be *pro rated*. In any point of view
is obscurity as to whether it was intended to make the legacy
ate and independent or joint in case the particular amount was
rge enough to pay both. The article of the Code offers a solu-
the testator must make his intention known in this respect, or
nd constituting the particular legacy will be proportionately
d.

have italicised the words "now the balance" in the third
, clearly indicating, indeed substantially declaring, that the
es just preceding in the clause of the will should be first paid.

NOTES DATED AFTER THE WILL.

The argument of the opponents as to these notes is grounded upon Art. 1722, C. C., and brings up a question upon which we have already passed when considering other legacies which gave rise to a similar objection.

The testator's intent to bequeath with reference to the future, and not with reference to the date of the will, is made evident, as we think, by the amount donated in the clause of the will we are now considering.

It required the notes and the cash on hand at his death to make up the amount donated. The testator wills with reference to all notes as we think, needful to make up the total donated. It is true that several of these notes bear a date subsequent to the date of the will, but they are covered in our judgment by words general in term: that the notes, together with the cash, will make up the total bequeathed. The object of the rule of interpretation is to discover the intention of the testator. It was not, in our view, the intent to leave undisposed of the notes for amounts comparatively small. It was his purpose to give all his property. A clause, unless it can not be otherwise interpreted, will not be interpreted so as to change the will of the testator.

ADVISORY CLAUSE OF THE WILL.

As we appreciate the utterances of the testator contained in his will he recommends to his wife to give to C. B. Morrison ten thousand dollars. It is a matter left to the will of the legatee. It is not a substitution or an illegal condition whereby property is taken out of commerce.

A recommendation, said this court, in Succession of Trouard, 5 An. 390, "to give from time to time some little assistance to a certain person is not a legacy." In our judgment the interest vested exclusively in the legatee and the request made was addressed exclusively to her conscience. The young man was reared by the testator and his wife, who are childless. He was, presumably, in favor with both, and the former trusted to the latter to carry out his request.

This brings the task of reviewing and construing the different clauses of Mr. Shaffer's will to a close and we have found no ground upon which to reverse the judgment.

throughout sought the intent of the testator. It alone, should govern and have effect. The questions, at times, g to ambiguous expressions of the testator, involved and If, in any respect, the meaning by us has not been seized d by the testator, an opportunity remains to press the iew to our attention.

refore ordered, adjudged and decreed that the judgment rom is affirmed at appellants' costs.

SEPARATE OPINION.

, J. I concur in the opinion of the majority of the court n regard to the following provision of the testament of 0, 1894, vis.:

I have in cash and other Notes which will amount to luding my portion of the present crop) fullye $20,000 to nty-five thousand dollars. *Now I will to my wife* oute of Thousand dollars cash, or its Equal.

hen will to Mrs. Abbi Cross and her daughter, the sum of and Dollars. Now, the ballanse I want my wife to take so divided among T. J. Shaffer's children in Such a waye be of some use to them (I meane the Female Parte of the Now I want my wife to give to C. B. Morrison, oute of which She received the Sum of $10,000—Tenn Thou-'s, Said Sum to be given to him as She thinke's Best, all e or so much a year, during his life time. I think so r is best, unless he goes into some payin business."

inion it was the evident purpose of the testator, that his be preferred as a legatee to the extent of fifteen thou-, to be paid her from the fund specified; and hence his is expressed in the *present* tense, thus: "*Now I will to* tc. And that the one in favor of Mrs. Abbi Cross, was *uently paid from the residue thereof*, if any, is evidenced s employed in the *future* tense, viz.: "*I will then will* ross," etc.

think those two dispositions fairly susceptible of a dif-ruction without departing from the text of the will.

ON APPLICATION FOR REHEARING.

MILLER, J. In this case the court grants the rehearing on the question whether the twenty thousand dollars, the subject of one of the dispositions of the will, shall to the extent the fund remained at the testator's death, go to his wife, or be distributed between her and Mrs. Abbie Cross, as we directed in our first decree. On this point the court will receive briefs from the parties and decide without oral argument, the briefs to be filed within twenty days. In all other respects the rehearing is refused.

ON APPLICATION FOR REHEARING.

MILLER, J. The rehearing in this case was granted on the question arising on that part of the will of the deceased relating to his supposed fund of twenty thousand or twenty-five thousand dollars, and introducing his wife and Mrs. Cross as legatees.

The disposition, so far as it is material to the controversy, is:

"Now I have in cash and other notes, which will amount to fully (including my portion of the present crop) fully $20 to $25,000 twenty-five thousand dollars. Now, I will to my wife out of this, fifteen thousand dollars in cash or its equal. I will then will to Mrs. Abbie Cross and her daughter the sum of five thousand dollars. Now, the balance I want my wife to take and have it so divided among T. S. Shaffer's children."

In our original opinion we reached the conclusion that the fund the testator supposed he would leave to discharge the legacies proving insufficient, the legatees should share the fund in the proportions of the amounts of their respective legacies. This is the rule of distribution when legacies exceed the funds for their payment and the testator has directed no priority or preference of payment. Civil Code, Art. 1635.

The re-examination of the question has impressed us that the testator did in this disposition intend the priority of payment, which excludes the proportionate distribution when the particular legacies are made with no such priority or preference and the property left is not enough to pay all the legacies. "But if, the Code says, there is preference of payment expressed, there is no proportionate distribution." The priority in this case in favor of the

stator's wife, we think is the necessary implication from his lan-
iage. He expresses himself: "I will to my wife out of this, fifteen
iousand dollars in cash or its equal." Supplying the punctuation
this" refers to the fund he then supposed amounted to twenty
iousand or twenty-five thousand dollars. The disposition, we
iink, in legal effect stands by itself; that is, not modified or
ependent upon the dispositions that follow. His wife stood first in
is contemplation in the distribution of this fund. "Then" follow-
ig the disposition in her favor, we think must be deemed to refer
) the residue of the fund when the fifteen thousand dollars is paid
) his wife. The words "then I will to Mrs. Abbie Cross and her
aughter the sum of five thousand dollars" conveys, in our opinion,
he plain significance that the Cross legacy was to have no effect
intil the wife's legacy was paid. The phraseology of the testator
vith no aids, usually calls for the application of the cardinal rule for
he interpretation of legacies; that is, the intention of the testator
'ulfilled, we think, by supposing the wife is to receive her fifteeu
:housand dollars first, and defeated, in our view, by giving Mr. Cross
a proportionate share to the diminution of the fund and to the
prejudice of the wife.

It is therefore ordered, adjudged and decreed that our former judgment, in respect only to these legacies herein referred to, be avoided and set aside, and that the fund for payment of the said legacies be first applied to pay that of fifteen thousand dollars to the wife of the testator, and the residue, if any, to the legacies in favor of Mr. Cross and daughter, and that appellees pay costs.

MR. JUSTICE BREAUX dissents.

No. 12,842.

LAKE BISTENEAU LUMBER CO. VS. MIMS, SHERIFF, ET AL.

50 619
s52 1945
52 1948

The asserted error of an act of mortgage in describing the property may be inquired into and corrected on the intervention of the mortgage creditor in the suit of an alleged owner enjoining the execution of the mortgage creditor, the petition of intervention containing the requisite allegations to show and admit proof of the error.

AN APPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

Leonard & Randolph for Plaintiff, Appellee.

Wise & Herndon for Lane & Bodley Co., Intervenors and Third Opponents, Appellants.

Argued and submitted June 3, 1898.
Opinion handed down June 13, 1898.
Rehearing refused June 28, 1898.

The opinion of the court was delivered by

MILLER, J. This appeal is by the Lane Bodley Company, the intervenors from the judgment dismissing their intervention in the suit of the Lake Bisteneau Lumber Company vs. The Sheriff.

The Lane Bodley Company sold certain machinery to Matthews, their debt being secured, it is alleged, by special mortgage on the land on which the machinery was erected, as well as by privilege on the machinery. On their debt they obtained judgment, with recognition of their mortgage and privilege, and the sheriff was proceeding with the execution of the judgment. Matthews sold the land subsequently to the plaintiff, the Lake Bisteneau Lumber Company, and they enjoined the execution, on the ground that the land seized, and about to be sold under the execution, was not covered by the mortgage of the seizing creditor, but belonged to the plaintiff in injunction under the sale by Matthews to the company. The Lane Company, not made defendants in the injunction suit, intervened, alleging their mortgage on the property seized, that there was a clerical error in the act of mortgage of description or omission of the lands mortgaged and setting forth in detail the error, with the averment substantially, that the error was manifest from the deed under which plaintiffs acquired; that they were estopped from disputing the mortgage on the lands, and that they had recognized the mortgage. In this condition an attempt was made by the Receivers of the Lake Bisteneau Company to transfer the injunction suit to the Federal Court which had appointed the Receivers, and if that had been accomplished, the Lane Company, arrested by the injunction from executing their judgment rendered by the State Court, would have been forced into the Federal Court to try the issue raised by the

injunction suit. The controversy was before us on a previous occasion on the appeal from the judgment dismissing the injunction suit. Our decision reversed the judgment and remanded the case for trial on the issues raised by the intervention. Lake Bisteneau Lumber Company vs. Mims, Sheriff, 49 An. 1283. On the return of the case to the State Court there was judgment sustaining the exception of the plaintiff in injunction to the intervention of the Lane Company, and from that judgment that company appeals.

The exception is substantially, that an error in the act of mortgage of the Lane Company can not be inquired into and corrected by an intervention in the injunction suit of the Lake Bisteneau Company against the sheriff, but the Lane Bodley Company must resort to a direct action and make their mortgagors and the vendors of the Lake Bisteneau Company parties. In the Federal Courts it is the exclusive jurisdiction of equity to reform written instruments so as to conform to the intention of the contracting parties, and in these courts the exceptions to the intervenors would have its force. But under our system where the mortgagee is seeking to enforce a mortgage containing an error of description corrected, it is claimed, by intrinsic evidence of the acts on which the parties claim, and other circumstances plainly denoting the alleged error, in our view, their is no necessity to compel the mortgagee to seek relief in a direct action, instead of an intervention with adequate allegations directed against the party in interest, who disputes the mortgage and claims the property. There is, in our view, the proper allegations and the necessary parties to adjust the issue tendered by the intervention, and the lower court erred in maintaining the exception to the intervention.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed and that the suit be and is hereby remanded for trial on the merits and that appellee pay costs.

No. 12,864.

STATE OF LOUISIANA EX REL. SIMMONS & COHN VS. HON. GEORGE H. THEARD, JUDGE DIVISION E, CIVIL DISTRICT COURT.

50 621
52 1617

The cession by the debtor to his creditors, operating on all his property, that subject to privileges and mortgages as on that not encumbered, vests in the creditors the right of possession of all such property, to be held, sold, and

proceeds applied by the syndic of the creditors to the payment of the debts of the ceding debtor, all rights of the mortgage and privileged creditors being preserved in the proceeds. Revised Statutes, Secs. 1790, 1791, 1816; Civil Code, Arts. 2170, 2176 *et seq.*; 1 Hennen's Digest, p. 689, Nos. 11, 13, 15.

Hence, the possession by the sheriff of the debtor's property, under writs in suits pending, is divested by the cession, the property transferred to the syndic, the suit is arrested in its further progress, and the right to release on bond in sequestration suits given to plaintiff ceases, when, prior to his application to bond, the defendant makes a cession to his creditors. *Ibid.*; 1 Martin, 207; 4 Martin, 264; 12 Martin, 666; 14 An. 648; 12 Martin, 32; 8 Rob. 172.

ON APPLICATION for a Writ of *Mandamus*.

Lazarus, Moore & Luce for Relators.

Respondent Judge *pro se*.

Submitted on briefs June 13, 1898.
Opinion handed down June 21, 1898.

The opinion of the court was delivered by

MILLER, J. The relators apply for the writ of *mandamus* directing the judge of the Civil District Court, Division "E" to grant them the order to bond certain merchandise seized under the writ of sequestration in their suit against the purchaser for the price and asserting the vendor's privilege.

It appears that a few days after the relators brought their suit against their debtor, he made a cession of his property and the judge of the lower court appointed a provisional syndic, the merchandise on which the relators claim the vendor's privilege then being in the sheriff's hands under the writ of sequestration issued by relators. Subsequently, the ten days allowed the defendant to bond the property having elapsed, the relators made the application to give bond and thereby obtain possession of the property, the relators claiming that the cession of their debtor did not divest them of the right to bond conferred by law on the plaintiff when the defendant on the writ fails to bond within ten days from the time the property is taken into possession by the sheriff. Code of Practice,

Art. 279. The application of plaintiff was refused by the court, on the ground that the cession of property arrested all suits against the debtor, and necessarily precluded the application to bond made by his creditor in the suit against the debtor pending, when the cession was made, the cession dissolving the writ of sequestration and transferring the merchandise sequestered to the possession of the syndic to be sold by him with all other property of the debtor in due course of the syndic's administration.

The well defined effect of the cession of property is to transfer all the property of the ceding debtor to his creditors and to the possession of the syndic when appointed, holding for them; the cession operates on all property, that subject to liens and mortgages as well as on that not encumbered; transfers all suits pending against the debtor to the court accepting the cession; forbids any further suits or proceedings against the debtor, and substituting the syndic's possession for that of the sheriff, dissolves all writs by which prior to the cession the sheriff may have held the property. Revised Statutes, Secs. 1790, 1791, 1816; Civil Code, Arts. 2170, 2176; 1 Hennen's Digest, p. 687, Nos. 1, 11, 12; p. 689, No. 15 *et seq.* The policy of the insolvent laws is that the entire property of the debtor shall pass under the administration of the syndic to be sold by him, and the proceeds distributed subject to the privileges or mortgages of the creditors preserved on the proceeds. It is manifest this purpose of the law would be defeated if after the cession, the privilege creditor could, by furnishing a release bond, withdraw from the syndic that part of the debtor's property on which the creditor asserts the vendor's privilege. It is contended the statute originally of 1842 now weaved into Art. 279 of the Code of Practice, giving to the plaintiff the right to bond property sequestered, constitutes an exception to the rule that all property passes to the syndic. In our view the statutory right given to plaintiff in sequestration suits must be construed as subordinated to the provisions of our insolvent system prohibiting any interference with the syndic's custody of all the debtor's property, so essential to his complete administration, and conferred so explicitly by the law when the act of 1842 was passed. On settled rules of construction we think no such repeal or modification of existing legislation can be attributed to the general act of 1842, as is claimed in the argument for relator. The act gives to plaintiff

the right to bond except when prior to the application to bond the debtor has made a cession. When that occurs in our view the cession acts on all property of the debtor, embracing as well that under seizure as his other property. This result, too, is affirmed by the general course of our jurisprudence applied to the varied phrases in which our courts have been called on to deal with the effect of the cession. Elmes vs. Estevan, 1 Martin, 193; Flower vs. Millaudon, 19 La. 191; Jacobs vs. Bogart, 7 Rob. 162; Keyes vs. Shannon, 8 Rob. 172; Marr vs. Lartigue, 2 M. 98; Beck vs. Brady, 6 An. 444. It is urged that notwithstanding the cession, the relator in this case should be allowed to prosecute his suit against the syndic and recover his judgment. If the relator is allowed to bond, the bond represents the property. If the relator prosecutes his suit it is with the view of maintaining his privilege. If as we hold the property passed to the creditor by the cession to be held and administered by the syndics, the asserted right to continue the suit, if conceded, could not, whatever its result, defeat the possession of the syndic. If no suit after the cession can interfere with the syndic's possession, neither can that possession be disturbed by permitting the creditor to give a release bond, the incident of his suit. Again, a suit against the syndic, to establish a privilege on the property of the ceding debtor can have no effect against other creditors, the real parties in interest in any litigation in which privileges are asserted against the debtor's property. Hence, the privilege which the relator's suit proposes to establish on the debtor's property must be asserted contradictorily with the creditors, and not in a suit against the syndic. R. S., Secs. 1790, 1791, 1816; Cox vs. Zeringue, 4 Martin 264; Mayhew vs. McGee, 12 Martin, 666; Fabre vs. McRae & Provosty, 14 An. 648; Tenny vs. Provosty, 14 An. 221. Our conclusion is that after the cession the right to bond the property of the ceding debtor sequestered before the cession ceases, because, by that event, the property passes to the syndics, whose possession can not be disturbed; and no suit by a creditor to establish a privilege on the property embraced in the cession can be prosecuted against the syndic.

It is therefore ordered, adjudged and decreed that our previous order herein be set aside and that relator's application be denied at his costs.

No. 12,390.

SUCCESSION OF MARCO GIVANOVICH; JOHN A. BARLOW, EXECUTOR TO DISTRICT COURT.

An act of the Legislature which imposes a succession tax upon the amount going to foreign heirs, legatees or donees, is a bill for the purpose of raising revenue, within the contemplation of Art. 130 of the Constitution, which should originate in the House of Representatives.

APPEAL from the Tenth Judicial District Court for the Parish of Natchitoches. *Hunter, J.*

Scarborough & Carver for Executor, Appellee.

John M. Tucker for Absent Heirs.

Phanor Breazeale and *Branch K. Miller* for Opponent, Appellant.

Argued and submitted February 17, 1897.
Opinion handed down March 15, 1897.
Rehearing granted June 19, 1897.
Argued and submitted on rehearing February 25, 1898.
Opinion handed down March 21, 1898.

The opinion of the court was delivered by

WATKINS, J. The Charity Hospital of the city of New Orleans through the State of Louisiana opposed the homologation of the account stated by the executor claiming from the succession ten *per centum* on all sums of money going to foreign legatees, under and in pursuance of Act 130 of 1894, the residuary legatee being a citizen of the Empire of Austria-Hungary, and the particular legatees having the same citizenship.

The executor proposing the distribution of funds, takes the position that the succession of the deceased testator is not liable for the tax, on the ground that citizens of the Empire of Austria are exempt from same by virtue of the terms and stipulations of the existing treaty between the government of the United States and the aforesaid Empire.

And upon the further ground that Act No. 130 of 1894 imposes a succession tax of ten per cent. for the use and benefit of the Charity Hospital upon such amount as may go to foreign heirs, legatees and donees; that is to say, such persons as may be beneficiaries of the deceased and not domiciliated in the State of Louisiana, and not being citizens of any State or territory of the United States of America; and that same is unconstitutional and void because it conflicts with and is in opposition to the requirements of Art. 130 of the Constitution of the State, which requires all bills for raising revenue and appropriating money to originate in the House of Representatives—said act having originated in the Senate.

In Succession of Sala, 49 An. —, this day decided, a similar question was presented and determined by this court, and it reached the conclusion that the charge of unconstitutionality of the law was well taken, and so decided.

In the lower court there was judgment in favor of the executor, approving and homologating his account, and rejecting the demands of the opponent—not disposing of the objection of unconstitutionality of the law—and the opponent prosecutes this appeal.

Without passing upon the treaty rights and exceptions of the foreign legatee, we will follow our ruling in succession of Sala, and place our decree upon the ground that the legislative act is unconstitutional.

Judgment affirmed.

McEnery, J., concurred in a separate opinion.

On Application for Rehearing.

The opinion of the court was delivered by

Watkins, J. In the succession of Pablo Sala, this day decided on rehearing, we held, upon a rehearing of the question of the unconstitutionality of Act 30 of 1894, that our former opinion was correct, and the act unconstitutional and therefore void.

On the rehearing of this cause the question was thoroughly examined, and reargued with great learning and ability on both sides, but neither that argument nor the authorities cited has, in the least degree, shaken our conclusions; on the contrary, they have confirmed us in the correctness of our original conclusions.

It is therefore ordered and decreed that our original judgment and decree remain undisturbed.

12,782.

50 627
50 1903

CORPORATION OF AMITE CITY VS. LAWRENCE HOLLY AND MRS. LAWRENCE HOLLY.

Whatever be the view concerning the gravity of the offence against a State law, the very fact that the Legislature authorizes the towns and cities of the State to deal with the same subject by ordinances indicates that to the Legislative mind the act also properly constitutes one of those petty offences which are regarded as local injuries.

The public welfare requiring the maintenance of peace and good order, as well as of careful sanitary regulations in towns and cities, renders summary proceedings in many cases a necessity; aud no occasion is presented for the inauguration of the revolution that must follow the announcement of the doctrine that a jury trial is an indispensable prerequisite.

The provisions of Article 92 of the Constitution of 1879, which confer upon municipalities within the State cognizance of cases arising under police regulations, authorize the enactment by the Legislature of laws enabling them, by appropriate ordinances, to put same in force; and they constitute an exception to the general rule announced in Article 7 thereof, which guarantees to an accused person the right of trial by jury—notwithstanding the two offences appear to be identically the same.

APPEAL from the Municipal Court of Amite City. *Sowell, J.*

W. H. McClendon for Plaintiff, Appellee.

W. B. Kemp and *O. N. Ogden* for Mrs. Holly, Defendant, Appellant.

Argued and submitted May 4, 1898.
Opinion handed down May 30, 1898.

The opinion of the court was delivered by

WATKINS, J. A fair statement of this controversy is found in the brief of counsel for the plaintiff and appellee, from which we make the subjoined extract, viz.:

"This is an appeal by defendant from a judgment of the Mayor's Court, sitting in Amite City, Tangipahoa parish, inflicting a fine of fifty ($50) dollars upon defendant for selling whiskey without a license within the corporation of Amite City, said judgment and sentence being rendered under and by virtue of an ordinance passed by the Council of Amite City, acting under and by authority conferred

by Act No. 8 of the General Assembly of 1896. No complaint is made or objection urged by defendant, either by pleading or brief, as to the regularity of the proceedings before the Mayor's Court, or to the proceedings of the Council in adopting the ordinance under which the defendant was tried and sentenced.

"The demurrer and plea to the jurisdiction, filed and in the record, p. —, in substance simply attacks Act No. 8 of 1896, upon the ground that said act is unconstitutional as violative of Arts. 5, 6, 7, 8, 47, 80 and 92 of the Constitution of 1879.

"Defendant in his brief appears to have abandoned the plea to the jurisdiction of the Mayor's Court, and to rest upon the plea to the constitutionality of the Act No. 8."

To much the same effect is the brief of defendant and appellant, as will appear by the following extract therefrom, viz.:

"But, may it please the court, we especially insist that this exception is well taken, to-wit: That the proceeding is violative of the bill of rights and Constitution of the State of Louisiana of 1879.

"Act 8 of 1896 authorizes 'city councils or municipal corporations to pass ordinances relative to the sale of liquor without first obtaining license.'

"Under this the council of Amite City passed an ordinance providing for the infliction by the mayor of a fine for the sale of liquors without license.

"The mayor under this ordinance authorized by this act imposed the fine in this case.

"And our contention is that the whole proceeding is void, because the ordinance was authorized by an act which is violative of the bill of rights which provides that 'in all criminal proceedings the accused shall enjoy the right to a speedy trial by an *impartial jury*.' Art. 7, Constitution 1879."

The record shows that the defendant, Mrs. Lawrence Holly, and Mr. Lawrence Holly were charged upon an affidavit in due form, "with retailing liquors within the corporate limits of the town of Amite City without previously obtaining a license from the police jury, town or city authorities, all of which is contrary to the form of the ordinances of the said city in such cases made and provided and against the peace and dignity of the State."

The section of the city ordinance under which the foregoing affidavit was made is of the following tenor, viz.:

"That no person or persons shall sell or retail spirituous or intoxicating liquors within the corporate limits of the corporation of Amite City, without previously obtaining a license therefor from the proper legal authorities; and any person or persons who may violate the provisions of this ordinance, on proper affidavit first made, shall be arrested, prosecuted and tried before the Mayor's Court of the corporation of Amite City, and on conviction shall, for each offence, be fined by the mayor, not less than twenty-five dollars and costs, and not more than fifty dollars and costs; and in default of payment of both fine and cost in full, shall be imprisoned in jail for a period of ten days."

The title of this ordinance is similar in terms to those contained in the section quoted—making mention of the fact that same is "authorized by Act No. 8 of the General Assembly of the State of Louisiana, approved June 26, 1896."

To this proceeding the defendants tendered a demurrer, the substance of which is given above, to the effect that the aforesaid ordinance is founded upon an act of the Legislature which violates the bill of rights, and contravenes the guarantee which is contained in Art. 7 of the Constitution, and is therefore unconstitutional and void.

The provisions relied upon are as follows, viz.:

"In all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury," etc. Const., Art. 7.

The provisions of the statute are of the following tenor, viz.:

"That the City Councils of municipal corporations throughout the State are hereby empowered to pass ordinances authorizing the arrest and prosecution before the mayors or recorders of said corporations, of any person or persons selling liquors within the corporate limits without having previously obtained a license; and the said ordinances may be enforced by fines and otherwise, just as ordinances against breaches of the peace in said cities are enforced." Act 8 of 1896.

The act furnishes ample authority to the corporation of Amite City for the adoption of the ordinance, and the proceedings thereunder were perfectly regular in every respect.

On the trial Mrs. Lawrence Holly was found guilty and convicted and sentenced to pay a fine of fifty dollars and costs, or in default of paying said fine and costs that she be confined in jail for ten days; but Mr. Lawrence Holly was found not guilty and discharged.

It is from that sentence and decree that Mrs. Lawrence Holly prosecutes this appeal, relying upon the unconstitutionality of the statute, because it, in effect, deprives her of the right of "trial by an impartial jury," as guaranteed by the Constitution.

Counsel refer us to the provisions of the Revised Statutes, which are to the effect that "whoever shall keep a grog or tippling shop, or retail spirituous liquors without previously obtaining a license from the police jury, town or city authorities, on conviction shall be fined not less than one hundred, nor more than five hundred dollars, and in default of payment shall be imprisoned not less than fifteen days nor more than four months." Sec. 910.

And upon that statute counsel base their contention that the ordinance denounces as a violation thereof the *same act* which the statute denounces as a crime; and for that reason the Legislature could not constitutionally confer upon the mayor of Amite City the jurisdiction to try and punish the act, thus depriving the defendant of his constitutional right of trial by jury.

The first question is, whether the ordinance denounces the same act as Section 910 of Revised Statutes does; and the second is, if so, does the unconstitutionality of the act of 1896 result from its having authorized the ordinance.

(1) The ordinance declares "that no person or persons shall sell or retail spirituous or intoxicating liquors within the corporate limits of the (town) of Amite City without previously obtaining a license therefor, from the proper legal authorities," etc.

The provisions of the two are substantially the same, with the exception that one applies to the State and the other to the town.

(2) The contention of the defendant's counsel is, "that the quality of the act is not changed by conferring jurisdiction upon a mayor's court;" and they say, that "it seems too evident for argument, that the court will not sanction an evasion of a constitutional right. If the State Legislature could not directly confer upon its courts the right to fine a defendant without a jury (trial), it could not *a fortiori* confer upon a municipal corporation this power violative of the bill of rights."

On the other hand the contention is, that the legislative act and ordinance of the corporation of Amite City thereunder, contemplate police regulation merely, and that, as such, same is protected from constitutional impairment.

The Constitution provides that "no judicial powers, except as committing magistrates in criminal cases, shall be conferred on any officers other than those mentioned in this title, *except such as may be necessary in towns and cities, and the judicial powers of such officers shall not extend further than the cognizance of cases arising under the police regulations* of towns and cities in the State." Const. of 1879, Art. 92.

The question then is, whether the statute of 1896 does more than authorize municipal corporations in towns and cities of the State to pass ordinances which are in the nature of police regulations therefor, for if the provisions of the statute can be so considered they are constitutional and valid.

Quite a similar contention arose and was decided in State vs. Fourcade, 45 An. 717—the defendant having been prosecuted under a city ordinance for selling watered or adulterated milk within the city of New Orleans.

In that case one of the defendant's contentions was that the city ordinance was illegal, because the State, by legislative enactments, had "taken and resumed exclusive control and jurisdiction for itself of all matters of offence and punishment contained in said State legislation in antagonism with, or on the same subject matter of these municipal ordinances; that the passage and effect of said statutes are to render illegal, null and void for the time being said ordinances, and as long as said statutes are in force the said city ordinances are branded with illegality and unsusceptible of enforcement."

While it is true that the exact question which is here presented was not propounded in its present form in that case, yet it was in effect, that is to say, that the defendant was being prosecuted twice for the same offence—once under a State statute and once under a city ordinance.

Or that as the same offence was denounced under a State law and a city ordinance in force at one and the same time, it was possible for him to be prosecuted under both, and this would be in violation of the constitutional fiat, that no one shall be twice tried for the same offence.

On that contention, our opinion makes this observation, viz.:

"Defendant urges that he is charged with an act which the city contends *she has the right to punish*, although the identical act is

for the same purpose denounced and punished as a State offence; that for the same act which the State has made a State offence, the municipality has no right to institute a municipal prosecution and punish as a municipal offence; and that the State having now constituted the offence one against the State, he can not, through the instrumentality of the ordinance, be deprived of his constitutional right of being charged only through an indictment, or an information, and of being tried by a jury."

And our opinion then states that defendant further assumes that the moment the Legislature declares that the commission of a particular act shall be punishable by the State as a State offence, the commission of the same act, which up to that time, as being violative of a municipal ordinance, would be, in the strictest sense, a municipal offence and triable as such, must cease to be so triable, and the procedure in regard to the prosecution be forced to conform to the constitutional requirements which govern State crimes.

From the foregoing statement of the question and extract from our opinion, it appears that the only difference therefrom which the instant case presents is, that the State law denouncing the offence was enacted *prior* to the enactment of the statute complained of as illegal; that this difference in the date of the adoption of the two statutes can not affect the legal principle involved in any way—the simple question being, whether they can both stand, and be enforced at one and the same time.

In the *Fourcade* case we declined to entertain the defendant's contention and affirmed the judgment appealed from; and in so doing our opinion collates a large number of pertinent authorities. From one of the cases cited—McInerney vs. City of Denver, 29 Pacific Reporter, 516—we make the following extract, viz.:

"The Legislature may undoubtedly delegate to municipal corporations power to adopt and enforce by-laws or ordinances on matters of special local importance, even though general statutes exist relating to the same subject.

"An ordinance must be authorized and must not be repugnant to a statute over the same territorial area; but if there be no other conflict between the provisions of the statute and ordinance, save that they deal with the same subject, both may be given effect. The resulting or correlative doctrine is now too firmly established to admit of serious question; that the same act may constitute two

offences, viz.: a crime against the public law of the State, and also a petty offence against a local municipal regulation.

"The weight of authority likewise fully sustains the view that a prosecution and punishment for one of these offences is no bar to a proceeding for the other," etc.—citing numerous authorities.

The opinion further says:

"Whatever be the view concerning the gravity of the offence against a State law, the very fact that the Legislature authorizes the city to deal with the same subject by ordinance indicates, that to the legislative mind the act also properly constitutes one of those petty offences regarded as local injuries. The public welfare requiring the maintenance of peace and good order, as well as of careful sanitary regulations in cities and towns, renders summary proceedings in many cases a necessity; and we are not now prepared to inaugurate the revolution that must follow the announcement of the doctrine that a *jury trial* is an indispensable prerequisite.

* * * * * * *

"An ordinance is not in the constitutional sense a public law. It is a mere local rule or by-law; a police or domestic regulation, devoid, in many respects, of the characteristics of public or general laws," etc.

This court entertained and expressed a similar view in State vs. Labatut, 39 An. 513. See also Mayor vs. Meuer, 25 An. 1193, and State vs. Callac, 45 An. 27.

In State vs. Gutierrez, 15 An. 190, our predecessors dealt with a similar question arising under provisions of the Constitution of 1852, which were quite similar to those of 1879, now invoked, and held, that they were perfectly harmonious, and in the course of their opinion said:

"The Art. 108, guaranteeing the right of trial by jury, is the general rule to which the Art. 124 forms an exception; the former proclaims a right; the other recognizes a class of cases to which that right does not extend. In other words, the Art. 108 has no application whatever to that class of offences which are to be tried summarily without the intervention of an impartial jury of the vicinage."

To the same effect is State vs. Noble, 20 An. 325.

For like reasons we must hold that Art. 92 of the Constitution of 1879 constitutes an exception to the general rule which is announced

in Art. 7 of that instrument which guarantees to an accused person "the right to a speedy public trial by an impartial jury," etc.

On this hypothesis, we are of opinion, that the apparent unconstitutionality of the statute complained of can be satisfactorily explained, and proceedings under the ordinance in question reconciled and rendered compatible with those under the Revised Statutes.

Counsel for the defendant raise in their brief an alternative issue, which was not set up in the demurrer they filed in the mayor's court on the trial.

It is of the following tenor, viz.:

"At the time of the alleged offence the parish of Tangipahoa, at a public election, had prohibited the sale of liquors within its borders. It is therefore abolished the imposition of licenses as a source of revenue, and with this abolition the criminal machinery set up to enforce the collection of licenses fell.

"It has been since that time both illegal and impossible to obtain a license for the sale of liquors; and it would seem most absurd that a fine should be inflicted upon a citizen for failing to secure a license, or for selling liquor without a license, when it was physically and legally impossible for him to obtain such license.

"It might be perfectly practicable for the city ordinance to supplement the State enactment and provide a fine for the sale of liquors, but this was not done. The proceeding was against him for the sale of liquor without a license, under an ordinance made when it was proper to be so made, but which ceased or fell necessarily when the sale of liquor was prohibited.

"We therefore ask the court if our arguments should not prevail on the merits, to remand the case in order that we may show that, at the time of the alleged sale of the liquor without a license, that by law it was impossible to obtain such license, the parish of Tangipahoa having adopted at a popular election prohibition."

We are of opinion that the issue presented on this appeal is one of law, namely, the constitutionality *vel non* of Act No. 8 of 1896, and that alone; and there is no force in the application to remand presented for the first time in briefs filed in this court, and it must be refused.

But we think it proper, that in affirming the judgment, the rights of the appellant be reserved in that respect.

Judgment affirmed.

No. 12,781.

J. P. FLOURNOY AND WIFE VS. SHREVEPORT BELT RAILWAY COMPANY ET AL.

Persons manning and operating street cars are expected to be careful at the crossings. The company must exercise reasonable care to provide men enough to properly control a train consisting of a motor car and a trailer. At deep grades leading to railroad crossings there should be a motorman and conductor aboard the train and in charge. There was only a motorman. The injuries, occasioned by the collision between the street cars and the passing train at the crossing, were injuries for which the defendant company must be held responsible in damages.

APPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

T. Alexander for Plaintiff, Appellee.

Joel Edwin Dean and *Wise & Herndon* for Defendants, Appellants.

Argued and submitted March 23, 1898.
Opinion handed down April 4, 1898.

The opinion of the court was delivered by

BREAUX, J. The object of this suit was to recover damages for injuries received by plaintiff in a collision between the train of the defendant company and the train of the Texas & Pacific Railway Company on the twenty-fourth day of July, 1896, at about six o'clock P. M.

As the train consisting of two cars, one trailer and the motor car of the defendant Belt Line Street Railway, started to move down a steep grade to a railway crossing, the passenger train of the Texas & Pacific Railway was about to pass. It had given the usual signal and was on schedule time. The Belt Street Railway, sliding down without restraint, collided with the moving train of the Texas & Pacific Railway. The motorman did not stop his cars as required by the regulations of the municipality, and the common rules of safety to passengers.

The greatest part of the forward end of the defendant motor car was taken off, and some damage was done to the passing train of the Texas & Pacific.

The plaintiff jumped off at the same time that other passengers jumped from the street car, and was injured.

Regarding her injuries the attending physician testified that her bruises and wounds showed that she had sustained a great shock.

She received a blow on the head, bruising it, and injuring the superorbital nerve. She had a severe contusion on the upper jaw bone. She had bruises on the shoulder, caused by the fall, and on her face. The plaintiff in consequence could not, during some eight or ten days, attend to her household duties. She remained several months under medical treatment and suffered pain.

We pass to the manner the car was operated.

The witnesses agree that the presence of two men, the motorman and conductor, is needful in running two cars, a trailer and motor car, on uneven ground, or over steep grades, as was the case here.

The necessity was more urgent from the fact that the motorman had only been recently employed as motorman. There was nothing about the train not in good order. The cars and appliances were inspected every night, and no defect was discovered about them immediately after the accident.

The loss of control of this train, and its gliding down the rails and colliding with a passing train, was manifestly owing to the inexperience of the motorman, or the absence of an additional man to assist in properly applying the back brakes. In either case the company was responsible for the injuries received.

In accordance with the agreement of counsel, the evidence taken in case of Russel against Shreveport Belt Railway Company was used and read as evidence in this case as far as applicable.

The verdict of the jury was for one thousand dollars. After having considered all of the testimony we are constrained to reduce the amount to seven hundred and fifty dollars. We feel confident that the jury must have overlooked one fact in arriving at the verdict, to which we can not do otherwise than give effect. When one suing chooses to fix the amount by any act or deliberate utterance we can not well avoid giving it effect. She consented to accept that amount.

It is therefore ordered, adjudged and decreed that the judgment appealed from is amended by reducing the amount of the judgment from one thousand dollars to seven hundred and fifty dollars. And that appellee pay the costs of appeal.

BLANCHARD, J., recused, having been of counsel.

No. 12,579.

H. LAROUSSINI VS. PHILIP WERLEIN.

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The court in the first suit decided, as to plaintiff's demand, that he (plaintiff) had no cause of action to compel the defendant to sign a contract of lease and rent notes.

This ruling did not conclude the plaintiff from prosecuting suit for any right not necessarily covered by the ruling.

Where the judgment does not decide certain issues, and this is made manifest by the decree itself, the decision will not support the plea of *res judicata*.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Henry Denis and *Branch K. Miller* for Plaintiff, Appellant.

Edwin T. Merrick and *Lazarus, Moore & Luce* for Defendant, Appellee.

Argued and submitted March 23, 1898.

Opinion handed down April 4, 1898.

The opinion of the court was delivered by

BREAUX, J. Plaintiff brought this action in Division "E," Judge King presiding, on an alleged verbal contract of lease.

Defendant averred, by way of exception: no cause of action; estoppel, for the reason that in the first suit plaintiff declared on a written lease, and in this suit he claims on a verbal lease.

The facts are that plaintiff brought suit in the first case in Division "B," Judge Theard presiding, on April 9, 1895, against the present defendant, in which he stated that the defendant had been his lessee since June 30, 1890, under the terms of a lease expiring September 30, 1895; and that in March, 1895 in anticipation of the expiration of the terms of lease, he contracted and agreed to renew the lease for five years on the terms stated in the petition.

He alleged substantially that the agreement of renewal was verbal, but was complete, that "in no manner to make the contract dependent upon writing;" it was understood at the time, that at some future date the evidence of renewal would be reduced to writing.

It is alleged when Werlein, the defendant, was called upon to sign he declared that he had changed his mind. He refused to sign.

In this first suit defendant in his exception averred that the petition was premature; in the second place (in the alternative) that the petition disclosed no cause of action.

Defendant admitted that he was in possession under the first lease and alleged that he desired to obtain a new contract of lease in writing, to commence after the determination of his first lease.

That he had interviews with plaintiff upon the subject and had "even fixed upon the amount of compensation" offered by him to plaintiff, but he denied that other important stipulations had been adjusted; he averred that it was understood between them that the contract was to be reduced to writing, and that no contract was to be considered as complete until reduced to writing; that he was not called upon to sign a contract of lease covering the terms and conditions as he understood them.

The judge of the District Court decided: "that as to plaintiff's demand that defendant be ordered to execute and sign a written renewal of lease, and accompanying rent notes; the exception of no cause of action herein be maintained, and that said demand be rejected."

"As to plaintiff's demand for the recognition and enforcement of the alleged lease between himself and defendant, for the right to issue execution for amount, monthly instalment "of rent as it shall become due and five per cent. attorney's fee on the total amount of rent to become due; the exception of prematurity herein be maintained, and that plaintiff's said demand be dismissed as of *non-suit*."

On appeal this court reviewed the issues passed upon by the District Court and entered the following decree.

"The judgment maintaining the exception of no cause of action is affirmed." Laroussini vs. Werlein, 48 An. 13.

Subsequently plaintiff filed a second suit claiming on a verbal lease as before stated, to which defendant filed an exception as already noted.

The District Court sustained the plea of *res judicata*.

From the judgment plaintiff prosecutes this appeal.

The object of the first suit, as we appreciated the issues, was to *compel* the defendant to sign rent notes and a contract of lease.

We understood that the gravamen of defendant's objection was leveled against the specific performance claimed by plaintiff. In his brief that issue was argued and attracted our attention.

The decision was that the defendant could not "be ordered and forced to execute and sign a written renewal of lease." We affirmed the decision in its entirety for reasons assigned in our opinion in the case cited *supra*. Our judgment applied to the issues directly adjudicated by the District Court, as shown by our quotation from the decree. The original decree of the court *a qua* "limited the issues in terms, and to that extent it became the decree of this court."

No other issues were included in or concluded by the judgment.

The question the court decided was: "Did plaintiff have the right to compel the defendant to sign a lease and notes for rent?" This is the question that came to us for decision from the District Court.

There was not a real trial of the matter at issue, save as made evident by the decree of that court.

The points must have been considered in order to give rise to *res judicata*.

The decree informs us that they were not.

The plea is not to be upheld by inference or *arguendo*.

In *Wells, Res Judicata*, p. 241; with reference to an issue growing out of a contract, the opinion was expressed:

"The court entirely ignored that defence, and did not pass upon it at all. It makes no part of the judgment rendered in the case, and hence it can not be set up as included in the judgment as an element to

support the plea of *res judicata*. Hoggatt vs. Thomas, 35 An. 298; Fink vs. Martin, 5 An. 104.

A decree of *res judicata* applies only to matters directly adjudicated.

Of two questions the court decides one only; and expressly so states; the other question remains undecided and unaffected. The plea of *res judicata* does not apply unless the decided question is inseparably connected and carries with it a decision of the accompanying question which was not in our view the case here—*i. e.*, in the pending case.

"Actually adjudicated issues must in general be involved in the final judgment in order to be conclusive." Bigelow on Estoppel' under heading *Res Judicata*.

In our judgment the basis of the first suit was deficient; the defendant could not be forced to sign the contract of lease. This conclusion did not carry with it a decision of the other issues; in case plaintiff had a right remaining in spite the fact that the defendant declined to sign the contract of lease.

The counsel for the defendant argued that plaintiff should be estopped by judgment in the former suit from alleging any indebtedness of the defendant.

In our opinion there is no basis for the estoppel, for the reason that there was no adjudication in the former suit—that defendant was not indebted on any remaining claim he urges. We pass exclusively upon the question of *res judicata*.

All the other questions, both as relates to plaintiff or defendant, remain unaffected by our decree.

It is ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed in so far as it decrees that any other issue has heretofore been decided in the case (*save* that the defendant could not be forced to execute and sign a written renewal of lease and accompanying rent note) in respect to exception in parenthesis, it is affirmed; in all other respects it is annulled, avoided and reversed.

It is ordered, adjudged and decreed that the case be reinstated on the docket, and proceeded with according to law. Costs of this appeal to be paid by appellee.

BLANCHARD, J., takes no part in the decision.

No. 12,853.

STATE OF LOUISIANA VS. THOMAS O'LEARY.

ıe verdict guilty of shooting with intent to kill, on an indictment for shooting with a dangerous weapon with intent to kill and murder, necessarily implies shooting with a dangerous weapon charged in the indictment, and the express words not in the verdict, are supplied by the implication. State vs. Smith, 38 An. 479; 34 An. 529; 1 Bishop's Criminal Procedure, Sec. 1005.

ıe verdict is to be deemed a conviction for the offence of shooting with intent to kill included in the offence the indictment charges. Acts No. 43 and No. 44 of 1890; 49 An. 1011.

APPEAL from the Criminal District Court for the Parish of Orleans. *Baker, J.*

M. J. Cunningham, Attorney General, and *R. H. Marr*, District Attorney, for Plaintiff, Appellee.

J. Q. Flynn for Defendant, Appellant.

Submitted on briefs June 4, 1898.

Opinion handed down June 22, 1898.

The opinion of the court was delivered by

MILLER, J. The accused appeals from the sentence on the conviction for shooting with a dangerous weapon with intent to kill and murder.

On the rule for a new trial the ground was taken that the District Attorney in his argument commented on a previous trial of the accused for another offence. We find in the record no bill of exception presenting the question and can not notice it.

The motion in arrest of judgment is based on the ground the verdict is not responsive to the charge and states no crime known to the laws. The offence for which the accused was indicted is shooting with a dangerous weapon with intent to kill and murder. R. S. Sec. 792; Acts Nos. 38 and 44 of 1890. The verdict is guilty of shooting with intent to kill. The verdict, it is contended, is defective because it omits the words with a dangerous weapon. The argument treats the verdict as special, and defective because not stating all the essentials of the offence. While we recognize that special verdicts

must embody the ingredients of the offence, it is equally true that verdicts will not be construed as special in their character, when on a fair construction they respond to the indictment as finding the accused guilty of the crime charged, or what, in legal effect, is the same, guilty of the crime included in that charged. The indictment charges the accused with shooting with a dangerous weapon, to-wit, a pistol, with the felonious intent, him, the said M. F., to kill and murder. The verdict guilty of shooting with intent to kill must be deemed to imply with as much force as if expressed, with a dangerous weapon. The verdicts of juries, as it is put by one of the leading text writers, are framed by laymen; need not be couched in technical form; any words that convey the idea to the common understanding will be deemed adequate, and all fair intendments will be made to support the verdict. 1 Bishop Criminal Procedure, Sec. 1005. Our predecessors sustained the verdict on the same statute in the form of that here, against the objection there made, that the verdict did not contain the words, with a dangerous weapon, deemed implied. State vs. Smith, 38 An. 479; State vs. Cognovitch, 34 An. 529. The intent to kill is the less serious intent embraced in the statute and in the indictment. The verdict is in effect guilty of shooting with a dangerous weapon with intent to kill, not a special verdict but responsive to the indictment.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed.

NICHOLLS, C. J., dissents.

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No. 12,818.

STATE EX REL. JOHN VAN HALEN VS. HON. F. A. MONROE, JUDGE CIVIL DISTRICT COURT, PARISH OF ORLEANS, DIVISION C.

The general rule is that injunctions should not be dissolved on the *ex parte* application of defendant and the writ of *certiorari* will issue to reinstate the injunction when dissolved on such *ex parte* application without any hearing of the plaintiff.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

Simeon Belden and *John P. Montamat* for Relator.

rt & Kernan for Respondent.

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omitted on briefs April 22, 1898.
inion handed down May 2, 1898.

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e opinion of the court was delivered by

LLER, J. The relator seeks by the writs of *certiorari* and pro-
on to review the action of the lower court in dissolving on bond
njunction obtained by plaintiff to restrain the execution sale on
udgment of the Firemen's Building Association against the rela-
tutor of his minor children.

e petition for the injunction in substance averred that the
ed debt of the association for which they recovered judgment
een in great part paid, that the papers evidencing the payment
in possession of the association and the petition contained other
ations deemed necessary to entitle the plaintiff in the injunction
o demand the nullity of the judgment and an injunction against
xecution, the petition assigning another ground against the
ution, that under it the property of the succession of the
sed wife of the plaintiff in injunction was seized, and about to be

The injunction was dissolved on the *ex parte* application of the
dation on the bond required by the order of dissolution, and was
ved by the sheriff's sale and the adjudication to the association
e property the sale of which was sought to be enjoined.

e judge of the lower court in his answer to the relator's applica-
states that the answer in the suit of the building association
tted a portion of the debt sued for, that the property subjected
e judgment was not that of a succession, and he conceived that
ond required by the order of dissolution was ample to protect
terest represented by the relator.

have no occasion to deal with any question raised by the
on for the relator save that arising on the dissolution of the
ction, on the *ex parte* application of the Building Association.
purpose of the relator is by the exercise of our supervisory
liction to have that dissolution set aside, and to prohibit the
f from proceeding any further under the execution of the asso-
n. Constitution, Art. 90.

e Code of Practice provides that injunctions may be dissolved

when the dissolution will not work irreparable injury to the plaintiff seeking that relief. C. P., Art. 308. It is strenuously urged it was not competent to dissolve on bond an injunction the execution of a judgment sought to be annulled on the grounds stated in the petition for that writ. We do not find it necessary to consider that issue, but on the other ground taken by the relator we are of opinion that in this case the plaintiff in the injunction suit was entitled to notice and a hearing on the motion to dissolve, and the lower court was without power to dissolve the injunction on the *ex parte* application of the Building Association. Marin vs. Thierry, 29 An. 362; State *ex rel.* Moore vs. Judge, 37 An. 118; State *ex rel.* Gas Light Company vs. Judge, 37 An. 285.

Since the relator's application to this court a paper has been filed in the clerk's office expressing the unwillingness of the Building Association to bring to trial the injunction suit and reinstate the injunction, but the relator objects to the filing of the paper and insists, we presume, to our action on his petition.

It is therefore ordered, adjudged and decreed that our previous order be maintained, that the order dissolving the injunction of relator be set aside, the injunction reinstated to await the trial of the relator's suit and to abide the judgment in said suit.

No. 12,859.

STATE EX REL. MONTGOMERY THROWER VS. JUDGES OF THE COURT OF APPEAL.

The decree of a court of appeals does not become final by the mere disagreement of the court arising on the application for a rehearing.

One of the judges was of the opinion that the judgment handed down was erroneous, the other judge that it was not erroneous.

Where two judges can not concur for any reason in regard to their decree, the court shall select a district judge to sit in the case to determine with the other members of the court, after having considered the merits of the controversy, whether the judgment should become final by refusal to grant a rehearing, or whether it should be reversed, or whether other disposition should be made of the case.

There was no ground for decision in the matter involved.

ON APPLICATION for Writs of *Certiorari* and *Mandamus*.

. *Samuels* for Relator; Respondent Judges *pro se*.

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nitted on briefs June 18, 1898.
ion handed down June 20, 1898.
earing refused June 30, 1898.

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opinion of the court was delivered by

AUX, J. Relator sets forth in his application, that a judgment onounced in his favor by the District Court; that the defend- the 5th of May, 1897, appealed from the judgment to the of Appeals of the parish of Orleans.

in the latter court, a judgment was rendered on the 14th of y, 1898, affirming the decision of the District Court; that the ant applied for a rehearing. It appears that one of the judges favor of granting a rehearing and the other was opposed to g the petition for a rehearing.

sults, he (relator) urges, from this—*i. e.*, the disagreement, in of the judges, of the Court of Appeals—that he is entitled to a dgment. He applied to the clerk of the Court of Appeals ertified copy of the judgment in order to have the judgment ed. This copy the clerk declined to issue.

he alternative, he (relator) avers, that he applied for the tment of a judge *ad hoc* to have the grounds for the rehearing ered and decided. This application was not granted. In- to the rule *nisi*, which issued on relator's application, the of the Court of Appeals returned that the foregoing state- s in substance correct.

organ of the court, Judge Dufour, annexed a copy of his care- repared opinion in the case in question, and made it part of urn. The only grounds urged on appeal by the appellant in e, we are informed by the respondent court, were, that there o "note of evidence," and "no evidence of record" to ize a judgment.

Court of Appeals in the first instance found that the suit was ote; that the judgment contained the usual recital which gave the presumption that the District Court rendered a decision roper evidence. The Court of Appeals, in its decision handed with the concurrence of the two judges, quoted at length from

Smith vs. City, 24 An. 20, and cited Graham vs. Rice, 23 An. 393; Simmons vs. Howard, Prestons & Barrett, 23 An. 504; Cooley vs. Broad, 23 An. 73.

On the application for a rehearing, a difference of opinion arose with reference to the legality of the judgment handed down.

One of the members of the court, Judge Ogden, in pleasant terms regarding his colleague, the organ of the court, with whom he had at first agreed, recalled his concurrence and stated that, in his judgment, the court had drifted into an error which should be corrected; in his view a "statement of facts" or "evidence of some sort" was needful in order to reverse a judgment on appeal. Our understanding of the position of our learned brother is, that the cases are tried over on appeal without giving weight whatever to the judgment appealed from. He cited Graham vs. Rice, 23 An. 393; Simmons vs. Howard, Prestons & Barrett, 2 An. 504; Smith vs. City, 24 An. 20, and Jones vs. Neville and Wife, 9 Rob. 478.

Judge Dufour, also wrote an opinion on the application for a rehearing and cited a number of decisions to sustain the proposition, that there is no fault on the part of the *appellee*, where the record does not contain the evidence which the trial judge said was heard, and that under the law it is incumbent upon the appellant to have a statement of facts prepared before appealing. That in case of its absence from the record of appeal, the court will presume that the judgment was rendered on sufficient evidence. The honorable judge in his return, in addition states that the whole controversy is before us, and that it may as well be disposed of, under the authority conferred upon this court by Art. 101 of the Constitution of 1898.

The asserted finality of the judgment rendered by the Court of Appeals on the original hearing brings up the vital question for our determination.

We are not of the opinion that the judgment was final. While it is true that the court had agreed upon a judgment, its finality under the law was made to depend upon the continuing agreement of the court until a final disposition of the case.

The court disagreed in regard to the application for a rehearing as to whether it should or should not be granted. One of the judges, we have seen, was of the opinion that by the disagreement the judgment became final, and the other, that the judgment should be reversed for the reason that the judgment was erroneous.

The judgment, in our view, was not a final judgment under one or ə other of the Constitutions (1879 or 1898). The concurrence edful to the finality of the judgment, we take it, relates as much the final judgment on rehearing as it does to the judgment after e first hearing of the cause.

The right of appeal is a favored right. It should not be curtailed. is only where those who seek the right fail to comply with statu- ry requirement that it is lost. Here there was no omission in the plication for a rehearing. The right to have the grounds urged, nsidered by the court, was absolute. Why should that right be ought to naught by the disagreement of the court? While refer- ng with all the attention we could command to both the article of ıe Constitution of 1879 and the article of the Constitution of 1898 on ıe subject, we did not find a word, phrase or sentence lessening the xtent of the right to be heard on appeal, in case of the disagree- ıent of the court. On the contrary, the statutory regulation is: the ourt shall consider the reasons adduced in the petition for a rehear- ıg. The one losing is as much entitled to have his reasons for re- ıearing considered on his application for a rehearing as he is entitled o have them considered at any prior period in the proceedings.

It naturally follows, "when two judges can not concur, for any rea- on, the court shall select a district judge or judges to sit in the ase." Art. 102 of the Constitution of 1898.

In our view the case should be reinstated for further proceeding and a district judge selected as required in case of non-concurrence; and the question, whether it is proper to presume that the trial judge had sufficient evidence before him to justify his judgment, con- sidered and decided. It follows, that in this matter, the Court of Appeals should pass upon all questions needful to a final determina- tion of the case. With reference to the controversy before us, we consider our task at an end.

We beg to differ from the learned brother who sets forth in his return to the rule *nisi* issued by this court that we may now assume jurisdiction of the merits of the controversy and determine whether or not the judgment involved was erroneous, because it was not affirmatively shown by "a statement of facts" or "note of evidence of any sort," that it was rendered on sufficient evidence. It is, we think incumbent upon the court seized with jurisdiction to complete the work and write the final judgment.

The Court of Appeals has not certified to this court any question or proposition of law for determination as required by Art. 101 of the Constitution of 1898. To resume, relator prayed to have the judgment declared a final judgment.

This we must decline to grant. In the alternative he prayed for the appointment of a third judge.

This application should be granted under Art. 102 of 1898, by the appointment of a district judge, to sit in the case.

It is therefore ordered, adjudged and decreed that the writ of *mandamus*, which issued in this case, be made peremptory, a judge selected, and the question decided in accordance with the views before expressed.

The costs of this *certiorari* and *mandamus* to be paid by the party to the suit who will be cast in the final decision of the case.

No. 12,755.

ALLIE A. AIREY VS. THE PULLMAN PALACE CAR COMPANY.

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108 178
50 648
112 1091

ON WRIT OF CERTIORARI AND ON APPEAL AS RELATES TO THE PULLMAN PALACE CAR COMPANY, ORIGINALLY ONE OF THE DEFENDANTS.

As to this defendant, the suit was dismissed on an exception of no cause of action. Subsequently, through inadvertence, a judgment was signed against this defendant. The court *a qua* afterward signed the judgment it was intended to sign in the first place. The error was complained of, both in the petition for writ of *certiorari* and in answer to the appeal. It was manifestly an error; the judgment against the Pullman Palace Car Company, based upon the error, was of no value whatever.

ON THE MERITS AS RELATES TO THE TEXAS & PACIFIC RAILWAY COMPANY.

As between the passenger and the railroad company, the latter is responsible to the former for a breach of a contract of carriage growing out of the negligence or oversight of employees of the Pullman Car Company.

It devolves upon the railroad company, through the employees of the parlor car company to timely arouse passengers to enable them to get off at the station of their destination. A passenger carried beyond destination may have a right of action. The contract of the passenger is not subject to limitation of responsibility, if any such responsibility was stipulated between the parlor car company and the railroad company.

Loss of time, "expenses occasioned" and "inconvenience" are elements of damages proven.

ON APPLICATION FOR WRIT OF CERTI

py of the record was complete.
ne involved in the application for the writ was co
he same case (title as above) on appeal.
s no ground for the writ. It is discharged.

PEAL from the Civil District Court for tl
Rightor, J.

N. Wolfson for Plaintiff, Appellant.

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cy Roberts for Pullman Palace Car C
llee.

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ve, Spencer & Cocke for Texas & Pacifi
ndant, Appellee.

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gued and submitted April 7, 1898.
nion handed down April 18, 1898.

ON THE MERITS.

e opinion of the court was delivered by
EAUX, J. Plaintiff sued the defendant for
ontract of carriage with which (the plaint
iled to properly comply.
intiff, in feeble health, in June, 1895,
go a surgical operation. After her arriv
with malarial fever; the intended opera
gh in a weak condition she decided to retu
n of Natchitoches. Her attending phy
iently restored to health to make the trip.
intiff boarded a west-bound train at
mileage ticket which she, when called u
uctor. She also had a berth ticket, wh
on one of the sleepers of the train. Pl
sted the conductor of the Texas & Pacifi
e to alight from the train at Cypress Stati
hat he would. This promise is not denie
yce (a station east of Cypress) at about

The conductor of the Texas & Pacific Railway and porter of the Pullman were relieved, being the end of their run, and another conductor and porter supplied their places. The new conductor inquired of the porter, servant of the Pullman, who had been on duty since 8 o'clock, whether they had any passengers for any way stations between Boyce and Shreveport.

He answered "No." This new conductor stated that he had no other means of finding out the landing place of the passengers on the way. He could not himself go in the car and arouse the sleeping passengers. It would be very annoying to them. Without notice to plaintiff the train passed Cypress. About twenty miles beyond that station plaintiff, who had arisen after the car had left Cypress, stated to the conductor that she wished to get off at Cypress. He stated in reply, that the train had already passed that station some distance. He requested her to get off at the next station, where there was a hotel, and he would commit her to trustworthy persons and see that she returned on the next train without any expense whatever to her. She declined the offer, and expressed the wish of going to Shreveport, where she had relatives, to which place she did go and remained about two weeks.

During the time she was at Shreveport she was offered a return ticket by the defendant, which she declined to accept.

Plaintiff alleged, and she stated as a witness, that her disappointment was very great when she learned that she had passed the station where she was to get off, to take the Natchitoches tap road on her way to her home, six miles further; that it was quite a shock to her in her nervous and weak condition of health.

The Pullman Palace Car Company filed an exception of no cause of action. This exception was maintained on December 3, 1896, and the suit against this company was dismissed.

The other defendant pleaded the general issue, and especially denied plaintiff's charge of negligence.

On the seventh day of May, 1897, a judgment for ten dollars was entered in error and by oversight, against the Pullman Palace Car Company (although a judgment of dismissal had been entered in its favor some time previous).

On the sixteenth day of November, 1897, the judge of the District Court sought to correct the error by signing another judgment for the amount at which he had assessed the damages against

Texas & Pacific Railway Company; the remaining defendant
r the suit against the Pullman Palace Car Company had been
nissed, as just stated. Plaintiff prosecutes this appeal from both
gments—*i. e.*, from the two judgments signed.

o appeal was taken from the first judgment dismissing the action
inst the Pullman Palace Car Company, on the ground of no right
ction, which had not been signed.

Ve, in the first place, took up for determination the case against
Pullman Palace Car Company, the issues in that case being sep-
e and distinct from those in the case against the Texas & Pacific
way Company.

Ve are led to infer that the Texas & Pacific Railway Company
itted that an error had been committed, without, however, as we
it, its conceding that the judgment signed to correct the clerk's
der was correct.

ounsel for plaintiff expressly stated in argument that he did not
ect, and that he did not desire, a judgment against the Pullman
ace Car Company.

n view of this statement, and of the facts showing error, patent
record, we can not do otherwise than pronounce null the judg-
nt signed against the Pullman Palace Car Company.

his company is before us as an appellee. It did not choose to
eal; no other alternative is left to us save to apply the rule that
oversal carries with it the cost of appeal.

Ve pass to the case against the Texas & Pacific Railway Company,
le a co-defendant of the Pullman Palace Car Company.

y reason of the business relations between the Pullman Palace
Company and the Texas Railroad Company, each, in our judg-
nt, may be made to respond in damages. As relates to negligence
h as is here charged, they are in *pari delicto*. As we take it, these
panies were operating trains unitedly and in a measure, at least,
common. The principle applicable was settled in Williams vs.
lman Palace Car Company, 40 An. 417, in which this court held:
Railway Company was responsible to a passenger for the laches
he Parlor Car Company. He, the injured passenger in the case,
n the case before us for determination, held a ticket of the Palace
Company, and a passenger ticket of the railway company.

he evidence discloses in the case here, with reference to arousing
sengers, that the conductor made proper inquiry, and was not

correctly notified by the porter. It is quite true that it is the business of the conductor to manage the train in his charge, according to regulations, which regulations do not, however, include the necessity of his personally arousing passengers in Pullman Palace Cars on arrival of the train at the place of their destination. This duty more particularly devolves upon the employees in charge of the sleepers. But this view of his service does not have the effect of lessening the railway company's responsibility.

This court clearly approved, in the case cited *supra*, the principles set forth in several decisions in other jurisdictions, that the conductor and porter of the sleeper car company were in law, as relates to passengers, the railway's servants and employees.

We have naught to do with the *status* of the Palace Car Company; whether it was or was not a common carrier. The plaintiff was traveling on a ticket evidencing a contract with the defendant. She could, in our opinion, hold the defendant railway company to the performance of the whole contract.

The plaintiff gave herself concern to notify those in charge as to where she was going.

Besides, the passenger check signed by the Pullman conductor was for a berth from New Orleans to Cypress. That was in itself proof of the passenger's station to get off. This proof bound all concerned.

Her nephew, who accompanied her to the station in New Orleans, specially requested an employee of the parlor car to see that she was awakened in time to get off at the station to which she was going. In addition she had the assurance of the conductor, that she would be awakened in time.

Evidently some one among the employees was at fault, for the passenger, we think, had given notice enough.

The negligence of the porter or conductor of the parlor car was the negligence of the railroad company.

We are constrained to hold that the failure in duty of the Pullman porter was chargeable to defendant.

We are brought, by the conclusion to which we have arrived, to a discussion of the amount plaintiff was damaged.

This court has already decided that a railroad company carrying, in violation of its contract, a passenger beyond the designated station is responsible for damages.

e amount in that case was restricted to the actual pecuniary loss ained. Judice vs. Southern Pacific R. R., 47 An. 258.

was determined in the cited case that plaintiff had avoided mizing the inconvenience to which she was subjected.

e court applied the rule in case cited *supra*, that where one is led to the avail of a contract, and can save himself from loss ing out of violation of it, at small expense, it is a matter of , failing in which he can only charge the delinquent with such age as the person claiming could not prevent.

is was also the view stated in Beers vs. Board of Health, 35 An. , and "in the absence of bad faith of the defendant Board of th, no punitive damages were assessed."

dgment for nominal damages only was allowed.

e defendant contended that plaintiff did not in the least exert elf to reduce the damages, and that having chosen to go to veport instead of accepting return fare and the opportunity to rn by the next train, she was not entitled to her expenses while hreveport.

was natural, after the passenger had passed the way to her e, for her to go further—*i. e.*, to Shreveport, in order to find er and comfort among friends and relatives, instead of stopping, he was requested by the conductor, at a town hotel, among agers.

her items for damages claimed are, urgent business requiring her ence at home, shock to plaintiff's nervous system when she was rmed that she had passed the station, humiliation and delay.

e asserted loss in a matter of business was not traced to the nce of plaintiff caused by the failure to stop at the station to h she was going.

ithout a showing connecting plaintiff's alleged loss growing out er absence from home, a judgment allowing damages would be arrantable. There is no intimation of what she might have done she been present to compel an unwilling tenant to pay a debt h he failed to pay. This indebtedness was the loss charged. other element of damages, nervous shock to the system, is lly as untraceable to the negligence of defendant.

was not shown, after having passed the home station, that any ptom of sickness made its appearance, occasioned by defend- negligence or breach of duty.

We have not discovered any indication of disease for which the defendant can be held in damages.

It does not appear that it had other effect than the shock.

No one is expected to be of good cheer when taken away from the place of destination.

But it is not a proper element of damages unless injury is shown.

No injury or disturbance to health was proven.

There was no manifestation of physical weakness.

This brings us to the humiliation to which plaintiff was subjected, alleged in her petition.

We do not think that word applies, or has any meaning in this case.

No one was humiliated, or had the least cause to feel humiliated.

It was unquestionably a sore annoyance to have been forgotten, but nothing, so far as the record discloses, occurred having the least tendency to humiliate.

There remains for consideration the questions growing out of "inconvenience," delay and expenses.

This court has decided, in at least one case cited, *supra*, that they may give ground to claims for damages.

It is manifest that the plaintiff must have felt some inconvenience. She was subjected to a delay and made to disburse to meet expenses.

We think the amount should be larger than heretofore allowed—*i. e.*, ten dollars. Absence from home and the inconvenience, if they amount to anything at all, can not in our view, be less than fifty dollars, under the circumstances shown.

It is ordered, adjudged and decreed that, as against the Texas & Pacific Railway Company, defendant, the amount of the judgment is increased from ten to fifty dollars; to the extent of that increase the judgment is amended, and, as amended, it is affirmed at appellee's costs.

It is further ordered, adjudged and decreed that, as against the Pullman Palace Car Company, the judgment against it as appellee, dated the 13th day of May, 1897, is annulled and decreed void.

This appellee to pay its costs of appeal, and the appellant, as to this judgment, is to pay the cost of the District Court.

APPLICATION FOR WRIT OF CERTIORARI.

The relator applied for a mandate to have an error corrected.

He avers that the name of Pullman Palace Car appears as defendant, condemned to pay the sum of ten dollars to the plaintiff.

t the judgment was rendered against the Texas & Pacific Rail-
Company.

t by a blunder of the clerk, not discovered in time, a judg-
written by him against the Pullman Palace Car was signed.

relator, to sustain his application, relies chiefly on facts which
ne known to him after the judgment had been signed.

a general rule conclusions of fact can not be inquired into on
f *certiorari*. The motion for the writ relates exclusively to

ides the relator had a remedy by appeal to correct the error of
he complains. The remedy by appeal is adequate.

decisions of this court sustain the rule, where the suit is to
cided in the last resort, and where there is an appeal the writ
tiorari will not issue. C. P. 889.

ere is no suggestion here of a diminution of the record. The
s not applied for in aid of appellate jurisdiction.

relief is sought exclusively under the supervisory power of
court.

State *ex rel.* Keplinger vs. Perez, Justice of the Peace, 48 An.
we said: The writ of *certiorari* (not in aid of appellate juris-
n) is not the remedy to have appealable issues reviewed.

s decision, of recent date, conforms with a number of preced-
ecisions.

ere is an appeal actually pending in this case.

s therefore ordered, adjudged and decreed that the rule *nisi* is
arged, and the application for a writ of *certiorari* dismissed at
or's costs.

No. 12,890.

E OF LOUISIANA EX REL. HENRY BEZOU, RECORDER, VS. JUDGE OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVISION A.

ffice of Recorder, under the Constitution of 1879, was not a constitutional
ice. 46 An. 880.

xisting Constitution, as to those Recorders now in office, is not retrospec-
e.

statutory office of Recorder, under the Constitution of 1879, as to those pre-
ously elected to that office, continue to be a statutory office under the
isting Constitution.

The authority of the municipal council to organize a tribunal to try the issues raised continues as it was prior to the existing Constitution.

ON APPLICATION for a Writ of *Mandamus* and Prohibition.

E. Howard McCaleb, *Albert Voorhies* and *F. D. Chretien* for Relator; Respondent Judge *pro se*.

Samuel L. Gilmore, City Attorney, and *Walter B. Sommerville*, Assistant City Attorney, for City of New Orleans *et als.*, Respondents.

Submitted on briefs June 25, 1898.
Opinion handed down June 28, 1898.
Rehearing refused July 8, 1898.

APPLICATION FOR WRITS OF MANDAMUS AND CERTIORARI.

The opinion of the court was delivered by

BREAUX, J. Relator, who is the recorder of the Second Recorder's Court of the city of New Orleans, complains of the refusal of the Judge of the Civil District Court to grant him the injunction for which he applied. The City Council, with a view to his trial upon charges of inability to properly discharge the functions of his office, have taken steps against him.

He (relator) called in question the authority of the council to hear and decide these charges. He sued for an injunction.

His purpose in applying for the injunction was to prevent the council from taking jurisdiction of the case.

The Judge of the District Court, respondent here, after having heard counsel in behalf of petitioner and of the city, refused to grant the injunction.

Relator thereupon addressed a petition to this court for a writ of *mandamus* to compel the District Judge to issue an injunction, directed to the mayor and members of the City Council.

Upon his application for a writ of *mandamus* a rule *nisi* was issued by this court. In this court, in support of his application for a *mandamus*, relator contends that, under the Constitution of 1898, he is a constitutional officer who may be removed for cause by a judgment of the District Court under Art. 222 of the Constitution; but that the City Council is not vested with any such power.

ar questions arose under the Constitution which preceded our
law, recently adopted and now in force. At first, under that
ution an extreme position was taken. It was contended at
t a court of impeachment of the City Council of New Or-
organized to pass upon charges preferred against one of the
of the municipality, was not a legal body. That the proceed-
such a court would be an invasion upon the functions of the
y, to whom was specially delegated the power to determine
cal questions.

court held in the case cited *infra* that the power of trial of
al officers by the municipal council was not, in character,
, but that it was a power essential to the proper administra-
municipal affairs—one necessary to good order and useful
vernment.

e case to which we refer it declined to issue an injunction and
he action of the municipal council and held that an injunction
ing the council would be an interference with its functions.

ourt gave expression to a decided unwillingness to interpose
hority prior to a hearing, or the least exercise of municipal
on in the case. *Non constat* the court said, in substance, that
would be any resulting injury; that the legality or constitu-
y of its action would be within judicial control under proper
. State *ex rel.* Behan vs. Judges, 35 An. 1081.

uestion was before this court a second time in another case
eceived our patient attention and consideration.

oint raised was: the Constitution having provided for the
by the courts of designated officers for causes set forth, the
ure was without power, because of the constitutional limita-
prescribe other mode of removal by other authority. In other
that the jurisdiction expressed in the Constitution operated
e Legislature as a limitation of power.

court took an opposite view of the question and held that the
ion, in adopting Art. 201 of the Constitution of 1879,
ly intended to establish special and additional, and not
usive method of removal; that both the court trial and
eachment trial as provided could stand together. That they
ifferent in origin of the power and the character of the
ings, as well as the penalty and its effects. The court also
at the recorders' courts were part of the local or municipal

government, and as such they were statute courts. State *ex rel.* Whitaker vs. Adams, 46 An. 830, 848.

We pass to a consideration of the similarity (or the asserted dissimilarity—counsel in behalf of relator contend) there is between the existing organic law and the Constitution it repealed.

Counsel for relator urged that, by reason of the change and difference between the two instruments, the recorder selected to fill a statutory office has been, by the Constitution, promoted to a constitutional office.

It is first principle; Constitution and laws, as relates to their effect, look to the future. They operate prospectively, save where the words employed make it manifest that it was the intention to give them a retrospective effect. Cooley on Constitutional Limitations, p. 76.

The words employed in the Constitution expressly relate to the future, as to the recorders of the city of New Orleans, who were in office at the date of the adoption of the Constitution. They (it is ordained) are to continue in the exercise of their functions and jurisdiction conformably to existing laws. Art. 122 of the Constitution of 1898.

As relates to "existing laws," the office was statutory under the Constitution of 1879; it is statutory under the existing Constitution; at least, as concerns those now in office.

We have grave doubts, considered *in prospectu*—*i. e.*, as relates to those who will hereafter qualify and fill the office under the existing Constitution—as to the intention of the Convention to make it (the recorder's office) a constitutional office. We are quite confident, however, as to those now in office, that the legislation of the Convention did not mean it to operate retrospectively.

At the date the Convention opened its deliberations we had all accustomed ourselves to look upon the decision last cited as settling the question before us for decision. Had it been the intention of the Convention that it should have a retrospective effect, the words employed would clearly show the purpose of promoting those in office as recorders to a constitutional office. Instead, the affirmative words of the instrument, save as relates to jurisdiction, are that they shall, under the law, remain as they are. The law under which the relator is called upon to respond to charges before an authority of the municipality was on the statute book when he was elected. It had been sustained

ls court's interpretation. He has less cause to complain than who will hereafter be elected or appointed under the existing ltution, who will come under the new order of things without g accepted the benefit of the old.

er all, it is a question of a tribunal to hear the charges preferred lecide whether or not they are sustained. The questions are mplicated, and it is perhaps advisable that trial be had.

long since, relator, an elderly man, was elected. Age, its ities and sickness are the only complaints made.

are confident, before any tribunal of this State, temporary or nent, every consideration and respect due to age will be , and that removal will follow the hearing only in case it is evident that the relator is no longer equal to the task devolving a recorder. We, in the matter before us, dealt only with the etter of the law. It, and the precedents to which we have ed, left us only one alternative; that was to decline to grant r's demand.

s ordered, adjudged and decreed that relator's demand be ed, and our rule *nisi* issued upon his application be discharged.

No. 12,888.

OF LOUISIANA EX REL. MRS. LENA FORSTALL VS. HON. FRED. . KING, JUDGE OF THE CIVIL DISTRICT COURT, DIVISION B.

atrix having set out as grounds for relief by *certiorari* that the respondent ge had not passed upon a plea to the jurisdiction and other pleas in the rse of his decision of a cause pending before him, and the proof made by return shows that he had in point of fact passed upon and decided said as, said relief will be refused.

APPLICATION for a Writ of *Certiorari*.

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kelepiel & Hart (*J. Paris Childress* of Counsel) for Relatrix.

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pondent Judge *pro se; Robert G. Dugué* for C. J. Meyer, ndent.

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mitted on briefs June 25, 1898.
nion handed down June 30, 1898.

The opinion of the court was delivered, by

WATKINS, J. The grounds stated for relief are the following, viz.:

That in the suit of C. J. Meyer vs. Lena Forstall, in the Fourth City Court, relatrix, as the party defendant, was sued for the possession of the premises No. 862 St. Charles street, city of New Orleans.

That the plaintiff made no allegation as to whether he claimed the premises as owner or lessee; nor what the rental value of the premises were; nor that she was tenant under contract of lease; nor that she had defaulted in the payment of rent; nor that he had given her a legal notice to vacate the premises leased.

That she excepted to said proceedings on the ground that the Fourth City Court was without jurisdiction *ratione materiæ*, and also set up her lease of the property for the term of one year from the 9th of October, 1897, at a monthly rental of seventy-five dollars, and that, consequently, the amount due under the unexpired term of her lease exceeded the sum of one hundred dollars, an amount in excess of the jurisdiction of that court.

That, nevertheless, judgment was rendered against her therein in favor of the plaintiff, from which she prosecuted an appeal to the respondent's court suspensively.

That in the appellate court, the relatrix filed a plea of prematurity, but that on the final trial of said cause, the respondent affirmed the judgment without passing on said exception, or her plea to the jurisdiction of the court of first instance.

That during the progress of the trial of said cause plaintiff amended his claim in certain particulars, and thereupon proof was administered, but same was subsequently withdrawn with the consent of the court; and that she thereafter moved the court to strike out the evidence thus adduced, but unsuccessfully, and the respondent considered said evidence in violation of her rights.

Thereupon, the contention of the relatrix is, that she was entitled to have had her exceptions to the jurisdiction and prematurity passed upon; and she avers that the respondent exceeded its powers in considering evidence which had been tendered and received under an amendment which had been discontinued before the rendition of judgment therein.

That such proceedings are radically null, and vitiate and render null the proceedings had thereunder.

It is to remedy and redress the alleged illegalities in the aforesaid proceedings that the writ of *certiorari* was applied for.

The respondent makes the following return, viz.:

That the suit described was brought to his court on a suspensive appeal, and that same was tried, decided and the judgment of the lower court was reversed and one rendered in favor of the plaintiff; and that he so decided on the ground that the testimony adduced was not sufficient to show the relation of landlord and tenant between the plaintiff and the defendant in that suit, and hence did not establish that the city court had jurisdiction of the case, etc.

That upon a proper showing, a new trial was granted, and, upon the second trial, he pronounced an exactly opposite judgment, which resulted in the affirmance of the judgment which was appealed from —"the evidence having established, to respondent's satisfaction, that the defendant * * * occupied the plaintiff's premises as a tenant under a lease by the month at eighty-three dollars and thirty-three cents per month; that she had not paid her rent for several months; that she had been duly and seasonably served with a notice to vacate, prior to the instituting of this suit; that her landlord, the plaintiff, desired and was entitled to the possession of his property; that the city court had jurisdiction of the demand, and that its judgment was correct and ought to be affirmed."

His return further states, that "separate judgments were not rendered on the exceptions of prematurity and want of jurisdiction, because the relatrix did not ask for separate rulings upon them; did not ask for any ruling at all upon them. But they were passed upon nevertheless.

He further represents, that it is the rule and custom of his court, "in trying appeals from city courts, to take up and try together all pleas, defences, etc., made in the cause, and to pass judgment on the whole at one and the same time. This was done in this case without objection; and the court, when it affirmed the judgment appealed from, decided the exceptions of prematurity and want of jurisdiction were not well taken. That judgment, in terms, dismissed the exception to the jurisdiction, and it is that judgment which was affirmed."

With regard to the ground taken in respect to the amendment of the pleadings and the evidence thereon taken, the respondent's statement is, that it was made as plaintiff's counsel supposed for the

accommodation, and at the request of the defendant's counsel; but upon his dissent from that proposition, same was promptly withdrawn.

He further states that the amendment was a purely formal one and therefore, in his opinion, altogether an unnecessary one.

The return has furnished a complete answer to all the grounds on which relief is demanded.

It is therefore ordered and decreed that our preliminary writ be set aside, and the demands of the relatrix be refused at her costs.

No. 12,858.

STATE OF LOUISIANA VS. PROSPER RENAUD.

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105 166
50 662
116 88
50 662
e119 142

A letter written by a prisoner while in jail, and without being closed or sealed and handed to another prisoner to be sealed and mailed to a witness of the writer, is competent evidence against the accused, notwithstanding same may have been surreptitiously read by the person to whom it had been entrusted, and thereafter handed to a deputy sheriff, instead of being mailed.

That proceeding can not be classed as an unreasonable search and seizure in a constitutional sense.

A single declaration uttered during the progress of the trial by the father of the deceased, apparently hostile to the accused, and which was at once repressed by the judge, can not be viewed as having unduly influenced the verdict of the jury against the accused.

APPEAL from the Twentieth Judicial District Court for the Parish of Ascension. *Guion, J.*

M. J. Cunningham, Attorney General, and *G. A. Gondran*, District Attorney, for Plaintiff, Appellee.

R. McCulloh for Defendant, Appellant.

Argued and submitted June 13, 1898.

Opinion handed down June 21, 1898.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. The ground of the motion is, that the transcript of appeal was not filed within ten days after the order of appeal was granted; and under the law, it was out of time when filed.

That upon the 4th of June, 1898, the appellant filed a motion for the extension of the return day of the appeal, and obtained an order extending same; and that said order was unavailing because the time within which the appeal could have been filed, and within which the return day could have been legally extended, had already elapsed.

The record discloses, that the order of appeal was granted on the 20th of May, 1898, and the transcript was only filed on the seventh day of June following.

The clerk of the District Court prepared and caused to be filed in this court, a certificate in which the fact is stated that "he was delayed in the preparation of the transcript by a search necessitated by the absence from the record of the letter filed and made part and portion of a bill of exceptions, reserved by defendant; and by a stress of other business, so he could not prepare the transcript until after the lapse of the legal delays for its filing in the Supreme Court."

This certificate has not been traversed, and it clearly shows that it was not the fault of the appellant that the appeal was not filed in due time; but that of the clerk, if of any one.

But the statement of the clerk is that for good and sufficient reasons he was unable to prepare the transcript in time.

True it is that the appellant might have filed his motion for an extension of time within the ten days allowed for bringing up the appeal, but owing to the particular cause assigned by the clerk, it is not apparent that the defendant or his counsel was aware that the transcript would not be ready in time.

State vs. Bevell, 47 An. 48, is in point.

The motion to dismiss is denied.

ON THE MERITS.

The defendant was indicted for the crime of murder, found guilty by a verdict of the jury, and sentenced to the extreme penalty of the law; and from that sentence and judgment he prosecutes this appeal.

I.

The first bill of exceptions which attracts attention is one relating to the introduction in evidence by the State, of a letter written by the defendant to one Marcellin Renaud, while he was in jail, and

delivered to a "trusty" thereto attached, for the purpose of mailing it to him.

The bill of exception relates, that the "trusty" to whom he delivered the aforesaid letter, handed same to the deputy sheriff instead of mailing it; and that was done without his knowledge or consent—said "trusty" having first read same.

That the deputy sheriff retained possession of said letter for the purpose of using it in evidence against the defendant on the trial.

That counsel for the defendant objected to the admission of that letter in evidence on the ground "that no man can be compelled to give evidence against himself, and that the illegal taking of said letter by the said officers of the law, and the introduction thereof in evidence, was a violation of the constitutional provisions of the United States guaranteeing a citizen against the unreasonable search and seizure of his property and papers and against being compelled to give evidence against himself."

The said objection having been overruled, he retained a bill of exceptions.

The trial judge assigns as his reasons for overruling said objection, that the letter was written on a piece of paper which was furnished to the defendant by another one of the prisoners in the jail who was a kind of "trusty," and that when the defendant had written same he handed it to him and requested him "to enclose same in an envelope and mail it."

That after he had obtained possession of the letter thus written, the "trusty" read it, and then gave it to the jailer, who is deputy sheriff, and he delivered it to the District Attorney.

"There was no force, violence or compulsion used in getting possession of the letter referred to, which was delivered by the accused voluntarily to the prisoner in jail, who gave it to the jailer, and, therefore, in my opinion, no unlawful seizure was resorted to as contemplated by the law prohibiting the seizure of a person's papers."

It seems to us that the judge's opinion and ruling were correct on the plainest principles of reason and logic.

On the evidence adduced it seems perfectly plain that the defendant voluntarily parted with the letter he had designed for his friend. That it was indited on a scrap of paper and was neither placed in an envelope nor sealed. That the trusty violated the defendant's con-

fidence by reading it and placing it in the possession of an officer of the law, who proposed to put it in evidence against him. That was simply the misfortune of the defendant, who was over-confident of the trustworthiness of his messenger.

There was surely nothing unlawful in this; and being unlawfully or wrongfully obtained would not render the letter inadmissible in evidence.

The letter was properly admissible in evidence as an admission of the accused; and same was not legally subject to the objection that its admission in evidence was the just equivalent of compelling the accused to testify against himself. The writing of the letter was voluntary, and its contents stand for themselves as an admission of the facts therein contained.

We think the judge's ruling correct.

II.

The second bill of exceptions relates to the refusal of the judge to grant a new trial.

The ground of the motion for new trial is, that during the trial "there was much feeling in the court house among the bystanders, who were in large numbers; and that the jury must have been and were influenced by said feeling," etc.

In addition to this statement, the motion makes mention of the circumstance of the letter and its alleged seizure and introduction in evidence against him, over his protest and objection.

The statement is also made, "that while the District Attorney was arguing the case to the jury the feeling in the court house found expression by a person saying aloud, so that all in the court house heard him, "Put a rope on him," etc, and that such expressions "must have, and did affect the verdict of the jury," etc.

The statement of the judge for refusing to grant the rehearing is as follows, viz.:

"That no evidence was introduced, nor was any evidence offered on the trial of the motion.

"It is true that the father of W. P. Rochelle, Jr., who, it is alleged, was killed and murdered by the accused, was in court during the time that the case was being argued by the District Attorney to the jury, who, while speaking and appealing to the jury to find a verdict of guilty, remarked: 'What will you do with the accused?'

or words to that effect, exclaimed in the audience 'Put a rope around his neck!' "

The judge's statement is that "no other person made any remark, nor was any demonstration made;" and that he at once took the necessary steps to prevent a repetition of any such remark in court.

He further states that said observation was made in an undertone, though he heard it, and presumes the jury heard it also.

But he further states that he is "satisfied, however, that nothing was said or done sufficient to affect or influence the verdict of the jury."

The foregoing recital of the facts is quite sufficient to carry conviction to any unbiased mind that nothing occurred within the presence and hearing of the jury, except the single spontaneous declaration of the father of the deceased, which even tended to influence the verdict of the jury; and it is evident that whatever effect same may possibly have had was speedily overcome by the repressive measures which were instantly resorted to by the judge.

Fairly considered, we think it could not have exercised any influence upon the minds of the jury which was prejudicial to the accused.

We are of opinion that no error is exhibited by the record which entitles the accused to relief at our hands.

Judgment affirmed.

No. 12,856.

STATE OF LOUISIANA VS. AMOS CALDWELL ET AL.

50	666
50	1139
50	1248
51	172
51	437
50	666
52	117
50	666
107	623

Accused were indicted by a grand jury composed of twelve, under the provisions of Art. 117 of new Constitution, and convicted by a petit jury of twelve, of whom *less* than the whole number concurred, under the provisions of Art. 116. The crime was burglary committed before adoption of Constitution of 1898. The defence was made that these provisions of the Constitution were *ex post facto* as applied to past offences, and that accused could be indicted only by a grand jury composed of sixteen, and convicted only by a concurrence of all twelve of the petit jury: *Held*, the provisions referred to operate changes in the method of procedure only, relate to the remedy and are in no sense *ex post facto* in character, and that Arts. 116 and 117 of the Constitution are self-operative.

ON APPEAL from the Ninth Judicial District Court for the Parish of Red River. *Hall, J.*

State vs. Caldwell et al.

M. J. Cunningham, Attorney General, and *C. C. Egan*, District Attorney, *pro tem.*, for Plaintiff, Appellee.

W. A. Wilkinson and *J. M. Pincus* for Defendants, Appellants.

Submitted on briefs June 13, 1898.
Opinion handed down June 22, 1898.

The opinion of the Court was delivered by

BLANCHARD, J. Defendants appeal from a conviction and sentence on a charge of burglary and larceny.

The indictment was found by a grand jury composed of twelve under the provisions of the recently adopted Constitution of the State. It was met by a motion to quash on the ground that at the date of the alleged commission of the crimes charged the Constitution of 1898 had not been adopted, and, hence, the accused were entitled to have a grand jury empaneled, composed of sixteen of their countrymen, to pass upon the charges and return a true bill. It was further alleged as ground to quash that Art. 117 of the new constitution, authorizing a grand jury of twelve, is not self-operative and requires legislative action to carry the same into effect.

The motion was denied and a bill reserved.

There was no error in this ruling. The law is well settled that changes in the tribunal or method of procedure relate to the remedy, are always within the discretion of the law-making power, and are in no sense *ex post facto* so long as they deprive the accused of no substantial right. Cooley Constitutional Limitations, pp. 272, 273, 361, 362; Am. and Eng. Ency. of Law, Vol. 7, p. 531.

That Art. 117 of the Constitution is self-operative is shown by its terms, which declare that its provisions shall "go into effect on the adoption of this constitution."

The court having charged the jury that nine of them concurring could find a verdict, defendants excepted and reserved a bill. The grounds of exception are that the crime is charged to have been committed at a time antecedent to the adoption of the present Constitution, that the provisions of the Constitution in reference to trial by jury are not self-operative, that they require legislative action,

and that the enforcement of the same in the instant case would be to deprive defendants of a substantial right. It is averred in the bill that one of the jury, upon a poll following the announcement of the verdict, refused to assent to the same, and from this it is insisted that no legal conviction has ensued.

In answer to this the trial judge says: "Art. 116 of the Constitution of 1898 requires only nine of a jury to find a verdict in a case not capital. This is not *ex post facto*. It is a mere change in the remedy, or mode of procedure, which does not deprive the defendants of any right. Formerly no acquittal as well as no conviction could be had without the concurrence of twelve jurors. The change facilitates acquittals as much as convictions. It merely prevents mistrials. The change in the number of jurors who could convict is a mere change of remedy. This part of the Constitution is clearly self-executory. No legislation is necessary, or could add to, or take from, the provisions of Art. 116 as to the number of jurors ry to find a verdict.

"The first sentence of the article authorizes the Legislature to provide for the selection of jurors, but this provision has no relation to the remainder of the article. The third paragraph of the schedule of the Constitution of 1898 declares that the provisions of all laws inconsistent with it shall cease upon its adoption, except such as require legislation to enforce them, and the eighth paragraph declares that the new Constitution is in full force and effect from and after May 12, 1898, except as otherwise provided in it. Article 116 is, therefore, now in force and was properly applied in this case."

This is the first time the question has been raised under the recently adopted Constitution and the views above, so tersely and clearly expressed by our learned brother of the District Court, who was himself a distinguished member of the convention which framed the new organic law, meet our full approbation.

Mr. Cooley, in his work on Constitutional Limitations, pages 272, 273, states the law to be that so far as modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings if every case

was to be conducted only in accordance with the rules of practice, and heard only by the court in existence when its facts arose. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it can not lawfully dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.

So, too, on pages 361 and 362, he declares the State may give a new and additional remedy for a right already in existence, and it may abolish old remedies and substitute new. If a statute providing a remedy is repealed while proceedings are pending, such proceedings will be determined thereby unless the Legislature shall otherwise provide. Any rule or regulation in regard to the remedy which does not take away or impair the right itself can not be regarded as beyond the proper province of legislation.

An *ex post facto* law is one which is enacted after the offence has been committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage (A. and E. Ency. of Law, Vol. VII, p. 525).

The term is a technical one and relates only to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retroactively. *Ib.*, Vol. III, p. 886.

It has been held that a law is not *ex post facto* because it changes the manner of summoning and making up the jury, as applied to past offences.

Nor because it reduces the number of peremptory challenges allowed the accused.

Nor because it increases the number of such challenges allowed the prosecution.

Nor because it permits amendments to pending indictments.

Nor because it authorizes the jury to fix the punishment at the trial, which, under the law in force at the time the offence was committed, was fixed by the court.

Nor because it makes the court the judge of the law, whereas at the time of the offence the jury was. Am. and Eng. Ency. of Law, Vol. 7, p. 531 (note).

In all these cases it was held the change affected the procedure only, and that the new law was applicable to the trial of the offence.

So, too, we must hold with regard to the case at bar. The accused having committed the offence before the new law went into operation, can not claim the impairment of any substantial right because of indictment, trial and conviction thereunder. The new law does but relate to the remedy, or procedure, which it is the province of the law-making power to enact for the ascertainment, prosecution and conviction of crime. State vs. Bates (Utah), 47 Pac. 78; Lynn vs. State, 84 Md. 67; State vs. Taylor, 134 Mo. 109; State vs. Gay, 18 Mont. 51; Amer. Dig. 1897, p. 962, Sec. 53 (g).

Another bill of exception is leveled at the ruling of the court *a qua* admitting the confession of guilt made by the accused to one Sol. Canningan, called as a witness for the State. The objection was that the confession was not free and voluntary, but brought about by inducements held out. Also that the signature of one of the accused to the letter wherein the confession was made was not proven.

The trial judge states the confession was not offered or received as to Hagan Clark, one of the defendants, and that as to the other two, Amos Caldwell and William Clark, the evidence showed the note was written by Caldwell in presence of Clark, and was concurred in by the latter, who signed it; and that this note contained the same recitals the two had previously made voluntarily to Canningan, who was entrusted by them with the note for delivery to the person to whom it was intended. It seems that Canningan was the friend of the accused and went to the jail to see them, taking some tobacco for them. While there he said to Caldwell and William Clark: "If you will tell the truth about Mr. Carnes' money probably he will help you." Whereupon they told him to tell one of the parties (not Carnes) whose money had been stolen to come to them and they would tell him where his money was—that Hagan, meaning Hagan Clark, the other accused, had it. This was on Sunday. On Tuesday following Canningan saw the party (Mr. Terry) to whom the message was sent and delivered it. Whereupon Terry said to Canningan, "Tell them to tell you." Following this, Canningan again saw the parties and the incriminating note was written. All the parties accused and Canningan were colored. Canningan had nothing to do with the prosecution, was rather interested in getting the accused off as lightly as possible. He was the brother-in-law of William Clark. He was not commissioned by the prosecutors to see the accused and procure a confession from them. He merely expressed the opinion

that Mr. Carnes would probably help them if they would tell the truth about the money. He made no promise and was authorized to make none. He was not in the service of either Carnes or Terry and did not live on their plantations, but across the river some miles away. We agree with the judge below that "coming from such a source the mere suggestion that the prosecutor probably would help them does not amount to such an inducement as ought reasonably to attach such doubt to the confession as would exclude it." Especially so when it occurred more than two months after the crime, when the accused parties were in no confusion and laboring under no excitement nor special dread, and were free from improper influences.

We find no sufficient warrant for reversing the verdict and sentence appealed from, and, accordingly, the same stand affirmed.

50 671
118 495

50 671
124 805

No. 12,855.

STATE EX REL. NEW IBERIA TELEPHONE EXCHANGE COMPANY VS. HON. FELIX VOORHIES, JUDGE, ET AL.

To be legal and valid a citation must be addressed to the company or corporation, and not to the president of the same.

The lack of a legal and valid citation is such a radical defect in the proceedings that it can be reached and corrected by *certiorari* exercised under the supervisory jurisdiction of the Supreme Court at any stage of proceedings.

APPLICATION for Writs of *Certiorari* and Prohibition.

Foster & Broussard for Relator.

Respondent Judge *pro se*.

Todd & Todd for Respondent Edward Boyle.

Submitted on briefs May 30, 1898.
Opinion handed down June 21, 1898.

The opinion of the court was delivered by

WATKINS, J. Relator complains of the legality and validity of the citation which was issued and served upon it, as defendant, in the

suit entitled Edward Boyle vs. New Iberia Telephone Exchange Company, in the First Justice Court of Sixth Ward of the parish of Iberia.

The claim of the relator is that the plaintiff, Boyle, filed his suit against it as a corporation domiciled and doing business in said parish, upon a small and unliquidated claim as the balance due on open account; and that its counsel at once excepted to the citation, and the exception was tried and overruled.

That its counsel filed an answer pleading a general denial, fully reserving its rights under its exception; and thereupon the case was fixed for trial, tried and decided in favor of the plaintiff, and its counsel prosecuted an appeal therefrom to the District Court, unsuccessfully.

Thereupon relator's petition affirms "that the judgment rendered by said justice court, and affirmed by the said District Court, is erroneous, illegal and absolutely null and void, and that all remedies given under the law have been exhausted by him, except this application to have said error and wrong corrected," etc.

Relator's counsel aver that the absolute nullity of the citation in the justice court, at which its exception was leveled, consists in the fact that, while suit was brought against it in its corporate capacity as indicated by its title, no legal citation was issued to or served upon it in the manner required by law.

The respondent returns that the supervisory power of the Supreme Court can not be resorted to, or used as a means of revising judgments of inferior courts "which have been rendered according to the rules of law and practice and possessed of jurisdictional authority, except when gross injustice has been done;" and he further returns that, in his opinion, "the citation complained of conforms, in all respects, with the requirements of Art. 1077, C. P.—this case originating in a magistrate's court, and that the provisions of Art. 179, C. P., do not govern the case," etc.

He further returns "that under Art. 857 a writ of *certiorari* lies and is only issued when the inferior judge refuses to hear a party or his witnesses, or where he has pronounced sentence without having cited him to appear."

The record of the magistrate's court shows that the citation complained of is of the following form, viz.:

"State of Louisiana, Parish of Iberia, First Justice Court, Sixth Ward.

"EDWARD BOYLE
"vs.
"NEW IBERIA TELEPHONE EXCHANGE, CORPORATE UNDER LAWS OF LOUISIANA, ROBERT F. HOGSETT, *President*. } No. 137.

"*To Robert Hogsett, President of the New Iberia Telephone Exchange:*

"You are hereby cited and required to appear in an action brought against the New Iberia Telephone Exchange, of which you are president," etc.

And the defendant's exception is "that it has never been legally cited, nor has any legal citation been served upon him."

On the trial in the magistrate's court no reasons were assigned, but in the District Court on appeal the respondent said:

"The court being of opinion that the citation excepted to is sufficient to bring the defendant corporation into court, possessing all the requirements of law, being addressed to the defendant corporation through its president," etc.

And entertaining that opinion he held that the ruling of the magistrate's court was correct and affirmed the judgment appealed from.

The point made and contended for by the relator's counsel is that the citation having been addressed "to Robert Hogsett, president of the New Iberia Telephone Exchange," is not a valid citation; that in order that it conform to the requirement of the Code it should have addressed to the New Iberia Telephone Exchange as defendant. C. P. 179.

The answer of the respondent, that the provisions of C. P. 1077 must control in all proceedings in magistrate's court, is without force, as that article simply requires that that officer shall upon the filing of a suit "immediately prepare a citation setting forth the amount and nature of the demand, (and) to call the defendant before him to answer said demands," etc., without making any requirement differing from those of C. P. 179.

In State *ex rel.* Yazoo & Mississippi Valley Railroad Company vs. Montegudo, Justice of the Peace, 48 An. 1417, the question presented herein was expressly decided and a writ of *certiorari* maintained.

In that case it was held that a citation addressed to the president of a railroad corporation is an absolute nullity, and a binding and

valid judgment can not be founded thereon. It should have been directed to the railroad company—citing the foregoing articles of the Code of Practice and Jacobs vs. Frere, 28 An. 625.

As we consider that decision exactly applicable, it is unnecessary to cite any other.

In that case we held that thus deciding would not result in the dismissal of plaintiff's suit, but merely operate a continuance of the cause for service under a legal and proper citation; and we annulled the judgment with a reservation of right in plaintiff to have the cause continued for service. We will adopt that course in the instant cause and enter a similar decree.

It is therefore ordered and decreed that our preliminary writ of *certiorari* be made peremptory, and that the judgment pronounced by the District Judge, and also the one rendered by the justice of the peace, be and the same are hereby annulled and set aside as absolutely null and void because of the illegality of the citation; but without prejudice to plaintiff's right to proceed to judgment upon a legal and proper citation, and that respondents be taxed with the costs of this proceeding.

No. 12,845.

STUDEBAKER BROS. MFG. CO. VS. FRED. ENDOM, TUTOR, ET AL.

50 671
51 1264
50 674
114 408

Heirs of dead wife are sued to make responsible for a community debt property inherited by them, which had belonged to the community. Novation is pleaded in this, that surviving husband had, after death of wife, given his own notes for the antecedent community indebtedness, represented by notes, which had been surrendered to him, subsequently sued on and judgment recovered against him. He is called as witness by heirs to prove novation, and was asked whether he individually, or the heirs, owed the notes first given (those of the community), or any part of them. Objection made and sustained that this called for the opinion of the witness:

Held, he should have been permitted to answer and if his reply was in the negative, to explain why no, by giving the facts which lead in his view to extinguishment.

AN APPEAL from the Fifth Judicial District Court for the Parish of Ouachita. *Potts, J.*

A. A. Gunby for Plaintiffs, Appellees.

Lamkin & Milleaps for Defendants, Appellants.

Argued and submitted May 31, 1898.
Opinion handed down June 22, 1898.

The opinion of the court was delivered by

BLANCHARD, J. Plaintiffs are manufacturers of wagons, carriages, buggies and other vehicles at South Bend, Indiana.

Fred. Endom, a business man of Monroe, La., handling goods and wares such as plaintiffs manufactured, opened an account with the latter in May, 1889.

For several years this account ran, purchases and payments being made from time to time. On July 1, 1893, a balance of two thousand six hundred and eighty seven dollars and seventy-eight cents was due plaintiffs and on that day the account was closed by three promissory notes executed by Endom and delivered to plaintiffs, each note bearing that date and being for the sum of eight hundred and ninety-five dollars and ninety cents, due respectively at five, eight and twelve months.

At the time the indebtedness was contracted and the notes executed Mrs. Catherine Endom, the wife of Fred. Endom, was alive. The community of acquets and gains existed between this husband and wife and the indebtedness was a community obligation. Mrs. Endom died on the 20th of July, 1893, shortly after the notes were given. She left six children, issue of her marriage with Fred. Endom. Several of them were of age, the others minors, of whom their father became tutor, qualifying as such. All the property appearing upon the inventory of this tutorship had belonged to the community which had existed between the dead wife and the surviving husband.

When the first note given by Endom to plaintiffs matured, it was not paid. Whereupon an agent of plaintiffs appeared in Monroe and finding Endom unable to settle, it was agreed between them that the old notes should be surrendered to Endom and new notes taken for their amount, plus the accrued interest. This was done on February 6, 1894, at which time the debtor executed four notes, each for seven hundred and four dollars and twenty cents, payable to the order of plaintiffs at stipulated intervals, with interest. The new

notes were delivered to plaintiffs and they surrendered the old ones to Endom. The next day, by public act of mortgage, the latter hypothecated certain real property in Monroe to secure payment of the new notes. The property so mortgaged had belonged to the community.

Endom paid none of the notes thus secured, and in October, 1895, plaintiffs proceeded *via ordinaria* to recover judgment on them, all of which had then matured, and to enforce his mortgage rights. In speaking of the mortgage the petition of this suit averred that Endom had mortgaged and hypothecated to plaintiffs "*all of his right, title and interest in and to*" the property which is described. This allegation differed, in this regard, from the act of mortgage itself, which assumed to cover the entire property.

Judgment was prayed for against Endom for the aggregate sum of the notes, with interest, etc., and for recognition and enforcement of the mortgage "on his right, title and interest" in the property.

No defence was made and the decree of the court was in accordance with the prayer.

Nothing in the present record apprises us whether or not this judgment has been executed or sought to be executed. Nor, if not executed, why not.

Two years from the date of this judgment the present suit was filed.

The petition sets forth that during the lifetime of his wife Fred. Endom had become indebted to plaintiffs in the manner hereinbefore described; that notes had been given to cover the same; that these notes represented a community obligation; that Mrs. Endom had died leaving heirs and an estate; that the father had become tutor of the minor heirs; that subsequent to the death of the wife new notes for the old ones had been given by Endom and a mortgage executed to secure payment of same; that by the substitution of the new notes and mortgage the old indebtedness was not intended to be novated; that the property mortgaged to secure the new notes belonged to the community; that this mortgage covered and was intended to cover the entire property; that subsequently suit was brought on the notes and to foreclose the mortgage; that the heirs of Mrs. Endom were not made parties and the judgment only recognized the mortgage as operative on the interest of Endom himself in the property; that in addition to this judgment against Endom plain-

tiffs are entitled to have their claim recognized as a debt of the community and as such binding upon all of the community property; and that the estate of the dead wife is liable to them for the full amount thereof.

The prayer is that the major heirs of the wife be made parties defendant; that the minor heirs be cited through their tutor, and for judgment against them *in solido* for the sum of two thousand six hundred and eighty-seven dollars and seventy-eight cents, with eight per cent. interest from July 1, 1893, recognizing and decreeing same to be a debt due by the community and as such binding on the dead wife's share in the community property.

It will be observed that this is not a suit on the last notes given by Mr. Endom to plaintiffs. These were already merged in the judgment rendered in the suit brought against him individually.

If it be an action on the notes first given, those of July 1, 1893, then it is a suit on notes not in possession of plaintiffs, which they had surrendered to the debtor, and which, in all probability, are not in existence at all.

If it be a proceeding on the original indebtedness between Endom and the plaintiffs, then it is an action on an account stated, which was closed and liquidated by the notes of July 1, 1893.

Defendants considered the suit an action on the notes first given by Endom, those of July 1, 1893, and prayed oyer of the same. Plaintiffs answered this prayer for oyer by the declaration that they did not have possession of the notes.

Defendants then, as matter of defence against the action, pleaded the extinguishment by novation of the pre-existing obligation of the community, to-wit, the notes of July 1, 1893, averring that the creditor had, after the dissolution of the community, received and accepted the individual notes and mortgage of the husband in lieu of the notes of the community, thereby discharging the obligation of the latter, and, subsequently, had sued on the husband's notes, recovered a personal judgment against him and a decree for enforcement of the mortgage he had given, in which proceeding respondents were not cited or made parties defendant. They aver that this operated a renunciation and discharge of whatever legal rights, if any, there existed against respondents and their property in favor of plaintiffs.

In any event they allege they are not liable personally and solid-

arily as averred by plaintiffs, because the succession of their deceased mother was not accepted unconditionally, but with benefit of inventory.

On the trial plaintiffs offered the depositions of two witnesses, parties in their employ, to prove the allegations of their petition, to the reception of which testimony defendants objected on the ground that plaintiffs had declared on certain notes and that parol evidence was not admissible to prove the existence and contents of the notes in view of the fact that there was no allegation of their loss or destruction; and, further, having declared on notes, evidence was not admissible to establish an indebtedness on an open account.

Those objections being overruled and the depositions received as evidence, defendants excepted.

We will not pass now upon the question here raised for the reason that, in our opinion, the case must be remanded on grounds hereinafter stated.

It was error on part of the trial judge to exclude the testimony of F. Endom, offered as a witness by defendants to prove the plea of novation tendered in their answer. This witness having been sworn and having testified that he was the father of the minors made parties defendant in this suit, and having stated which heirs of his deceased wife were of age at the time of her death, was asked this question: "Do you individually, or the heirs of Mrs. Catherine Endom, deceased, owe the three notes, or any part of them, mentioned in plaintiff's petition, viz.: those of date July 1, 1893?"

This was objected to on the ground that it called for the opinion of the witness. The objection having been sustained, defendants excepted and reserved a bill. Thereupon the witness was withdrawn and defendants closed their case.

Judgment followed in favor of plaintiffs and defendants appealed.

A motion to dismiss is filed here by plaintiffs, averring this court to be without jurisdiction *ratione materiæ* for the reason that the amount in dispute between plaintiffs and defendants is less than two thousand dollars.

There is no merit in this motion.

While the judgment is against defendants *jointly* for two thousand six hundred and eighty-seven dollars and seventy-eight cents, it is ordered to be paid out of the community property inherited by the heirs from their deceased mother; and it is expressly decreed that

"the said judgment in favor of plaintiffs is a debt due by the community existing between Fred. Endom and Mrs. Catherine Endom, deceased, and, as such, is binding on her share in the community property." Besides, the prayer of plaintiffs' petition is for judgment *in solido* against defendants for the sum mentioned above.

The motion is denied.

While the question, quoted above, asked the witness, Endom, might have been put in a less objectionable form, we think he should have been allowed to answer it and then explain why he considered that neither he nor the heirs of his wife owed the debt, if, so be it, he had replied to that effect.

He might, for instance, have answered: "No, we do not owe them," and then gone on to narrate circumstances connected with the taking up of the old notes of the community by the new notes of the surviving husband and the surrender of the former, amounting to legal novation. Or he might have answered it was expressly agreed, as consideration of the new notes and mortgage, that the old should be considered extinguished. He was cut off from making either of these replies, if, so be it, he could make either. The opportunity, at least, to give his version of the matter should have been permitted him, and while the better practice would have been to have changed the form of the question and pressed the inquiry in a different way instead of closing the case abruptly, we believe the interests of justice, certainly a better understanding of the case, call for a reversal of the judgment on this ground, and the remanding of the case.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that the cause be remanded to the court *a qua* to be proceeded with according to the views herein expressed and the law; costs of appeal to be borne by plaintiffs and appellees.

No. 12,819.

THE STATE OF LOUISIANA VS. SANDY MADDISON.

If a witness resides in the State of Mississippi, and personal service of a summons can not, after due diligence has been exercised, be made upon him, the depositions taken before the committing magistrate may be introduced in evidence on the part of the State.

APPEAL from the Twelfth Judicial District Court for the Parish of Assumption. *Guion*, *J.*

M. J. Cunningham, Attorney General, and *G. A. Gondran*, District Attorney, for Plaintiff, Appellee.

John Marks for Defendant, Appellant.

Submitted on briefs May 7, 1898.

Opinion handed down May 16, 1898.

The opinion of the court was delivered by

WATKINS, J. On information the defendant was charged with having committed the crime of robbery by putting Alexander Green in bodily fear, by making an assault upon him, and taking from him by force the sum of twelve dollars in money, and stealing and carrying same away, and the jury returned a verdict of "guilty of assault with intent to commit robbery;" and from a judgment and sentence to imprisonment at hard labor in the State penitentiary, he prosecutes this appeal.

I.

The first bill of exceptions relates to the admission in evidence on the part of the prosecution, of certain written testimony of the prosecuting witness, Alexander Green, which had been taken on the preliminary examination, same having been offered in connection with a summons which had been issued for the witness, and the sheriff's return thereon endorsed, showing that said witness could not be found in the parish, and that his domicile was in the State of Mississippi.

The contention of counsel for the defendant in his bill of exceptions is, that the inquiry of the sheriff disclosed that the witness had been seen at Donaldsonville in an adjoining parish about one week previous; and that it had been reported that he had a residence in an adjoining parish, and that, in consequence thereof, the State had not laid a proper or sufficient basis for the introduction of secondary evidence.

That he had a constitutional right to have the witnesses for the prosecution confront him, and that this privilege could not be legally denied him under the circumstances related.

The trial judge assigns amongst others the following reasons for overruling the defendant's objection, viz.:

That before offering the testimony taken before him sitting as a committing magistrate, proof was made, that the deputy sheriff, to whom a summons had been delivered for said witness, "had inquired diligently for (him) and had not been able to find him, he being *then* a resident of the State of Mississippi," etc., though there was a *rumor* extant that he had been recently seen in an adjoining parish a week previous to the trial.

That "considering the fact that the witness, Alex. Green, was not a resident of Assumption parish, but of the State of Mississippi, and that he was only temporarily in the parish where the crime charged was committed," and that due diligence had been shown on the part of the sheriff in searching for him in the parish of Assumption, he regarded the testimony admissible.

It thus appears that the witness in question resided in the State of Mississippi—that is to say beyond the realm and the jurisdiction of the court, and that at the time of the trial he was out of reach of the process of the court.

The statement of the trial judge is that due diligence had been shown on the part of the sheriff in making search for the witness in the parish of Assumption; and there is nothing to show that there was any truth in the rumor that he had been, theretofore, recently seen in the adjoining parish of Ascension.

On this showing we think it evident that the judge correctly admitted the evidence. The law neither contemplates nor requires the performance of a vain thing; and as it is shown that the witness resided in the State of Mississippi, the process of the court could not reach him—thus presenting an exception to the constitutional requirement relied upon.

II.

The second bill relates to the portion of the charge of the trial judge to the effect that on a trial for the perpetration of the crime of robbery, it was legal and competent for the jury to bring in a verdict of "guilty of assault with intent to commit robbery."

State vs. Madison.

APPEAL from the Twelfth Judicial District Co[urt] of Assumption. *Guion, J.*

M. J. Cunningham, Attorney General, and [illegible] Attorney, for Plaintiff, Appellee.

John Marks for Defendant, Appellan[t].

Submitted on briefs May 7, 1898.
Opinion handed down May 16, 18[98].

The opinion of the court was [delivered by]

WATKINS, J. On informa[tion] having committed the crime [of] in bodily fear, by making [an] by force the sum of twe[nty] rying same away, and t[hat] assault with intent to [rob] sentence to imprisonm[ent] prosecutes this appe[al].

[illegible] and the charge of the judge and in exact conformity therewith; but

The first bill o[f] [illegible] relies upon the provisions of Act 59 of the part of th[e] [illegible], by implication, the latter section. prosecuting w[itness] preliminary [illegible], in terms, amends Sec. 792 of Revised Statutes, with a sur[plus]erence to Sec. 1053. sheriff's r[eturn] provides that "whoever shall assault another by wil- not be fo[und] at him, with intent to commit murder, rape or rob- Mississi[ppi], on conviction thereof, be imprisoned at hard labor, not The [preceding] two years; and the only change made therein by the act tions [of] 1896 is to extend the maximum imprisonment to twenty years. bee[n] In State vs. White, 49 An. 127, we had before us the question of pr[esented] the implied repeal of Revised Statutes Sec. 1053 by said act, and [we] declined to so hold.

We adhere to that ruling. See also State vs. Jonas, 48 An. 1570; State vs. Shelby, 48 An. 1518; State vs. Young, 49 An. 70.

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12,806.

Y MOORE VS. ROBERT HINGLE, JUDGE
IAL DISTRICT COURT, PARISH OF PLAQUE-

ponent, claiming appointment as administrator of a suc-
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pointed, and that the order of appointment and the letters of
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ceedings of the court in respect thereto are open to examination by
he Court in the exercise of its supervisory jurisdiction.

ICATION for a Writ of *Certiorari*.

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lkinson for Relatrix.

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ond, *Jr.*, for Respondent.

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l on briefs April 28, 1898.
anded down May 16, 1898.

The record shows that in keeping with that instruction the jury so found and returned their verdict in that exact form of words.

Counsel for defendant contends, "that the jury could not find accused guilty of a *greater* offence than that charged in the indictment, and that *assault* with *intent to commit robbery* was a greater offence under Act 59 of 1896," than *robbery* as denounced by provisions of the Revised Statutes.

A comparison must be made of the statutes in order to determine the correctness of this contention.

The Revised Statutes declare that whoever shall commit the crime of robbery shall, on conviction, suffer imprisonment at hard labor not more than fourteen years." Sec. 809.

It further provides that "if upon the trial of any person upon an indictment for *robbery*, it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an *assault with intent to rob*, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an *assault with intent to rob*, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob," etc. Sec. 1053.

Those statutes seem plain enough, and the charge of the judge and the verdict of the jury are in exact conformity therewith; but counsel cites and very much relies upon the provisions of Act 59 of 1896, as having repealed, by implication, the latter section.

Let us see.

The act referred to, in terms, amends Sec. 792 of Revised Statutes, and makes no reference to Sec. 1053.

The former provides that "whoever shall assault another by wilfully shooting at him, with intent to commit murder, rape or robbery, shall, on conviction thereof, be imprisoned at hard labor, not exceeding two years; and the only change made therein by the act of 1896 is to extend the maximum imprisonment to twenty years.

In State vs. White, 49 An. 127, we had before us the question of the implied repeal of Revised Statutes Sec. 1053 by said act, and declined to so hold.

We adhere to that ruling. See also State vs. Jonas, 48 An. 1570; State vs. Shelby, 48 An. 1518; State vs. Young, 49 An. 70.

As Revised Statutes Sec. 1053 has not been repealed by the passage of the act of 1896, its provisions are inforceable, and must remain as a guide for judges and juries, notwithstanding it may be conceded for the argument, that the effect of the act of 1896 is to make an assault with intent to rob, a greater offence than robbery; though we are of the opinion that such is not a necessary or logical conclusion.

The result of our having thus concluded is to sustain the judge's charge.

III.

The two remaining bills of exceptions merely state the two foregoing propositions in the form of a motion for a new trial, and in arrest of judgment; and such being the case the foregoing reasons are strictly applicable thereto.

Judgment affirmed.

No. 12,806.

STATE EX REL. PATSEY KELLY MOORE VS. ROBERT HINGLE, JUDGE TWENTY-SECOND JUDICIAL DISTRICT COURT, PARISH OF PLAQUEMINES.

It being alleged by an opponent, claiming appointment as administrator of a succession by preference, that a prior applicant therefor has been illegally and prematurely appointed, and that the order of appointment and the letters of administration thereunder issued are absolutely null and void and *ultra vires*, no right or title can absolutely vest in the appointee so long as such opposition remains undisposed of.

As, under the law, no suspensive appeal can be taken by an opponent claiming appointment as administrator from an adverse judgment, radical defects and illegal proceedings of the court in respect thereto are open to examination by the Supreme Court in the exercise of its supervisory jurisdiction.

ON APPLICATION for a Writ of *Certiorari*.

James Wilkinson for Relatrix.

John Dymond, Jr., for Respondent.

Submitted on briefs April 23, 1898.

Opinion handed down May 16, 1898.

The opinion of the court was delivered by

WATKINS, J. The relief demanded has reference to a contest in the respondent's court over the selection and appointment of a legal representative for the succession of one Charles Kelly, which was opened by his death in the parish of Plaquemines in July, 1896—the sole asset of which is a piece of real estate subject to mortgage in favor of Frank Giordano, the first applicant for the appointment.

The relatrix assigns as cause for her application that the deceased was her natural father by whom she had been frequently and repeatedly acknowledged during his lifetime as his natural daughter, and that she was entitled to be appointed, by preference, administratrix of said succession.

Her averment is, that on the 5th of October, 1896, said Frank Giordano filed an application to be appointed administrator, and was by the respondent appointed and granted letters of administration on the seventh day thereafter—that is to say, on the 17th of October, 1896—and that letters of administration were issued to him on the third day thereafter.

That the law neither allows the appointment of an administrator, nor the issuance of letters of administration, until after the expiration of ten days from the first insertion of the notice of the application in the official newspaper of the parish; and that the appointment of Giordano having been made prior to the expiration of that delay the act of the respondent was *ultra vires* and void, and the letters granted thereunder were likewise illegal and void.

That neither the affidavit, with reference to the publication of the application, nor the certificate of the clerk, on the faith of which the respondent's order is alleged to have been granted, had been in fact filed in the clerk's office until the 19th of October, the day previous to that on which the appointment of Giordano was made, and it was, therefore, unauthorized.

That under said illegal order and letters Giordano was qualified, and immediately thereafter he obtained an order for the sale of the property of the succession and caused the sale to be advertised.

That on the 28th of November, 1896, she filed an opposition, in which is fully set forth the premature and illegal acts complained of, and prayed for judgment annulling said order of appointment and the letters of administration which had been thereunder issued.

That during the course of the trial it was for the first time devel-

oped that her husband had disappeared some years previously and that his whereabouts were unknown, and thereupon counsel for Giordano moved the dismissal of her opposition because of her lack of authorization; and thereupon opponent's counsel replied by requesting her *immediate* authorization by the court and that she be permitted to prosecute her opposition as though she had been authorized prior to the filing of same.

That the respondent acted at once upon the suggestion of opponent's want of authorization and orally directed that a non-suit be entered; but that counsel for relatrix tendered his *written* motion for her authorization before respondent's action had been formally entered upon the minutes of the court, and he thereupon made and signed the following order, viz.:

"Let Mrs. Patsy Kelly be authorized to prosecute this suit.

"ROBERT HINGLE, *Judge*."

That notwithstanding the foregoing order was made and signed on the 9th of December, 1897, and filed in the record, a judgment was subsequently signed and filed on the 6th of January, 1898—very nearly one month having in the meanwhile elapsed—non-suiting relatrix as opponent for *want* of authorization.

That thereupon she applied for a new trial, when her application was met with the last named decree of non-suit, and with the reply of the respondent that a new trial was inadmissible when the judgment pronounced was one of non-suit, and that his only remedy was by appeal.

That well knowing a *suspensive* appeal would not lie from an order appointing an administrator, the relatrix renewed her opposition, adopting all the allegations of her original opposition, and obtained the judge's order of authorization in the following words, viz.:

"Let Mrs. Patsey Kelley Moore be authorized to prosecute this opposition and application.

"Open court, January 6, 1898.

"ROBERT HINGLE, *Judge*."

Said renewal of the opposition and order of authorization bearing same date as the judgment of non-suit above referred to.

That thereupon the respondent adjourned his court *sine die*, and there has been no term of the same held since that date, and prior to the present application for relief having been made, at which the

opposition and application for appointment by the relatrix could have been fixed for trial or tried; but that notwithstanding that fact, Giordano was permitted to file another petition for appointment, at Chambers, out of term time, during the vacation of court, and without previous notice of any kind to relatrix, by publication or citation, on the 26th of February, 1898, the petitioner acting upon the assumption that opponent had not first paid the costs of the first opposition, and that the payment of them was a condition precedent thereto.

Then follows the following averment of the relatrix, viz.:

"That without publication of this new demand; without notice to the relatrix or her counsel; without certificate from the clerk of the *absence* of opposition, and with full knowledge of the pending opposition of relatrix which the judge had himself authorized and signed in this cause; without any new affidavit; without a bond given to secure the letters, the former being null and void like the letters (which were first issued), and which they purported to secure, the Hon. Robert Hingle, judge of the court, signed on February 26, 1898, an order granting letters of administration on the estate of relatrix' father to said Giordano."

She further avers, that it is under the last named illegal order of appointment and the letters of administration thereunder issued, that Giordano qualified, and procured the probate order for the sale of the succession real estate of which the relatrix complains.

She further avers, "that counsel for Giordano being well aware, that said order was illegal, and in fact a judgment rendered without hearing the parties, prepared a typewritten reservation in said order which the District Judge was induced to sign, to *Frank Giordano* of any and all contentions as to the *legality* of all prior letters."

Having quoted *in extenso* and analyzed the allegations of the relatrix' petition, we will also quote the synopsis which she makes of her demands as the more accurate method of stating them, and which are of the following tenor, viz.:

"1. Because (the respondent) acted contrary to law and exceeded his powers in granting an order to Giordano for letters on October 17 (1897), two days before the clerk of the court filed any certificate, and only seven days after the publication of first monition.

"2. Because he acted contrary to law, and exceeded his powers

in signing said letters on the 20th of October (1897), the ninth clear day after the first publication.

"3. Because any ruling upon a verbal motion to non-suit is always within the discretion and control of the court; and that it was illegal for the court in *one* order to authorize the (opponent) to prosecute this suit, and to subsequently enter up a judgment non-suiting her for lack of authorization.

"4. Because it was illegal and arbitrary for the court to declare that she had no right to apply for a new trial from a judgment of non-suit.

"5. That it is and was a denial of justice, and was illegal, arbitrary, null and void for the lower court, after authorizing relatrix to file and prosecute her opposition and application, and after said opposition and application had been filed, to issue, out of term time, without hearing the parties, on an *ex parte* petition, without bond, affidavit, publication, or any other notice, letters of administration to the original applicant whose petition had been steadily opposed; and who, despairing of obtaining such letters contradictorily, persuaded the court, by this *ex parte* proceeding, to ignore her formal pleadings."

The *gravamen* of the relatrix' complaint is, that she has no other adequate and sufficient remedy than her application to this court for the exercise of the supervisory power, for the reason that under the law she is not afforded the remedy of a *suspensive* appeal from the order of court appointing Giordano administrator; and having no standing in court to enjoin the succession sale, the sole asset thereof would have been disposed of pending the litigation in respect to the appointment.

In his return, respondent makes a similar statement to that of the relatrix, producing and annexing a certified copy of the *mortuaria*, and therefrom we make the following extract, viz.:

"Respondent represents that he considered, and that he now considers, that in order to legally contest on January 6, 1898, the right of the said Frank Giordano to act under letters of administration actually issued to him in that succession on October 20, 1896, it was necessary for the said Patsey Kelley, after the administrator had been acting in his said capacity for a full period of fifteen months, to proceed by petition and citation in a direct attack upon the said appoint-

ment, the legality thereof, and the right of the administrator to fulfil the office.

"For this reason, considering therefore that there was no legal opposition pending on February 26, 1898, if opponent had mistaken her remedy it was not the fault of respondent; and, at the request of counsel for the said administrator, *reserving to the said administrator his full contention as to his rights in the premises under the original letters issued, and simply to protect the title to real estate which was to be sold to further the ends of justice, and enable the administrator to convert into cash and sell to better advantage the only asset of the succession, consisting of a piece of real estate which was mortgaged as aforesaid, new letters of administration were thereupon issued to Frank Giordano.*"

The foregoing extract from the return is a substantial verification of the principal grounds which are assigned by the relatrix for relief by *certiorari*, coupled with an amplification of the reservation he made in favor of Giordano; but this reservation, taken in connection with the reason the respondent assigns for granting additional letters to Giordano, is utterly subversive of his entire theory.

But if this were not so, an examination of the exemplications of the succession record completely sustains the complaint of the relatrix and supplies any possible hiatus in her statement.

For it appears that the opponent attacked the legality of the original appointment as having been prematurely made, and without the administration of proper proof of publication of the application.

To this opposition the contestee excepted, and his exception having been overruled he filed an answer, and the trial began upon issue thus joined. During the progress of the trial the testimony developed the fact that opponent was a married woman, and the record disclosed her lack of authorization to institute her demand. Thereupon counsel for the contestee moved for the dismissal of the relatrix' opposition, and the judge granted the request; but at one and the same time counsel for opponent demanded of the *court*, then and there, to authorize her to prosecute her opposition, and the request was then granted, and an order of authorization was signed.

This, the judge had, under the authorities, an undoubted legal right to do, and once done, the authorization became complete and effective; and the judge was, thereafter, without any power to legally recall or revoke the same. And the effect of the authoriza-

tion once granted, was to relieve the opponent of her legal disability to institute and prosecute her opposition.

But the record discloses that near thirty days subsequently, the respondent signed another decree of dismissal of relatrix' opposition because she had not been duly authorized; and that he thereafter, and upon the same day, refused to grant a new trial in her favor on the ground that the Code of Practice did not warrant the granting of a new trial in such a case.

Conceding for the argument only, that this second decree, or judgment of dismissal, had any legal effect—but in fact we are of opinion that it had not—we think it evident that the respondent entertained a mistaken notion of the law.

The language of the Code of Practice is general in terms, and their significance is plain. They are to the effect that "the party who believes himself aggrieved by the judgment given against him may * * * pray for a new trial, which *must be granted, if there be good ground for the same*," *etc.* Art. 558. (Our italics.)

Was not a *judgment* given against the opponent when her demand was dismissed?

It will not do to say that this dismissal was really one of non-suit, only when the immediate effect of the decree was, at the same time, to deprive opponent of the right of *suspensive* appeal, altogether, therefrom.

But the judge confessed his own want of confidence in the position he had taken, by granting to Giordano *new* letters; but being *ex parte*, the order had no effect with regard to the relatrix whose opposition was still pending.

This whole proceeding is manifestly illegal and unwarranted in law.

It is therefore ordered and decreed that the preliminary writ of *certiorari* be made absolute, and that the judgments and decrees complained of be decreed illegal; and that same be annulled and avoided, and the opposition of the relatrix be reinstated for trial according to law; and that the respondent be taxed with cost.

No. 12,469.

ERNEST DIONNE VS. NEW IBERIA REFINING AND PLANTING ASSOCIATION.

A contract which contains a stipulation to the effect that the obligor guarantees the trade of his laborers and lessees to the tenant of his storehouse, so far as he is able to control the same, is not an agreement to coerce the laborers and lessees to purchase goods from the proprietor of the store. Hence, such a contract is not *contra bonos mores*.

APPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

Walter J. Burke for Plaintiff, Appellee.

Foster & Broussard, T. H. Thorpe and *Andrew Thorpe* for Defendant, Appellant.

Argued and submitted December 27, 1897.
Opinion handed down February 23, 1898.
Rehearing refused May 30, 1898.

The opinion of the court was delivered by

WATKINS, J. Plaintiff alleges that, during the year 1894, he was solicited by the defendant corporation, represented by William Taylor as its authorized agent, to go upon the Morbihan plantation, in the parish of Iberia, of which it was owner, and then in cultivation, and to open a store thereupon "as a convenience to the laborers and others on said plantation."

That he yielded to its request and accepted a lease of a storehouse on said plantation, and in the written contract of lease is the following stipulation, viz.:

"The lessor will guarantee the payment of all accounts made by their employees in the store with their knowledge and consent, to the extent of wages due them; and further guarantee the trade of their lessees and labor in so far as they are able to control same, and the payment of all accounts contracted by them."

The original lease was signed by the defendant company represented by Wm. R. Taylor, as manager, accepted by the plaintiff,

and their signatures were attested by two witnesses; and the clause above quoted and relied upon is endorsed thereon as a marginal note, and signed in like manner.

The representations of the plaintiff are that the defendant had in its employ a large number of laborers on said plantation during the years 1894 and 1895, while the lease was in force, to whom he sold merchandise and made advances; and that when living up to its contract the association was in the habit of deducting from the wages of laborers and employees the amount of their store accounts; still in many cases * * * it failed to deduct the amount due him, and caused him to lose the collection of these various amounts due him from the various parties whose names and the amounts which each respectively owes, are set forth in a statement annexed," etc., aggregating one hundred and ninety-five dollars.

He further represents that during the continuance of his lease the defendant collected from the various laborers and employees on said plantation various sums due him by said laborers and employees for merchandise sold and advances made, aggregating one thousand dollars, and has failed to pay over or account for same.

He further represents that not only the said association did not secure to him the trade of its laborers and employees, as it guaranteed to do, but, on the contrary, it encouraged the tenants to open competition with him in his business by encouraging their laborers and employees to purchase merchandise from other persons; and that this competition caused him a loss of two thousand dollars, which the defendant association owes him under its contract.

He avers full compliance with all the terms of his contract, and that he placed defendant *in mora* before the institution of suit; and his prayer is for judgment for the three several sums demanded, aggregating three thousand one hundred and ninety-five dollars, with legal interest.

To the petition are annexed lists A, B, and C, on which are given the names of the defendant's laborers and the amounts of their accounts on which the plaintiff's demands are founded.

The defendant's answer is a general denial.

After considerable testimony had been taken, and much difficulty having been experienced in establishing certain facts, plaintiff's counsel tendered and filed, over the defendant's objections, a supplemental petition, and thereto annexed interrogatories on facts and

articles to the vice president of the defendant company; and the defendant's counsel filed an answer and set out several objections, viz.:

(1) That the petition came too late; (2) that the materiality of the testimony is not alleged; (3) that there is no affidavit attached to the motion; (4) that the interrogatorics propounded are immaterial to the issue.

On the conclusion of the trial the judge *a quo* assigned the following reasons for his judgment, viz.:

"The court finds that this case is predicated on a written contract of lease entered into between the plaintiff on the one side and Wm. R. Taylor, acting as the agent of the defendant corporation, on the other side.

"The court is of opinion that the right and power of Wm. R. Taylor to make this agreement has been satisfactorily shown, and that the contract has been satisfied by the silent acquiescence, by the acts and admissions of the president and other accredited agents of the defendant corporation, as well as their business relations with the plaintiff.

"The court considers as not written that part of the contract wherein the defendant binds itself to coerce its laborers to purchase from the plaintiff, believing that part of the contract to be against public morals and public policy, and not enforceable.

"The court is of opinion that the accounts designated on lists B and C, amounting to a total of four hundred and fifty-five dollars and twenty-two cents are due the plaintiff by the defendant corporation and must be paid.

"The evidence regarding accounts carried on list A is not satisfactory, and plaintiff's demand for the amount represented by it must be denied.

"The court is of opinion that no damages can be awarded, as none have been proven."

On this statement the court pronounced judgment in favor of the plaintiff for the sum of four hundred and fifty-five dollars and twenty-two cents with legal interest from judicial demand; and from that judgment the defendant prosecutes this appeal.

In this court the plaintiff and appellee has filed no answer to the appeal nor requested any amendment of the judgment which is appealed from; hence the only question is whether the judgment

shall be affirmed as it stands or reduced. It can not be increased; and list A and the plaintiff's demand for damages are not before us at all.

The argument in the brief of defendants' counsel is chiefly directed to the two propositions, (1) that the authority of Wm. R. Taylor in signing the act of lease to the plaintiff is not fully and satisfactorily shown; (2) that a contract which is illegal in respect to one of several considerations is illegal as to the whole.

The record discloses that the first proposition was the subject of much controversy during the progress of the trial, and this resulted in a great number and variety of objections being reserved, but upon a fair consideration of the whole evidence they have disappeared altogether.

Conceding the law to be on the second proposition as claimed by counsel for the purpose of the argument, we must say that we are disinclined to consider the clause of the contract referred to by the District Judge as one binding it "to *coerce* its laborers to purchase from the plaintiff," and, therefore, not a contract *contra bonos mores*. The clause is in those words, viz.:

"And further guarantee the trade of their lessees and labor in so far as they are able to control same," etc.

We do not construe that phraseology as intimating even the employment of force.

The corporation had a perfect legal right to guarantee the trade of the lessees and laborers *as far as it was able*.

In this view of the contract the law cited and relied upon by the defendants' counsel is not applicable, but it can not benefit the plaintiff by entitling him to an increase of the judgment, as he prayed for no amendment of it.

An attentive examination of the case has satisfied us that the judgment appealed from has done substantially justice between the parties.

Judgment affirmed.

BREAUX, J. concurs in the decree.

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No. 12,765.

STATE OF LOUISIANA VS. RUBEN DOWNS.

A demand on the part of the defendant's counsel that the prosecuting witness be qualified touching her competency comes too late after she has been sworn in chief and her interrogation actually commenced.

It is not the right of counsel for an accused to require the testimony of a witness upon cross-examination to be reduced to writing. The law limits that right to testimony which appertains to some question of law raised on a bill of exceptions and to be decided by the Supreme Court.

APPEAL from the Twelfth Judicial District Court for the Parish of Calcasieu. *Read, J.*

M. J. Cunningham, Attorney General, and *A. R. Mitchell*, District Attorney (*P. A. Simmons*, Jr., of Counsel), for Plaintiff, Appellee.

Kleinpeter & Kleinpeter and *R. L. Belden* for Defendant, Appellant.

Submitted on briefs March 26, 1898.

Opinion handed down April 4, 1898.

The opinion of the court was delivered by

WATKINS, J. The accused was indicted, tried and convicted of the crime of rape, and sentenced to life imprisonment in the penitentiary, and rests his appeal upon two bills of exception, and a motion for new trial—the defendant having been accused of ravishing Florence Pool, a colored girl of nine years of age.

I.

The first bill of exceptions taken by the defendant relates to the refusal of the trial judge to permit the prosecuting witness to be sworn and examined during the progress of the trial touching her competency as a witness—the objection made and sustained being that the request came too late after he had been sworn, and her interrogation as a witness actually commenced.

We extract the following from counsel's brief, p. 6, viz.:

The first bill is as follows, to-wit:

"Be it remembered that on the triai of the above cause the prose-

cutrix, Florence Pool, was duly called and sworn as a witness for the State, and pending the giving of her testimony in chief * * * Counsel for the accused requested that the witness be qualified touching her competency as to the appreciation of an oath, or her accountability to her maker in the event of her false swearing, she being a female negro child of nine years of age.

"The court overruled the request on the ground that it came too late—after the witness had been tendered and sworn as a witness and her testimony already begun, but with the reservation of right to assail credibility on cross-examination."

Replying thereto the Attorney General makes reference to the following authorities as sustaining the ruling of the court, viz.:

The ruling of the court was correct. Mr. Wharton says: "The law on grounds of policy presumes that all witnesses tendered in a court of justice are not only competent but credible" * * * Wharton's Cr. Ev., par. 368.

Again that author says: "A party who knows objections to the competency of a witness can not, so it has been held, hold back such objection until the witness has been examined, and then raise the objections if the witness' testimony prove unfavorable" * * * Par. 359.

While there may be some doubt of the perfect accuracy of the ruling of the trial judge, as the witness had only just been sworn in chief when the defendant's counsel made their request, we think the ends of justice were subserved by the reservation of the right of defendant's counsel to assail the credibility of the witness on cross-examination.

II.

The second bill of exceptions relates to the refusal of the trial judge to permit the testimony of the prosecuting witness aforesaid to be taken down in writing as requested by the defendant's counsel.

The judge assigned as his reason for having so refused the request, that "the ruling of the court above complained of was made because no reason was apparent or assigned for such course, and which if acquiesced in by the court would have materially retarded the cause and obstructed the business of the court."

We think the ruling of the judge was correct; not only for the reason which he assigned, but for the stronger one that the law does

not warrant the reduction of the testimony of a witness to writing under the circumstances related.

The statute provides "that on the trial * * * when an objection shall have been made and a bill of exceptions reserved, the court shall at the time and without delay order the clerk to take down the facts upon which the bill has been retained"—to be attached to the bill in case of appeal. Act 113 of 1896.

But the proposition of the defendant was to have the testimony of the prosecuting witness on cross-examination on the merits reduced to writing—an altogether different situation.

Neither the language nor the spirit of the law justifies the contention of defendant's counsel.

The testimony sought to be reduced to writing appertained to the guilt or innocence of the accused, and not to a question of law for this court to decide.

III.

The ground of the defendant's motion for a new trial is, that the verdict of the jury was contrary to law and evidence. In keeping with the uniform current of our jurisprudence we can not enter upon a discussion of that question, as it is predicated upon the facts adduced on the trial.

We find no error in the ruling of the trial judge.

Judgment affirmed.

No. 12,687.

STATE EX REL. P. ST. AMAND VS. BANK OF COMMERCE.

A tax assessed against money in possession of the liquidators of an insolvent bank is neither illegal nor unconstitutional, as it comes within the designation of both the Constitution and revenue law as property which is subject to taxation.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Clegg & Quintero and *Chas. J. Théard* for Liquidators of the Bank of Commerce, Appellee.

Samuel J. Gilmore, City Attorney, and *W. B. Sommerville*, Assistant City Attorney, for City of New Orleans, Opponent, Appellant.

Submitted on briefs March 22, 1898.

Opinion handed down April 4, 1898.

The opinion of the court was delivered by

WATKINS, J. This appeal is prosecuted by the city of New Orleans from a judgment dismissing its opposition to an account filed by the liquidators of the Bank of Commerce, proposing to distribute among the privileged and ordinary creditors thereof the sum of one hundred and ten thousand five hundred and eighty-nine dollars and eighty-seven cents, the claim of the city being for the sum of four hundred dollars taxes, with first lien and privilege upon the funds in the hands of the liquidators.

The amount claimed was not entered upon the account, and the demand of the city is that it should be placed thereon, and paid by preference.

From the tax bill in evidence it appears that the assessment was made for the year 1897 of twenty thousand dollars, of "money in possession" of the liquidators of the Bank of Commerce.

On the trial of the opposition it was agreed by counsel that the case was to be submitted and tried solely upon the question of the legality and constitutionality of the tax; and on the submission the judge *a quo* held that the tax was illegal, and dismissed the opposition of the city.

The city attorney applied for a new trial, and same was refused; and in the course of his reasons for judgment the judge *a quo*, among other things, said that in his opinion the "contention of the liquidators of the bank is correct; that the money in their hands is there as officers of this court, which is a department of government, and property in possession of the government is not liable to taxation."

In the brief of counsel for the liquidators, the position is taken, that the assessors have assessed "money in possession" of the Bank of Commerce, notwithstanding it is no longer in existence, its charter having been forfeited by a judgment, and liquidators appointed "to collect the assets and distribute them among the creditors."

"That the stock of the bank has been completely wiped out, and whatever money comes into the hands of the liquidators is the property of the depositors.

"In addition to the reasons given by the judge *a quo* for declaring the assessment and tax illegal and unconstitutional, it is submitted, that the effort of the city to assess and tax *moneys belonging to the depositors of a bank* is clearly an attempt at *double taxation.*"

In our opinion neither position is at all tenable.

The paramount law declares, that "all property shall be taxed." Constitution, Art. 203.

Another articles enumerates certain exemptions from property taxation, but "money in possession" of neither individual nor bank is found within its designation. Art. 207.

The terms of the revenue statutes just as imperatively require that "all property situated within the State of Louisiana" shall be taxed. Sec. 1, Act 85 of 1888.

A more recent statute provides in terms that "all property held, controlled, or administered in each separate capacity as president, cashier, treasurer, *liquidator*, assignee, master, superintendent, manager, sequestrator, *receiver*, trustee, stockholder, *depository*, warehouseman, keeper, curator, tutor, executor, administrator, legatee, heir, beneficiary, father, agent, attorney, usufructuary, mandatory, *fiduciary, or official capacity*," shall be taxed. Sec. 1, Act 106 of 1890.

The moneys in the hands of the liquidators were realized by them from collections, and are in no sense deposits; but if they were deposits, same would become *eo instanti* property of the *bank*, of which the depositors would be creditors merely.

The account of the liquidators shows that there is a large sum in their hands ready for distribution among the depositors of the defunct bank as creditors.

Forsooth, that the liquidators are, in a qualified sense, officers of the court, does not, in our opinion, shield the funds in their hands from taxation.

Neither the charge of illegality or unconstitutionality of the tax is, in our view, sustainable. The judgment appealed from must be reversed.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered that the liquidators amend and so restate their account as to include the amount of the tax claimed with interest, and that all costs be taxed against the bank in liquidation.

NICHOLLS, C. J., recused.

50 699
117 872

No. 12,552.

STATE OF LOUISIANA VS. WILLIAM P. NICHOLLS.

The nine hundred and seventh section of the Revised Statutes making it an offence for any presidents, cashiers or others in the service of chartered banks "to knowingly and wilfully embezzle or convert to his own use the funds of the bank furnishes a complete definition of crime; embezzlement has a technical meaning; without addition is of common use, and the violation of trust or duty, the incident of embezzlement, is implied in the section by the relation it implies, if not states, between the president or cashier and the funds of the bank. Revised Statutes of the United States, Secs. 5209, 5471, 5475, 4596; Second Archbold, p. 560; 120 U. S. 334; 156 U. S. 429; 107 U. S. 866.

It suffices that an indictment for an offence fully defined by the statute follows the words of the statute. 1 Bishop, Criminal Procedure, Sec. 356; Wharton, C. L. 1st., Secs. 334, 362; 32 An. 572; 107 U. S. 669.

This section though from a legislative act of 1821, when all banks in this State existed under special charters, can not be restricted to such banks, but extends to all banks whether holding their franchises under special legislative act or under the general law for the creation of corporations, especially in view of the fact that since 1855 the offence has been part of the crimes code of the State extending to embezzlements by presidents and others in the service of all chartered banks. Acts 1855, No. 120, Sec. 88; Pierce & King's Revisory Legislation of 1852, p. 192, Sec. 48; Act No. 166 of 1855; Revised Statutes, 1870, Sec. 907.

When the charge is that the good character of the accused is testimony to be weighed and considered with all other evidence, and to have the weight to which the jury conceives it entitled, it is not error to refuse further special instructions asked on behalf of the accused that propose to instruct only as to the tendency of character, testimony to benefit the accused under hypothetical phases of the testimony; if special instructions are given they must cover the whole law on the point, and the jury instructed that testimony of the good character of the accused is unavailing against positive testimony of guilt. 3 Rice, p. 607, Sec. 378; 1 Bishop Crim. Procedure, Sec. 489; Thompson on Jury Trials, Sec. 4244; 4 Mason, p. 510.

When the charge is accurate and complete as to the presumption of innocence and its effect as evidence, the conviction will not be set aside because the court in the course of its explanation on another point, *i. e.*, reasonable doubt, stated the jury are not to go beyond the testmony to seek for doubts, must confine themselves to the testimony and not resort to extraneous doubts or circumstances.

The tendency of all authority is to sustain instructions that substantially embody the law applicable to the case, though not in the precise words of the statute or in the frame requested on behalf of the accused, and it is equally clear that repetition of that already substantially charged can not be exacted. 41 An. 677, 605; 37 An. 619; 35 An. 1180, 1058; 37 An. 51.

Instructions asked on behalf of the accused requiring qualifications are properly refused. 35 An. 769, 775.

In explaining "embezzlement" used in this section, it is not error to illustrate the offence for the court to refer to the used methods of proof of general acceptance, nor can such illustrations be understood as changing the statutory embezzlement with which the accused is charged.

State vs. Nicholls.

The cashier of a bank, is in legal contemplation, the custodian of its funds. The Section 907 of the Revised Statutes was designed to punish embezzlements of the president, cashier or others in the service of the bank, whether or not legally charged with the custody of the bank's funds, hence the instruction, reasonably construed, was not erroneous that in the prosecutions under that section the actual custody of the money by the accused must not be shown.

Nor will the verdict be set aside because in explaining the intent to constitute the offence of "wilfully and knowingly" embezzling and converting the funds of the bank, the trial judge stated in effect, that the embezzlement was the fraudulent appropriation of another's property; that the intent of the accused to appropriate to his own use must have existed at the time of the appropriation charged to constitute the offence; that "an act was wilfully done when done without reasonable belief it was lawful;" these and similar expressions of the trial judge announcing with reasonable accuracy the criminal intent essential to the crime.

The refusal to allow a challenge for cause is no ground to set aside the verdict when the juror did not serve and the jury is completed without exhausting the peremptory challenges of the accused. 35 An. 315; 38 An. 480; 43 An. 365.

APPEAL from the Criminal District Court for the Parish of Orleans. *Baker*, *J.*

M. J. Cunningham, Attorney General, and *R. H. Marr*, District Attorney, for Plaintiff, Appellee.

Beattie & Beattie, *T. Marshall Miller*, *Chandler C. Luzenberg*, *Charles Louque* and *Lawrence H. Pugh* for Defendant, Appellant.

Argued and submitted January 15, 1898.
Opinion handed down February 23, 1898.
Rehearing refused May 2, 1898.

The opinion of the court was delivered by

MILLER, J. The defendant appeals from the sentence following his conviction, on the indictment under Sec. 907 of the Revised Statutes, making it a crime for any president, cashier, officer or person of any bank chartered by this State to embezzle and convert the money belonging to the bank or deposited in it.

The indictment follows the language of the statute and charges that the defendant on the date specified, being president of the Bank of Commerce, a bank chartered by the State of Louisiana, then and there did feloniously, wilfully and knowingly convert to his own use

twenty thousand dollars belonging to the bank and deposited therein. There are numerous bills of exception and assignments of error in the record, and as single propositions are made the subjects of two or more exceptions or assignments, it will be more convenient to deal with the propositions instead of attempting to discuss each bill separately.

It is urged the jury should have been charged there was no law to sustain the indictment, and on the same ground that the judgment should have been arrested. The argument is, that to embezzle and convert to his own use money belonging to the bank or deposited in it, used in our statute or rather Sec. 907 of the Revised Statutes announces no crime. It is supposed the statute is deficient in not setting forth the ingredients of the offence, or to state it another in form, does not define the offence it seeks to create. Embezzle, with or without the usual addition convert to his use, finds its definition in the text-books and is of constant use in the statutes for the punishment of crime. The words have a technical and popular significance and plainly convey the wrongful appropriation of the property of another, by the party entrusted with, or who has possession of it, under some trust, duty or office. With this significance, couched in the appropriate technical terms, embezzle alone, with convert to his own use, is to be found in the crimes act of the United States; notably in the familiar sections of the Revised Statutes dealing with the officials of national banks, as well as in our own criminal code. Revised Statutes, U. S., Secs. 5209, 5439, 5453; Revised Statutes of Louisiana, 1870, Sec. 907; Revisory legislation of 1852, p. 198, Act 1855, p. 120, Secs. 83, 131; Revised Statutes, 1855, p. 149, Sec. 84, of 1870, p. 179; Roscoe, p. 438; 2 Wharton Crim. Law, Sec. 1907; United States vs. Britton, 107 U. S. 666; United States vs. Northway, 120 U. S. 334; Moore vs. United States, 160 U. S. 268. If we correctly appreciate the argument in another aspect, it supposes the statute deficient in legal certainty, because it omits the words that the property embezzled came into the hands of the party in the course of his employment, or by virtue of his office, or other words to show the relation to the property of the party charged. Without these words it is claimed there is no distinction between embezzlement and larceny. The answer to this, we think, is, that the offence of embezzlement, purely of statutory creation, may be constituted without the words the argument exacts as essential.

Such words as describe the relation of the party charged to the property embezzled, *i. e.*, that it came into his hands by virtue or in the course of his employment, used in connection with embezzlement by bank officials, could in strictness be applied only to the cashier, in legal contemplation the custodian of the bank funds. The purpose of our statute was to reach the president, or others in the service of the bank, whether or not the custodian of the funds. Whether the funds embezzled were paid to the president by a debtor of the bank, or taken by the president, or in his hands to be used for the bank, or by whatever mode such funds were in his possession, it was the design of our statute to provide the offence of embezzling such funds by the president, or others in the service of the bank. Hence, the statute in dealing with embezzlements by presidents of banks omits the words used in other sections of the Revised Statutes, in defining the offence generally. It was enough in the view of the lawgiver, to enact, that any president of the bank who embezzles its funds should suffer the prescribed penalty. The terms of the statute necessarily imply funds in his hands as president. The statute, in our opinion, does define the offence, and distinguishes it from larceny. By the terms of the statute, giving to embezzle its recognized significance, the offence of wilfully and knowingly appropriating to his use the funds of the bank by the president, must be deemed to be created.

If Sec. 907 constitutes by its terms a complete offence, then the recognized rule applies, that in indictments for statutory offences it suffices to follow the words of the statute. An exception to the rule is where the common law designation of a crime is employed: then the essentials of that crime must be stated in the indictment. In this case no such designation is used. The statute, complete, as we think, in its statement of the offences, is the guide for the pleader. On this branch of the case our attention is directed to the decision of the insufficiency of an indictment, under a Federal statute, directed against embezzlements of public property by any person. It was held under such a statute to be essential the indictment should show the relation of the party charged to the property, he is charged to have embezzled. No such relation appeared in that statute, and without that there was nothing to distinguish embezzlement from larceny. Moore vs. United States, 160 U. S. 270. The difference between that and our statute is obvious. The relation

of the bank official to the moneys of the bank is implied in our statute. The statute is directed against the bank president who embezzles the bank's funds. The words imply the essence of embezzlement that distinguishes it from larceny, *i. e.*, that he was in possession as president and embezzled the funds thus lawfully in his possession. In the case cited the court observed that if the statute contains all the elements of embezzlement, no addition is required in the indictment. Not expressly, it is true, but with equal if not greater force by necessary implication, our statute contains that ingredient the argument supposes to be wanting, *i. e.*, that the funds came into the hands of the president as president. Anything more to embrace that element would be mere verbiage. Where nothing is to be added to the statutory definition, it suffices for the indictment to follow the statute, and unsafe to state the offence otherwise. It remains to add the sufficiency of an indictment in the form of that here was maintained by our predecessors. We hold the indictment sufficient. 1 Bishop Crim. Procedure, Sec. 356; 1 Wharton Crim. Law, Sec. 34; State vs. Palmer, 32 An. 572, 574.

It is strenuously insisted by the charges requested, motion to quash and the assignments of error, that Sec. 907 of the Revised Statutes has no application to the accused, because he is president of a bank not chartered by special legislative act, but under the general law. The argument is based on the fact that this section was originally an act of the Legislature of 1821, when all our banks were chartered by special acts, hence, it is argued the section must now be deemed to refer to that class of banks alone, and not to those like the Bank of Commerce organized under the general law. The argument confronts the plain language of the section extending to all chartered banks. But one or two banks still linger under special charters. The result of the argument is, there is no law in Louisiana to reach embezzlements by officials of State banks chartered in the only mode allowed since the prohibition of special charters. Const., Art. 46. We are told to meet this supposed defect in our legislation with the equanimity enforced by the aphorism that the law as written, and not the consequence, is the judicial guide. No court, however, should affirm the result exacted by the argument without the closest scrutiny of the reasoning for the conclusion. The earnestness of the argument has given to the proposition an importance far beyond that of first impression, and induced that consider-

ation due to the zeal and research of counsel. The distinction made by our laws in reference to the modes of business, and privileges of banks chartered under special acts, and the banks deriving their charter from the general law, have been brought to our notice: thence it has been argued that because only banks holding special charters existed in 1821, therefore the legislation of that year is to carry a limitation on Sec. 907 of the Revised Statutes, and restrict it to the class of banks existing in 1821. Yet that section for almost half a century has been a part of our crimes act embracing all banks, whether chartered by special acts or under the general law. In this connection our attention has been directed to the decision of a District Judge that a penal section of another character (now Sec. 877 of the Revised Statutes), originally introduced in the free banking act of 1853, was to be restricted to the officials of such banks, and by the same reasoning it is claimed Sec. 907 is to be confined to banks of the earlier class of 1821 when all held by special charters. This decision, we think, entirely omits the control that should have been exerted in the determination of the question arising from the fact that although the provision of the act of 1853 was originally confined to free banks, it afterward became like Sec. 907, a part of the crimes act applying to all banks. It seems to us, in construing a penal or any statute the prominent object in the legislative contemplation must have its influence. We must suppose the Legislature in 1821, proposed to punish embezzlements by bank officials and to provide the legislation for that purpose not only in respect to the banks then existing, but to reach delinquencies of bank officials for all time and all banks. In this view the act of 1821 would have applied to all banks coming into existence afterward by the changed methods of later years. But we think it entirely conclusive against the contention in this respect that this act of 1821, even if limited to one class of banks originally, was incorporated in the crimes act applicable to all banks as early as 1852, was re-enacted in 1855, and again in 1870. Pierce & King's Digest of 1852, p. 192; acts of 1855, No. 166; Revised Statutes of 1855, Sec. 84. We think the motion to quash and the charges on the ground that Sec. 907 of the Revised Statutes did not apply to the Bank of Commerce were properly denied.

It is insisted the charge of the court was not in accordance with

the law in respect to the presumption of innocence. The text writers and decisions exhibit some variance in expression, but none of substance, in stating the presumption of innocence. As one puts it, the law presumes innocence, until the contrary is proved or appears from a stronger presumption; another writer states it thus: as men do not generally violate the criminal code, the law presumes every man innocent, but some do transgress it, and therefore evidence is received to repel the presumption. This legal presumption of innocence is to be regarded by the jury in every case as part of the evidence to the benefit of which the accused is entitled. 1 Greenleaf on Evidence, Secs. 34, 35; Roscoe, p. 14. At the outset of the charge we find the instruction was given to the jury.

"All persons accused of crime are presumed by law to be innocent until they are proven to be guilty. The consequence of this rule of law is that they are not required to prove their innocence, but may rest upon the presumption in their favor until it is overcome by positive affirmative proof. It is therefore the duty of the State to establish to your satisfaction beyond a reasonable doubt every essential ingredient necessary to constitute the guilt of the prisoners of the crime charged." We are asked to set aside the verdict in this case on the ground that the instruction did not place the defendant with all the advantage the law secured to him by the presumption of innocence. It is a serious responsibility to disturb the verdict of a jury on the ground of misdirection. It should, undoubtedly, be done when the accused has been deprived by the charge of that correct instruction as to the law to which he is entitled. But on reason and authority no court should set aside the verdict in a criminal case because of asserted error in giving to the jury a familiar principle of law, unless the instruction is clearly erroneous. Nor when an instruction which fairly covers the legal principle has been given, should the verdict be disturbed because the trial judge declines to give the same principle in that varied form in which it is requested on behalf of the accused. In what respect does this instruction misstate, or fail to convey to the jury an adequate appreciation of the presumption of innocence? Unless we find the substantial basis to hold the instruction deficient or misleading, it is beyond the power of this court to disturb the verdict. After the trial court had thus charged, the following instruction on the same

point was asked, which the trial judge refused on the ground his charge was sufficient, and that the instruction was calculated to mislead: "If you find from the evidence that the actions of the accused present a double aspect, one free from crime and the other criminal, and your minds are in doubt on this matter, you are bound, under the law, to lean to that construction and interpretation of the acts of the accused which would make their acts honest and non-criminal, for the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when one brought to trial upon a criminal charge, he must be acquitted unless he is proven to be guilty. This presumption of innocence is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. Every reasonable doubt or presumption arising from the evidence must be construed in favor of the accused." The requested charge is, we think, argumentative, that is, goes beyond the statement of the legal principle; proposes to guide the jury in the application of the principle they are to make of the presumption under hypothetical phases of the testimony; but it is difficult to find in the more elaborate charge requested any clearer or fuller enunciation of the presumption of innocence than that expressed in the charge of the court. In the argument to show the insufficiency of the charge it is urged the presumption of innocence is not a mere shield, but a "weapon of offence," and proves innocence until the contrary is established. But this effect of the presumption of innocence is quite as tersely stated in the charge, though the jury are not told that the presumption is both a "shield" and a "weapon" not apt to be understood by them. It is claimed in the argument that the defendant in a criminal case does not rest on the mere presumption of innocence, but "by force of the law that tries him puts in evidence as part of the proof the fact of innocence," and this, it is added, is positive evidence which the law recognizes as introduced in every case and proves innocence till broken down by stronger proof. This is a strong presentation of the presumption in the argument to a court, but in our view would be utterly inappropriate to give to the jury. We do not recognize that the "fact of innocence" is put in evidence. The presumption is not the fact, but disappears with contrary proof. This part of the argument is not persuasive that the law as to the

presumption was not fully given, nor does the argument point out how the charge could have been fairer to the accused. But the argument supposes that the error as to the presumption is made apparent by considering it in connection with the charge as to reasonable doubt. The presumption of innocence and the principle that requires proof beyond reasonable doubt are totally distinct. The objection based on the charge as to reasonable doubt supposed to aid the other objection is, that the trial judge in charging as to reasonable doubt excluded, it is claimed, from the jury, the presumption of innocence. In that part of the charge the jury are told they must not go beyond the evidence to seek for doubts, but must confine themselves to the testimony; and not resort to extraneous facts or circumstances. Doubts of innocence could not arise from the presumption of innocence. The very explicit charge as to that presumption and its effect already given must be deemed to have distinctly impressed the jury they must give that presumption its full weight along with all the testimony in the case. It strikes us as a strained appreciation that in any part of the instructions the jury were told to discard, or in any manner to exclude the presumption from their consideration. The court, in that part of the charge which it is claimed tended to exclude the presumption, was dealing with another subject, and not until the jury had been explicitly charged as to the presumption. The charge in a criminal case must be construed in a reasonable sense, and thus construed, we think the charge as to the presumption not at all weakened by the other instructions relied on in the argument. It is claimed that a recent decision of the United States Supreme Court aids the contention of the defendant. In that case, as we read it, the verdict of the jury was set aside, not for any error in the charge as to the presumption, but because none was given. While there was an elaborate direction as to reasonable doubt, the charge was deficient in not instructing as to the presumption of innocence. The court in that case deemed it proper to distinguish, with great elaboration, the difference between reasonable doubt and the presumption of innocence. In defining the presumption of innocence, the court said it was evidence introduced by the law itself on behalf of the accused, and again, "that it was an instrument of proof which the court were bound to consider." This language the argument emphasizes as illustrating the deficiencies in

the charge in this case. The Supreme Court in that case is not defining the charge to the jury. It uses the language to show the difference between reasonable doubt and the presumption. The pertinence of the decision, too, is affected by the point at issue. In that case there was no instruction as to the presumption. Here, that instruction was given. In the opening of this charge there is the clearest statement, as we think, of the presumption of innocence, followed by an equally distinct expression, that as a consequence the accused was not required to prove innocence, but entitled to rest on the presumption until overcome by positive affirmative proof, and this is followed by the explicit language that the State must prove beyond a reasonable doubt every ingredient to constitute guilt. On the most careful consideration we are unable to appreciate the ground for complaint of the defendant on this part of the charge, and hold that the exception to the charge on this point, and to the refusal of that requested, afford no basis on which we can set aside the verdict of the jury.

A large portion of the discussion has been directed to the instruction given and that refused as to the character of the defendant. On this subject the court charged that good character is to be considered just as any other fact in the case; is to be weighed and considered as any other evidence; "and to have such weight as the jury should deem it entitled to under all the evidence in the case." The charge left to the jury the bearing and weight of the testimony, omitted any expression as to the deductions they should draw, and this is, we think, consonant with the spirit of our law, that submits to the jury exclusively the effect of testimony and confines the judge to instructing them on the law. R. S., Sec. 991. It is strenuously contended the court should have gone further, and defined the appropriate weight of character testimony in hypothetical phases of the evidence. We are asked to set aside the verdict on the ground substantially, that the charge denied to the defendant the benefit that would have been derived from a different instruction of the weight of character. The jury, it is insisted, should have been told explicitly the weight and effect of good character, and to give it that effect when proved. The text writers, examining the value of character testimony in criminal prosecutions, recognize its usefulness in doubtful cases, and affirm the competency of the testimony in all cases. Such testimony it is stated, may tend to create a doubt

in favor of the accused, or remove a doubt against him; but with singular unanimity the authorities are to the effect, that testimony of good character is useless against clear evidence of guilt, and any special instruction to juries as to character testimony must convey the qualification, that if the jury are satisfied by positive evidence of the guilt of the accused, character testimony is wholly unavailing. We find the principle thus stated substantially, in the text-books and Mr. Rice's book on Criminal Evidence, may be accepted as the type of all authority on the point. Section 378 *et seq.*, p. 607; Thompson on Jury Trials, Sec. 244, pp. 17, 99; 1 Bishop Crim. Pro., Sec. 489; and in our own reports we have, State vs. Garic, 35 An. 970. As intimated in some of the text-books, and obvious to the common mind, a special charge as to good character with the qualification that must accompany it, would be apt to impress the jury more against than in favor of the prisoner. The trial judge states he thought it fairer to the accused to give the general proposition that the jury should give to the proof of good character the weight they conceived should be attached to it under all the circumstances of the case. It is impressive too that the special instructions were not asked in that form in which they must have been given, we think, if given at all. The special instructions asked were: "Good character when proved may create reasonable doubt and operate an acquittal, no matter what the proof." Again the charge was asked: "If the jury, from the evidence, are in doubt as to what the intent of the accused in doing certain acts, or a series of acts, you have a right, in arriving at a conclusion on this point, to take in consideration and weigh the character of the accused, and if you find that prior to the doing of the act charged, the accused bore a high character for honesty and integrity in the community in which he lived—you are to weigh this fact and to give the accused the benefit of it. Character, under certain phases of the case at bar, tends to create a doubt which otherwise might not have existed in favor of the accused, or to remove a doubt already existing against him. You should look upon it as a part of the whole evidence adduced upon the trial and it is an important factor in coming to a conclusion, when you have doubt as to the innocence or guilt of the accused." The trial judge refused both charges on the ground he had charged sufficiently as to character, and he could not give either of the requested instructions without qualification, and because they tended to mislead and con-

fuse the jury. The first of the requested instructions, we presume, is not insisted upon. But in the argument, the last, it is contended, should have been given. It is quite true that the instruction does not assume the effect of any evidence before the jury but the hypothetical form of the statement will not of itself, make an instruction proper. This charge is not the mere statement of a legal principle. It is argumentative; its tendency is all in favor of the accused and does not present that principle in respect to character testimony the State is entitled to insist upon. It is often that some allusion to the facts accompanies the instruction as to the law, but in all cases it is exacted that the instruction shall not assume the facts as proved or take the form of an argument. Aside from the form in which the instruction is framed, it seems to us there is the more serious objection already stated. The instruction is not a full statement of the law. The instruction announces only the tendency of character testimony to favor the accused. No instruction as to the bearing of character testimony would be complete that did not instruct that such testimony could not avail against positive testimony of guilt. It is, we think, too clear for discussion, that if special instructions are given on any subject, the whole and not part only of the law is to be given, least of all, that part only that operates in favor of the defendant. 3 Rice, Sec. 378, p. 607. It is equally clear that if the requested instructions require explanation or qualification they should be refused. State vs. Riculfi and McClung, 35 An. 775; State vs. Phil. Jackson, 35 An. 769. It is our conclusion the instructions asked were properly refused. The instruction the court gave on the bearing of proof of good character was, in our view, sufficient to secure to the defendant the full benefit of that species of proof. The further instructions asked on his behalf, in our view, could not have been given with due regard to the rights of the State and settled jurisprudence.

In the discussion here, the argument has assailed the explanation of the trial judge as to the character of the reasonable doubt. Following the explicit charge that the State must prove every ingredient of guilt beyond a reasonable doubt, the court charged: "This doubt must be a reasonable one, that is, one founded upon a real, tangible and substantial basis, and not upon a mere caprice, fancy or conjecture. It must be such a doubt as would *induce* action without hesitation in an important matter by reasonable men in the exercise of an ordinary yet

prudent judgment. It must be such a doubt as would make you *feel* you had not an abiding conviction as to the prisoner's guilt. If after giving a fair and impartial consideration to all the facts in the case, you find the evidence unsatisfactory upon any point indispensably necessary to constitute the prisoner's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty. You are not permitted to go beyond the evidence to seek for doubts, but must confine yourselves strictly to a dispassionate and impartial consideration of the testimony given upon the trial. You should not resort to extraneous facts or circumstances in reaching your verdict." We have carefully considered the objection to this part of the charge. The expression is questioned in the argument, that it "must be such a doubt as would induce action without hesitation in an important matter by reasonable men, in the exercise of ordinary but prudent judgment." The comment is that the reasonable doubt is not that which induces, but that which deters action. Between the doubt that deters, and that which induces action, the difference is metaphysical. Taking this whole charge, we do not think it could have been misunderstood by the jury. We should find it extremely difficult on this ground to set aside this verdict, and the difficulty in thus setting it aside would not be as serious as giving a satisfactory reason for it.

It is urged in support of one of the exceptions that the court erred in defining the offence. The court instructed that the indictment was based on Sec. 907 of the Revised Statutes, embodied in his charge: that embezzlement was the fraudulent appropriation of property by the person to whom it was entrusted; that the intent must be fraudulent; that by criminal intent, the law means the intent to do an act forbidden by law; that this intent imparts to the act the character of an offence, and that an act was wilfully done when done without reasonable belief it to be lawful. It is contended that as the offence was statutory, the charge was erroneous in not instructing that the evidence must show defendant was one of the persons mentioned in the statute, and had knowingly and wilfully converted to his own use the money of the bank, and the argument insists that the trial judge defined not the offence for which the defendant was on trial, but some other. It seems to us that the recital to the jury of the entire Sec. 907 of the Revised Statutes: the statement the defendant was on trial for that

offence, and that the State must prove every allegation of the indictment which reproduced the statute, must be deemed to give the jury full instruction that the evidence should show the defendant was president of the bank, and had knowingly and wilfully converted its funds. We can not appreciate that this verdict is to be set aside because the jury were not expressly told they must find that the defendant was president of the bank, nor on the ground they were not sufficiently instructed that to convict they must find he wilfully and knowingly embezzled and converted its funds. While embezzlement is a statutory offence, it has the significance generally accepted of the appropriation of the property of another by the person to whom it is entrusted, with the intent to appropriate, or as it is sometimes expressed, for the purpose of applying it to his own use. This is the substance of the definition we find in all the books, accompanied by such adjectives as felonious, wrongful, or fraudulent. If the trial judge defined embezzlement at all, in our view he must have given substantially the definition we find in this charge. We therefore can not appreciate that the charge is erroneous in its definition, but seems to us to convey with substantial accuracy the elements of the offence with an apt explanation of embezzlement, the leading word in the section. It is strenuously urged that "fraudulent," used in the charge, is not the equivalent of the adjective employed in the section. The reading of the section and the statement that was the offence for which the accused was on trial apprised the jury the act must have been committed "knowingly and wilfully." It seems to us "wilfully and knowingly" appropriating another's property might well be qualified as "fraudulent" or wrongful without misleading the jury or varying the issue they were to try. Again, it is claimed that "wilfully" was not correctly stated to the jury. The word is often used in the sense of the commission of an unlawful act, with knowledge it is unlawful. "Without reasonable ground for believing the act to be lawful" is one of the definitions given by Abbot, taken from a Wisconsin decision. This knowledge and a purpose to do wrong is given in one of the cases. The trial judge stated that to do an act forbidden by law without reasonable belief it was lawful, was to do it wilfully. Between doing an unlawful act, knowing it to be unlawful, and doing it without reasonable belief it is lawful, is a difference of words. We do not perceive that in this respect the accused has any cause to

complain of the charge. It is insisted, too, that the trial judge erred in referring to the usual proofs of embezzlement in defining the offence. The examples of these proofs given by the trial judge were those found in the text writers in illustrating embezzlement, *i. e.*, false accounts by the party charged, his refusal to account, or his concealment of the funds entrusted to him. 2 Archibold, p. 455. We find no error in the references by the trial judge to the proofs usually administered to support the charge. It is contended, too, that the court erred in its instruction that to constitute the offence under Sec. 907 the actual custody of the funds by the bank officer charged was not essential. The law deems the cashier the custodian of the bank's funds. Morse on Banks and Banking, p. 156. The idea conveyed by this part of the charge is that the section extends to every officer of the bank who embezzles the bank's funds, whether or not the legal custodian. Whether the president or any officer of the bank comes into the possession of the bank's funds by payment from the bank's debtor, or takes the funds or obtains possessiou in any other mode, and appropriates the funds to his own use, he is brought within the scope of this section. Hence, the omission in the section of the words "which he shall receive in the course of his employment," to be found in Sec. 905, applicable to embezzlement or other fiduciary relations. We think the trial judge was correct in thus explaining the nature of the offence created by Sec. 907. The State vs. Palmer, 32 An. 565. We have thus given attentiou to the supposed omissions and misdirections in the charge defining the offence. The law denouncing embezzlements by bank officials was fully stated; the jury were told the intent to do the act forbidden without reasonable belief it was lawful, was the intent required to convict; were further instructed that the intent to appropriate at the time of the appropriation must have existed to constitute the offence. In addition to the general instructions we find the charge: "If you are convinced the accused embezzled or wrongfully converted to their own use the money of the bank, it will be your duty to convict," accompanied with the direction adapted as we gather from the bills to affirm the defence proved, relied on by the accused if in the opinion of the jury that defence was maintained by proof thus. "If, on the other hand, you find that though the money of the bank was taken by the accused, or either, that it was not embezzled or wrong-

fully converted, but was drawn for the benefit of the bank, and was so used, it will be your duty to acquit." We can not resist the conclusion that these instructions as to the character of the offence were all the accused could reasonably expect. Our courts have repeatedly affirmed that the charge in its entirety and not isolated parts is the test of its sufficiency. If verdicts were to be set aside under that rigid criticism that finds fault with a word or phrase, not the precise adjective or form of expression used in the statute creating the offence, few verdicts would stand. If the instructions to juries fairly construed according to the appreciation of reasonable men to whom they are supposed to be addressed are substantially correct, the law is satisfied. On the fullest examination of this part of the case we find no basis to disturb the verdict.

Another exception was reserved to the refusal to charge: "If the jury are satisfied that the accused concealed the fact of the withdrawal of the funds of the bank from the directors or any of them, but still used the funds for the benefit of the bank, they are not guilty of embezzlement or conversion." The court in refusing this charge stated: "This charge was requested by the attorney for J. A. DeBlanc. I think it fully covered by the general and special charges given. To have given it as set forth in the bill, would have narrowed the issue before the jury to a question of concealment. The only question was whether the defendants had used the money for their own benefit, or for the benefit of the bank. I think the charge confusing and misleading." The objection to the requested charge is well stated by the trial judge. Concealment is usually the accompaniment, but is not itself crime. The requested instruction tended to confine the attention of the jury to one only of the elements of the offence. The reason assigned for the requested instruction was that the judge had virtually instructed that concealment of the drawing of the money proved guilt. We do not so understand the instructions to the jury. The part of the charge supposed to call for the requested instructions is, we presume: "The usual evidence given of the embezzlement is, that having received the money he denied the receipt of it, or did not account for it when he ought, or accounted for other money and not for it, or rendered false accounts or practised some other deceit in order to prevent detection, from which the jury might fairly infer that the defendant either actually disposed of the money or withheld it from his em-

ployer with intent to do so, which seems to be the meaning of embezzle. In order to constitute the crime it is necessary there should be criminal intent. No man should be punished as a criminal unless his intent is to do wrong." We do not understand that these general references to the "usual proofs" laid down in the main in the text-books as ordinarily administered in prosecutions for embezzlements had any tendency to announce to the jury that concealment in itself proved guilt.

Our attention is directed to the exception to the overruling of the defendant's challenge for cause to a juror on the ground that he had formed a fixed opinion in respect to the charge against the defendant. The juror was subjected to a long examination both by the State and by the counsel for the defendant, stated that he had heard the subject discussed, had a prejudice against bank officers arising from the then recent bank troubles, would carry that prejudice with him into the jury box, first said he would require the accused to prove their innocence, but changed that statement; the juror made other answers, some favorable and others unfavorable to his competency, but on his final examination by the judge stated he could try the case impartially and give his verdict on the testimony. The whole tendency of our jurisprudence is to test the fitness of the juror, not by his expression in answering one or more questions, but by his answers in their entirety, and great influence in determining his competency is exerted by his final answer to the trial judge. State vs. Jones, 38 An. 792; State vs. Jackson, 36 An. 96. We should be inclined to hold the ruling correct, but even if not, it would afford the accused no ground of complaint. The judge states in signing the bill that the juror did not serve, because challenged peremptorily, that when the juror was challenged the accused between them had twenty-three peremptory challenges left, and that no complaint was made afterward that either was compelled to accept an obnoxious juror. The judge adds that many of the juror's answers were due to his confusion caused by his lengthy cross-examination, but the examination of the whole satisfied the judge the juror was competent. The fact, however, the juror did not serve, and the panel was obtained without any complaint afterward of other jurors, and, as we understand the statement of the judge, without exhausting the peremptory challenges, removed any cause of complaint against the ruling. State vs. Farrar, 35 An. 315; State vs. Melton, 37 An. 77; State vs. Egan, 37 An. 368; State vs. Redmond, 37 An. p. 774.

The trial judge stated to the jury that the accused under our law had the right to testify in their own behalf, but if they do not avail themselves of this right their failure shall not be construed for or against them. This is the substance of Act No. 29 of 1886, which adds "the judge shall so charge the jury." It is insisted the judge had no right to allude in any manner to the fact the defendant did not testify, and because he did so, we must reverse the verdict. We can not take that view. We find in the briefs two decisions, one by the New York Court of Appeals that the presiding judge has no right to allude to the fact the prisoner had not availed himself of testifying as permitted by their statute; another of the Supreme Court of Illinois, that no presumption against the prisoner arises from his failure to testify under their statute, and the trial is to be conducted on the same presumption as if the statute had not been passed. We doubt, however, whether in either State such an allusion as that made here would vitiate the verdict. In Wilson vs. United States, 149 U. S. 60, the prosecuting officer in the course of his address to the jury commented with great severity on the fact the defendant did not go on the staud though entitled to de so under the act of Congress. 149 U. S. 60. We do not think that decision sustains defendant's contention directed against the statement of the judge. The directions in the act of 1886 "the judge shall so charge" were designed to exclude from the minds of the jury any inference unfavorable to the accused arising from his not testifying. In our view the statement of the judge in this respect furnishes the accused no basis for complaint.

We presume the bill we find in the record bringing up a newspaper article, attributing to the District Attorney remarks on the trial of the case in the lower court, is not pressed. For obvious reasons we could not notice the bill, and the District Attorney states, in addressing the jury, he made no remarks beyond the line of his duty.

The bills of exception are numerous. There are assignments of error besides. The discussion has not followed or dealt with the bills of assignment separately, but rather with the issues raised. The case has received close and earnest attention at our hands. We believe the case in all its aspects has been fully considered; that, at least, has been intended by us. The restricted province of this court is to deal only with the questions of law, and they have been ably

discussed by counsel. But with all the aid of the argument in support of the contentions on behalf of defendant, the conclusion we reach is the record shows no ground to reverse the sentence.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed.

Rehearing refused.

WATKINS, J., concurs.

BREAUX, J., dissents.

NICHOLLS, C. J., took no part.

No. 12,725.

JOSEPH D. JAMES, FOR USE PAUL ANTHONY CALVIT JAMES, VS. RAPIDES LUMBER COMPANY, LIMITED.

ON APPLICATION FOR REHEARING.

50 717
51 1018

50 717
106 173

50 717
113 245
114 375

50 717
115 467

50 717
118 51

It is the duty of the master to give warning of danger to an inexperienced employee, not informed of the danger, who is placed in charge of dangerous machinery.

The facts found by the verdict are sustained by a presumption of correctness, until error is shown.

It is the negligence of the foreman of a steam saw-mill to call on one of its employees suddenly. and on the spur of the moment, to take a position in the mill that is dangerous, without giving him any instructions or explanation whatever, of the movements of the machinery, or the risk and hazard of the employment, with which the employee had neither a previous knowledge or acquaintance. For such negligence, the proprietor is responsible to the servant.

APPEAL from the Tenth Judicial District Court for the Parish of Rapides. *Hunter, J.*

H. H. White for Plaintiff, Appellee.

Howe, Spencer & Cocke and *R. P. Hunter* for Defendant, Appellant.

Argued and submitted February 10, 1898.
Opinion handed down March 7, 1898.
Rehearing refused April 18, 1898.

The opinion of the court was delivered by

WATKINS, J. This action was instituted by the plaintiff for four thousand dollars damages for the use of his minor son, Paul Anthony Calvit James, against the defendant company for the injuries he suffered for the deprivation and loss of his left hand, which was cut off at the wrist by a diminutive saw in its mill, through the fault and negligence of the company, its officers and employees.

The defendant answered at length and in detail, and also filed a plea of no cause of action, which was considered with the merits.

The cause was tried by a jury, who found a verdict for the plaintiff in the sum of three thousand seven hundred and fifty dollars; and after an unsuccessful effort to obtain a new trial the defendant prayed for and obtained this appeal.

The plaintiff's demand is for three thousand dollars general damages and for one thousand dollars insurance.

He represents that on the 17th of September, 1897, his minor son was working in the employment of the defendant company as watchman and lumber grader, and that while so employed he was ordered to go to work at one of their machines known as an edger; and that upon going to work at the edger, and upon taking hold of the first piece of lumber from it, his left hand was cut off at the wrist by the edger.

He shows that his son was a minor; that the edger is an exceedingly dangerous machine, and that it was situated in an exceedingly dangerous position. That its appliances were not properly protected so as to prevent the happening of accidents; and that, consequently, only skilled and well-trained workmen should be employed to work there. That at the time his son was assigned to duty at the edger the defendant well knew that he was a minor; that he was not a skilled workman; that he knew nothing about working at the edger, and that he had been theretofore employed at work which was not dangerons. That, notwithstanding all that, the defendant's foreman called upon him suddenly, upon the spur of the moment at a time when the mill was in full operation, to assume that part of danger; and that his son, being called upon to make a sudden and unexpected election whether he would undertake the employment, or by declining it run the risk of a discharge, he chose the former—not having been warned by the foreman of the defendant, or any officer of the company, of the danger there was of working at the edger; nor given

any instructions as to the character of the work he was expected to perform, or of the means of guarding against accident.

He shows that when he was employed by the defendant the amount of seventy-five cents per month was exacted from his son by the company, and deducted from his wages, as premium on accident insurance, the policy representing which the company had obtained from the Union Casualty and Surety Company, of St. Louis, Mo.

He shows that no policy was issued to him, and that none was applied for in his name; but that same was applied for by, and was issued in favor of, and made payable to the defendant company.

That notwithstanding the aforesaid monthly exactions of insurance premiums from his son, as an employee, the conditions of the insurance were never explained to him. That since the accident he has made demand of the defendant first and afterward of the insurance company for a statement of the insurance, but was refused information by both of them—the latter only admitting that it carried an accident policy *indemnifying the defendant company against loss or damage they might sustain, or had to pay their employees.*

It is on this score that the plaintiff claims one thousand dollars; and it was at this demand that the defendant's plea of no cause of action was leveled.

In this court the plaintiff and appellee filed an answer to the appeal and requested an amendment of the judgment so as to award him one thousand dollars insurance money against the defendant.

This demand, as we understand it, is, that his son is entitled to the sum of one thousand dollars of the insurance money which is ultimately recoverable from the accident insurance company on the policies of insurance which were issued payable to the defendant company, because he had paid the premiums which bought the insurance.

Or in other words, the insurance premiums having been exacted from its employee and used to keep in force a policy guaranteeing the defendant against loss, or damage it may have to pay said employee on account of an accident, the amount of said insurance when realized by the defendant from the insurance company should be paid over to his son in diminution of the full amount of the damages due him.

That is to say, the insurance policies should inure to the *benefit* of an employee who has kept up the premiums which give life to the policy.

The defendant for answer pleads a general denial, and then admits that defendant was injured in the hand by its mill, but avers "that if in any event respondent was liable for damages, which is expressly denied * * * then respondent avers that the damages claimed * * * are out of all proportion to the injury done," etc.

It denies any knowledge of the minority of the plaintiff's son, and affirms that from his size and appearance it was believed that he was a grown man several years past majority.

It avers that he came to the mill several months prior to the accident, sought employment and was employed in several capacities, especially as night watchman, and had received his wages in his own name without disclosing his minority.

That after having been employed as a night watchman for several months, the plaintiff's son sought work at the mill, "expressing to the defendant's foreman and superintendent, his capacity to fill, and his desire to fill, any place to which he might be assigned," etc.; and that at his request "he was put to work in the mill at day work, and had worked in the mill for several days in different capacities in plain view of the machine and saw, where he was finally hurt in his hand."

"That on the morning of the accident (the plaintiff's son) was by the foreman of the mill hands requested to fill the place of one of the men who was sick and absent, and whose duty and work were to take plank which had been sawed and planed off a table and platform, to lay them on a machine about eight or ten feet away from the saws (which were) so placed (as) to cut off square both ends of the plank; and which machine was operated by steam power and worked rollers and dogs, so that after the plank was laid on the rollers, it was not necessary for a workman to follow the planks, or to remove from his safe and remote position with reference to the saws.

"It avers that the machine was first class of its kind, and in perfect working order; and that it was so placed, and all of its appliances were so arranged as to furnish the best possible protection to the men engaged in operating it.

"That it required no particular skill, or knowledge to safely and properly perform the labor required of the workman at the machine; that any man who could lift, with other men at the other end, one or several planks and lay them on the rollers, could perform the work required of the plaintiff's son.

"That instead of maintaining the position he was told to take, at a perfectly safe distance from the saw which was intended to cut off the ends of the planks, at the end of which he was put at work, as soon as he had put the plank on the rollers he immediately began to follow them up the incline and in the direction of the saw. That the other workmen warned him by calling to him in a loud voice, but he continued to follow the planks until they had reached the saw, which was in plain view of him; and that he reached his hand forward until it touched the saw and was injured by it."

Under the foregoing statement of facts, the answer charges the plaintiff's son with contributory negligence which exonerates the company from liability for damages, and its averment is that he voluntarily and knowingly assumed all of the risks which were incident to his employment, and for that additional reason there can be no recovery.

In the answer there is no mention made of the plaintiff's demand for the payment of insurance money; consequently it must rest on the general issue.

From the evidence it appears that youug James was assigned to work at the *trimmer*, which is a small circular saw situated near the edger, a much larger machine.

From the parol evidence, as well as the photographs which were taken of the *locus in quo* while the machinery was in operation, it appears that there is visible to the eye not more than one-fourth of the saw, which is, apparently, of but a few inches in diameter.

As stating defendant's view very succinctly, we make the following quotation from counsel's brief, viz.:

"That on the day of the accident the plaintiff's son was requested to take the place at the trimmer of the regular workman who was sick and temporarily absent. That the duties required *of* him were to take the planks, after they had been sawed, from a table or platform and lay them on the apron of the trimmer several feet from the saws, and were taken thence to the saws by machinery for the purpose of having their ends squared—so that it was not necessary for the workman to follow up the planks or to move from his safe position, remote from the saws," etc.

And he further places the defendant's charge of contributory fault on the part of young James on the ground stated in its answer, "that it charges specially that he did leave his position and follow up

the timber until it and his hand reached the saw, and this carelessness caused the accident," etc.

Before analyzing the evidence, or stating our conclusions thereon, we may just as well disembarrass the case of young James' minority, as he testifies as a witness that he was nineteen years of age at the time of his engagement in the defendant's service; and there is no evidence tending to show that the defendant was aware of his minority.

And it is shown that the young man was very well grown for his years and justified the assumption of his being a major, resulting from the fact which was pointed out by the witnesses—that he had made his contract with the company, and collected and receipted for his monthly wages.

Counsel for the defendant claim that after young James had served the defendant for several months in the capacity of night watchman, and afterward of lumber grader, he was assigned to duty in *trucking lumber* as it came from the trimmer, and "in doing this work he was about ten steps from the trimmer saw which afterward hurt him * * * and, consequently, had the opportunity to *observe* the machinery and know the danger of the situation."

They take the further position that young James subsequently worked at the "live rollers," an automatic contrivance to carry boards away after they have been trimmed; and that while thus engaged he was only about five steps from the trimming saw, by means of which he lost his hand; and that, in this way, he had become familiar with the position and movement of the saw, and knew of the danger of the employment to which he was thereafter assigned.

With these statements kept in view, we will make some extracts from the evidence and apply same thereto.

Young James testifies, in speaking of the incidents which occurred just previous to the accident, that he went to the mill to work loading trucks, but that he continued in that occupation *about* "*three hours* and was then changed to the live rollers." That he worked at that employment one "evening and the next day until about four o'clock."

Then occur the following interrogations and responses, viz.:

"Q. Then what did you do?

"A. The next morning I went up to go to work. Did not know

what to start at, and stayed around expecting to take my same place at the live-rollers.

" Q. What occurred then?

" A. The foreman hallowed at me—Mr. Chester was the foreman —telling me to take the place behind the edger at the trimmer.

" Q. On what day was that?

" A. On the 17th of September.

" Q. What occurred when you took your place behind the edger at the trrimmer?

" A. I got back there; had not been there a minute, I suppose, when two pieces of two-by-four came through the edger, and I took hold of them. They were crossed so I could not see the saws; and to uncross them I gave them a push, and pushed my hand through the saw.

" Q. The saw then cut off your hand?

" A. Yes, sir.

" Q. Cut it entirely off?

" A. Except a little skin.

" Q. Up to that time had you ever been employed in working about the machinery of the saw-mill?

" A. No, sir.

" Q. Did you have any skill or knowledge about working about machinery?

" A. None at all; no, sir.

" Q. Did any one instruct you about the duties you were about to perform at the time you were behind the edger?

" A. No, sir.

" Q. Did any one warn you that it was a dangerous place, or explain the machinery there to you?

" A. Not that I remember. No, sir.

" Q. Well, you do remember, don't you?

" A. I do remember that no one told me.

" Q. You say Mr. Chester, the foreman, called you there?

" A. He passed by. He was on one side of the rollers. *He pointed his finger at me, and told me to go back there. That was all that passed—all he said.*

" Q. What is the custom of the mill about obeying orders?

" A. If I had not gone there, I guess I would have had to go home."

Again:

"Q. How far was the saw that cut your hand from where you were put to work?

"A. I don't know exactly. *I never saw the saw—never moved out of my tracks—only gave the planks a little push.*

"Q. Are you sure you did not follow up the planks?

"A. Quite sure.

"Q. When you started to put your hand out to follow it up * * * did anybody say anything to you?

"A. If they did, I did not hear it. I could not have heard a shot-gun behind that edger when it was running.

"Q. Anderson was just the length of the plank from you, on the same side, and working at the machine?

"A. Yes, sir.

"Q. You did not hear him hallow at you and warn you to let the plank alone?

"A. No, sir."

Again:

"Q. Mr. James, I will ask you this question. If you had been warned and instructed about that machine would you have put your hand where it could get cut off?

"A. I would not; certainly not."

Another witness testimony is as follows, viz.:

"Q. Mr. Morris, were you an employee of the Rapides Lumber Company when this accident occurred ?

"A. I was.

"Q. How long had you been working there ?

"A. Well, I have been working there, off and on, about four years.

"Q. Do you know this trimmer at which Mr. James got hurt ?

"A. Yes, sir; I do.

"Q. Mr. Morris, state whether you would consider that a dangerous machine at which to place an unskilled workman ?

"A. I consider it quite dangerous; I did not like to work there myself; I call it quite dangerous.

"Q. As a saw-mill man would you consider it necessary to instruct and warn the new men that were put there ?

"A. I would; yes, sir."

This question was objected to and the answer of the witnes

thereto as eliciting an opinion; and same having been overruled the defendant's counsel reserved a bill of exceptions thereto.

In our opinion, the testimony sought to be elicited of this witness is not exclusively a matter of opinion, as it is predicated upon the facts about which he had been interrogated, and upon which he was requested to express his judgment. He had in the previous question been asked whether he considered a trimmer saw a dangerous machine, and replying thereto without objection he said he considered it quite dangerous.

The present question is, being by you considered a dangerous machine, "would you consider it necessary to instruct a new man," to that effect?

Taken in that connection it was a proper question.

In the further interrogation of this witness he stated, in confirmation of the testimony of young James, that Mr. Chester, the foreman, said to him when assigning him to duty at the trimmer "You work over that way," pointing in the direction of the edger. He states that this was the direction which was given to young James in his presence.

On cross-examination this witness was asked the following question, and thereto made the following replies, viz.:

"Q. Well, are not those two saws on the trimmer in plain view from almost anywhere around the mill?

"A. I always saw the saws. I knew where they were. I did not run into them. *At the place where this man was working this board covers the saw, and might worry a person who did not know the saw was there.*

* * * * * * *

"Q. Well, is not that saw in plain view of a man standing in the proper place—there when James was put to work?

"A. I do not think it is. These planks may be rather in the way. A man not knowing where to look for the saw might not notice it. But you can see the saw from where he works.

"Q. The plank is high enough up to see under it?

"A. He can see under it or over it, either one. *If he undertakes to look for the saw he can see it.*"

The board referred to by this witness is the swinging board that is exhibited in the photographs, and is shown by the testimony to be

employed as a protection to the employees against injury from the small ends of the planks which are cut off by the trimmer saws.

"Q. What particular skill or experience does it require for a man to go there and do that work—to put the plank on the trimmer?

"A. *It requires a man who knows something about it. He must know something about it, or he might do like this man and get his hand cut off.*"

Mr. Julius Levin, a saw-mill proprietor of large experience, was also interrogated with the following result, viz.:

"Q. If you should place a green hand (at work) at the machinery would you not consider it your duty to instruct him as to his danger and duties?

"A. I would have him instructed.

"Q. State whether or not you consider that position I have just mentioned—at the trimmer—a dangerous position, particularly for a green hand?

"A. All positions behind *any saw* are dangerous if a person is not *very careful.*

"Q. It requires a good deal of skill and activity?

"A. *A great deal of care and watching.*"

The foregoing is a fair summary of plaintiff's evidence; though there are some general statements of the defendant's witnesses which differ therefrom in minor particulars.

The testimony of Mr. Chester, foreman of defendant's mill, is of the following tenor, viz.:

"Q. How long had had you been working at this mill of the Rapides Lumber Company when this accident happened to Mr. Tony James?

"A. I had not been there but a short while, probably a month or six weeks. I went to work on the 28th of July," but he was foreman at the time of the accident.

Again:

"Q. When you told Mr. James to go in there—*i. e.*, to the trimmer machine—and take Boone's place did he make any objection to it?

"A. He did not.

"Q. Was it done suddenly, or hurriedly, or in such a way that he was obliged to?

"*A. I simply told him to take that position, and he just walked in, and went at it. I went back into the fire room,* " *etc.*

In conclusion we will refer to the statement of Mr. Anderson, who was the associate of young James and saw the accident, and thus describes it, viz.:

"There were two two by fours and Mr. James and I caught hold of a piece of lumber—he caught one end and I caught the other—and we carried it and put it on the trimmer chains; and one of the two by fours got on top of the other two by four and Mr. James undertook to shove one off the other, and carried his hand up on to the other, and carried his hand up on the saw."

He then stated that in making this movement young James moved just a little from his position in the effort to push the planks, and that as he did so "he hallooed as loud as he could to let it alone—that he just screamed—but he followed the timber until it got to the saw."

In so doing young James was attempting the performance, ignorantly, of an office which the machinery was provided to do without his aid—and this was evidently the result of his inexperience and want of information as to his duties.

No particular analysis of the foregoing testimony is deemed necessary. That the employment to which young James was assigned was dangerous we make no doubt, We think the dangerous character of the trimmer-saw is made clear by the testimony, and is made apparent by the photographs.

To our thinking, the mere recital—even as it is related in the defendant's answer—of the occurrence, discloses a *prima facie* case of negligence on the part of the defendant.

The proof discloses a total want of knowledge on the part of young James of the situation, and of the duties he was expected to perform; and of which he was vouchsafed not a word of information or instruction by the defendant's foreman.

Suddenly called upon by the company's foreman to undertake the performance of a delicate and important duty, in a saw-mill in full operation, and supply the place of a sick man who had been engaged thereat for about two years, without warning or precaution, young James was unwittingly cast into the teeth of a small saw which cut his left hand off *within twenty seconds after he had assumed its performance.*

Plaintiff's counsel graphically describes the situation thus:

"Into this trap of flying wheels, machinery, belts and whistling saws, noise, dust, plank and rollers, Chester thrust, without a

moment's warning, advice, instruction or preparation, a boy, a minor, who knew nothing of its dangers."

It is quite out of the question for us to affirm, under these circumstances, that young James had assumed the responsibility of the dangers of the position to which he had been assigned.

In our opinion his right to recover damages of the defendant is very clear, under the provisions of the Code. R. C. C. 2315, 2317 and 2820.

And likewise under the construction of the general law applicable to master and servant, which is given in the decisions cited in Stucke vs. Orleans Railroad Company, 50 An., omitting those appertaining to fellow-servants as not pertinent to the issue.

Under all the authorities, it is the recognized and bounden duty of the master to provide a reasonably safe place at which his servant is to work; and to see to it that he is not exposed to unnecessary risks in the course of his employment. And in order that a dangerous service be intelligently undertaken by his servant, it is the duty of the master sufficiently to acquaint him with its risks and dangers, and give him a fair knowledge of the situation at the time of his employment. Failing in either of the foregoing particulars, the master will be held liable for whatever injury results to the servant. Cooley on Torts, Sec. 550; Ryan vs. Fowler, 24 N. Y. 410; Perry vs. Marsh, 25 Ala. 659; Horner vs. Nicholson, 56 Mo. 220; Wheeler vs. Wason Manufacturing Co., 135 Mass., 135; Mason vs. West, 73 Maine, 253.

In Smith vs. Sellers, 40 An. 527, this court said that the servant "assumed the risk only of such hazards as are apparently incidental to an employment intelligently undertaken."

In Erslew vs. Railroad Company, 49 An. 86, we held that if an employee of a steam railway company knew or ought reasonably to have known the precise danger to him of the guy wire of the electric street car company in the course of his employment, and saw fit, notwithstanding, to continue in it, he might be held to have assumed the extraordinary risks, as well as the ordinary risks of his service. But this consequence must rest upon positive knowledge, or reasonable means of positive knowledge of the precise danger assumed. Meyers vs. Railroad Company, 49 An. 21; Myhan vs. Electric Light and Power Co., 41 An. 964; Buswell, Law of Personal Injuries, Secs. 202, 203; Tutrix vs. Sellers & Co., 39 An. 1011; Helen vs. O'Rourke, 46 An. 178.

See Buswell on Personal Injuries, p. 338. And we take following extract from 146 Mass. 190, Civiac vs. Woolen Company, viz.:

"The duty of the defendant would be sufficiently discharged by pointing out to the plaintiff the situation of the machine, and the rapid revolution of the wheels when in operation, and explaining the effect of touching them under these circumstances."

This statement of the law we accept as perfectly accurate; but when it is applied to this case, it is made evident that the defendant's foreman was greatly in fault, in that he gave young James no explanation or instructions of any kind.

Indeed, the foreman had, necessarily, an imperfect knowledge of the situation, as he had been in charge of defendant's mill only for a few weeks at the time of the accident.

With regard to the plaintiff's demand for insurance money, but little need be said. The demand is made of the defendant as a *negotiorum gestor;* and not on a claim arising *ex contractu*, against the insurance company, as being liable for a loss sustained on its policy.

We do not think that his demand against the company is well founded, as he avers that it has not yet recovered from the insurance company; and the plaintiff could not, in any event, recover from the insurance company, because his name does not appear as a beneficiary in either one of the policies which were written in favor of the defendant exclusively.

That the defendant had made exactions of young James monthly, from his wages, in order to keep up the premiums, can not have the effect of establishing in his favor a beneficial interest in the insurance policy.

The contrary doctrine was maintained by this court in Putnam vs. Insurance Co., 42 An. 740.

We are of the opinion that so much of the plaintiff's demand as relates to the insurance must be rejected and disallowed, and the amount of the demand for damages be reduced to three thousand dollars.

It is therefore ordered and decreed that the judgment appealed from be so amended as to reject and disallow the plaintiff's demand for one thousand dollars insurance, and thus reduced to three thousand dollars, same be affirmed with costs of appeal to be taxed against the plaintiff and appellee—with the reservation of whatever

rights he may have against the defendant upon a *quantum meruit* for an interest in the insurance money when same has been collected.

The opinion of the court on the application for rehearing was delivered by BREAUX, J.

ON APPLICATION FOR REHEARING.

BREAUX, J. Three witnesses for the plaintiff, men of experience in the management of saw-mill machinery stated that there was danger, if one without experience or instruction of any sort undertook to work as a hand at the machine known as the trimmer.

That it is unsafe to place one at that work who is a green hand without warning or instruction. That the danger should have been explained to him; that it was an act of imprudence to call the plaintiff, who had been engaged elsewhere in the mill, and at once give him in charge the work necessary to be done at the end of the trimmer in transferring the lumber from the edger to the trimmer.

On the other hand, three witnesses for the defendant testified that the work was not as hazardous as represented; that men without experience and warning sometimes were placed to work at trimmers.

The jury and the trial judge who saw and heard the witnesses believed the former.

Great weight, it is clear, should be given to their finding as relates to the facts of the case.

It does seem that the act of the plaintiff in putting his hands on two pieces of timber, 2 x 4 (crossed one over the other), as they were about to pass the trimmer saws, was an act of the greatest imprudence; that one with the least experience or warning would not have thus exposed himself. The plaintiff, it appears, was not deficient in intelligence. Had he been made aware of the danger, it would be proper to hold that he had assumed the risk of the dangerous employment. It must have been evident to the jury he had not had sufficient opportunity to become familiar with his duties nor had he been, it appears, sufficiently instructed. It was not, the jury found, an ordinary danger. It was not, their verdict implies, a danger known to the employee, and one which he, without warning, should have appreciated. The defendant in the brief asserts, in opposition to the position that the plaintiff should have been warned and instructed before placing him at the trimmer, that the only instruction which could have been given him would have been not to

put his hand on the saw, and that this would have added nothing to his knowledge.

This contention, as stated by defendant as relating to visible danger, is supported by several well considered decisions of courts of other States. From the point of view just stated they recommend themselves as eminently just and correct.

But the jury here, substantially, found a different state of facts. They must have concluded, in order to arrive at their verdict, that the instruction which could have been given him would have been given had it not escaped attention; that is, the instruction not to put his hands on the pieces of lumber after having placed them on the trimmer, and particularly after they were being carried on the endless chains to the saws.

We have no hesitation in saying, if the facts were as the verdict implies, the judgment was correct and legal.

The evidence before us did not disclose that the facts were not as found by the jury.

There is no good reason to infer that the foreman of the mill did not have a proper knowledge of the situation, and that he was not, in every respect, a well qualified and competent foreman. But the ability of the foreman is not of itself ground to discredit the return of the jury. Under the most careful and experienced foreman an accident may happen for which the employer must be held in damages.

It may be stated, also, as related to the lumber mill, that the situation was not more grave and dangerous than it is in all factories in which there are many fast revolving circular saws with white steel surface a few inches above the horizontal line of their shafts.

It is not negligence to own and operate such machinery—the demands of commerce require effective, improved machinery. In the case here it was not defective and not unavoidably dangerous. The fact remains that it was not properly handled, due, as the jury thought, to the want of notice and instruction which should have been given to an inexperienced hand. Under our jurisprudence, until it clearly appears that such a finding is erroneous, we are constrained to accept the conclusion as correct.

Lastly: our decision held that claim for insurance can not be recovered in this case. Defendant asserts that reservation in the

decree invites new and troublesome litigation. In order to put that matter at rest, we here state that the judgment here includes and settles the amount of all claims plaintiff is entitled to for injuries received by him as alleged. When this amount will have been paid it will be in satisfaction of all claims, and we, in consequence, recall all reservation heretofore made.

It is therefore ordered, adjudged and decreed that our original judgment remain undisturbed, save as to anything reserved to plaintiff, after he will have been paid. There is no further right reserved to plaintiff.

Rehearing refused.

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No. 12,791.

MRS. MARY BEAULIEU VS. MRS. MARY V. MONIN ET ALS.

The prohibition of our Code of donations *inter vivos* of all the property of the donor, leaving him destitute, is not removed by the promise or engagement of the donee to support the donor during life. Civil Code, Art. 1497; 11 Rob. 302; 12 An. 204.

The owner who recovers his property owes to the party evicted the taxes paid and the value of useful improvements made by him which have augmented the value of the property. C. C., Arts. 508, 3453; 16 La. 314; 33 An. 744.

The evicted party in bad faith owes rents from the beginning of his possession. 7 N. S. 112; 12 Rob. 256; 3 An. 258; C. C., Art. 3453.

The possessor under a title void on its face, because violative of a prohibitory law, can not claim the protection accorded by law to purchasers and mortgagees who acquire on the faith of the title conveying ownership placed on record by the owner. 8 N. S. 227; 19 La. 352; 1 An 286; 47 An. 49.

APPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

Foster & Broussard for Plaintiff, Appellee.

Weeks & Weeks for Defendants, Appellants.

Argued and submitted May 2, 1898.
Opinion handed down May 30, 1898.
Rehearing refused June 28, 1897.

The opinion of the court was delivered by

MILLER, J. The plaintiff sues to annul a donation by her to her children, and to annul, also, the transfer by the donees to the Jeanerette Building Association, plaintiff claiming besides the rents of the property from the date of the donation. The ground of the nullity of the donation demanded by the plaintiff is that it divested her of all her property, in violation of our law, hence is null; and it is averred the building association acquired no title by the transfer of the donees, hence is liable for the property and its revenues at ten dollars per month. The children, the donees, in their answer aver that the acts, in form donations by their mother to them, were, in fact, the partition of the property, the subject of the acts, owned by them as heirs of their deceased father and by their mother, his widow, in community; that one of the defendants in consideration of his mother's transfer agreed to support her; that this and other stipulations of the children, in respect to their mother giving to her acts of transfer the effect of operating a partition and settlement of the succession of their father, were, by error, omitted by the notary, and it is insisted the acts should be construed in connection with the omitted stipulations deemed to vary their character; the answers further aver the transfer to the building association, and that valuable improvements have been put on the property by the defendants, the children, and the association. The building association answers that they acquired the property for a full price and in good faith, and that since the purchase the association and the children have paid taxes and made useful improvements on the property. All the defendants unite in the reconventional demand, in the event plaintiff recovers, that their claim for taxes paid and for the value of useful improvements be recognized and enforced. From the judgment, annulling the transfers of plaintiff to her children, decreeing that the building association acquired by the transfer to it only a mortgage on the one-half of the property, *i. e.*, the half owned by the children, and rejecting the reconventional demands of the defendants, they appeal.

It is undisputed the property in controversy was acquired during the marriage dissolved in 1864 by the death of plaintiff's husband, hence was owned in eqnal parts by plaintiff and her children; that in 1889 she conveyed to them her share of the property for no consideration, the word donation being used in the act with other words

of conveyance, but in our view the acts are to be deemed donations manifested on their face; that subsequently the children conveyed to the Building Association, the acts importing that the association paid the price, but that the vendors owning shares of the stock of the association had borrowed an amount from the association equal to the price, which they stipulate to pay with six per cent. interest, according to the charter of the association until payment to be vested with the title. We think it established that when the plaintiff made the donations she divested herself of all her property, and we think it is also established that the property has been improved and taxes have been paid on it by defendants.

During the trial the defendants offered testimony for the purpose of showing that the defendants, or one of them, had agreed to support the plaintiff during her natural life, and that this agreement was the real consideration for her transfer of the property. The testimony was excluded on the grounds that it tended to contradict the acts, and no such issue was made by the pleadings. Another ground of exclusion, more serious, occurs to us; whether it would have aided the defendants, if admitted.

The purpose of the article of the Code, prohibiting donations that embrace all the donor's property, would seem to exclude that dependence for support implied by the agreement the defendants sought to prove. Civil Code, Art. 1497. Is such an agreement to be deemed the equivalent of the reservation by the donor exacted by the Code, of enough of his property to live? Is the donation that leaves the donor nothing, withdrawn from the very explicit prohibition of the Code, merely because the donee engages or promises to support the donor? It must seem that construction does not accord with the article of the Code on the subject. In the very early case of Vick vs. Deshautel, 9 Martin, 85, arising under the old Code, such a donation as that it is supposed would be shown by the excluded testimony was sustained. In the later case, Lagrange vs. Barre, 11 Rob. 302, the court commenting on the fact that the Vick case arose under the old Code, held that the donation of all the donor's property, though on the condition inserted in the act of full support of the donor by the donee, was null. "He must reserve enough for his subsistence," as required by the Code, the court held was not fulfilled by the agreemcnt of support contracted by the donee. Again, in the case of Bourgeat vs. Dumoulin, 12 An., p. 204, the

court sustained the donation, embracing nearly all the donor's property, when in the act the donor reserved besides an annuity as a charge on the property for a sum deemed adequate for all the wants of the donee, and as we gather by the sequel of that case in Porche vs. Moore, 14 An., p. 238, there were also debts for which the donee was bound. We have no such case here, and the court in the Fourteenth Annual case drew the distinction between that and the earlier decision in 11 Rob., which it affirmed. We think the 11th Robinson case announces our law. Hence our conclusion is that the alleged agreement of the donees, even if it had been proved, would not have removed the transfers of the mother from the prohibition with which we are dealing. Nor can we accept the suggestion the acts were not donations, but were designed to effect a partition of the property. It is quite true, the acts state, that partition was intended, but it is manifest from the acts and all the testimony that no partition was proposed or effected, except among the children. As to the mother she gave all she had and received nothing. It is our conclusion the acts of transfer from the mother to the children are brought clearly within the prohibition of the Code of donations that strip the donor of all he possesses.

The Building Association invoke the protection accorded by law to purchasers and mortgagees acquiring on the faith of recorded titles. Miles vs. Oden, 8 N. S., p. 227; Blanchard vs. Castille, 19 La., p. 362; Richardson vs. Hyams, 1 An. 286; Thompson vs. Whitbeck, 47 An., p. 49. But the principle of these decisions can have no operation in this case, because the title from the mother, violating a prohibitory law, carried its nullity on its face.

But though the title of the Building Association as against plaintiff can not be sustained, its claim for taxes and useful improvements, whether the demand is by the association or the children, rests on a different basis. The right of the evicted party to recover for such improvements, taxes or other charges for the preservation of the property, and add to its value, rests on the principle that the real owner can not profit at the expense of him who, during his possession under a title, though void, has by his expenditures improved and thereby augmented the value of the property. Civil Code, Arts. 508, 3453; Pearce vs. Frantum, 16 La., p. 414; Heirs of Wood vs. Nicholls, 33 An. 744. The record shows with reasonable certainty that these expenditures on the property were made with

the money obtained from the Building Association, by the children, the donees of their mother. We appreciate, as suggested in the briefs there can be but one recovery for these expenditures unless part were incurred by the association, and part by the children to whom the association made the loan. In the condition of the record we can not adjust the amount of the expenditures, or to whom the amount is due. We think it best, therefore, to comply with the suggestion in the briefs and remand the case to ascertain the amount paid for improvements, taxes and other charges for the preservation of the property, whether by the association or the other defendants. The defendants on the other hand are liable for the rents of the property from the date of the acts of donation under the void title conveying to all notice of its nullity. C. C., Art. 3453; Donaldson vs. Hull, 7 N. S. 112; Williams vs. Booker, 12 Robinson, 256; Hill vs. Bowden, 3 An. 258. The liability of the defendants can also be adjusted under our order to remand.

The plaintiff claims that the property should be decreed free from any mortgage in favor of the Building Association, the mortgage having been recognized by the judgment of the lower court on the one-half of the property belonging to the children. The question of the title or right conferred on the Building Association by their contract so far as that title affects the interest of the children to property acquired during the marriage of their mother, it is not necessary to determine. Our law annuls the donation in its entirety. C. C., Art. 1497. The mother is restored to all her rights as they stood before the donation, subject to her liability for the taxes and improvements. The nullity of the donation, the liability of plaintiff for improvements and taxes, and the accountability of defendants for rents are the only questions we determine.

It is therefore ordered, adjudged and decreed that the judgment of the lower conrt, in so far as it decrees the nullity of the acts by which the plaintiff conveyed to her children the property in controversy, be affirmed—in other respects the judgment is annulled; and it is now ordered and adjudged that this cause be remanded to the lower court for the determination of the liability of plaintiff for improvements, taxes and other charges, if any, for the preservation of the property, and the accountability of defendants for rents, all other questions being reserved, and that plaintiff pay costs.

No. 12,789.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY VS. PAUL PECOT, SHERIFF, ET ALS.

1. Suits relating to taxes or licenses are preference suits, triable without a jury and at Chambers if court be not in session. Sec. 56 of Act 106 of 1890.
2. Where there is doubt, an appeal will not be dismissed. If a bond be not sufficient for the suspensive appeal taken, it yet remains good for the devolutive appeal.
3. A distinction is to be drawn between suits to correct an assessment, and suits which go to the inherent validity of an assessment and to the legality of the tax based thereon.
4. Those of the first class must be instituted within the time fixed by the statute; those of the latter class are not subject to such time limit.

APPEAL from the Twenty-fourth Judicial District Court, the Parish of St. Mary. *Allen, J.*

D. Caffery & Son and *Denègre, Blair & Denègre* for Plaintiff, Appellant.

M. J. Cunningham, Attorney General, and *Sigur, Milling & Saunders* for Defendants, Appellees.

Argued and submitted May 3, 1898.
Opinion handed down June 22, 1898.
Rehearing refused June 30, 1898.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

BLANCHARD, J. Plaintiff corporation owns and operates a railway extending through the parish of St. Mary, Louisiana.

Trouble arose over the assessment of its property in said parish for taxation for the year 1897, and this suit is the sequel.

The parties litigant are as wide apart as to the nature and character of the action as they are in respect of the judgment that should be rendered.

The plaintiff insists that the complaint is not of an over-assessment, but of a void assessment; that it is not a suit to reduce an assessment, nor to correct an assessment for misdescription or other

irregularity, but one to have the assessment of certain property declared void for radical defects, and to enjoin the collection of taxes predicated on the illegal and void assessment on the ground that, being based on an illegal assessment, the taxes themselves are illegal.

Defendants, on the other hand, insist that the action is one instituted against them (to-wit: the tax collector, the assessor and the police jury of the parish of St. Mary) for the purpose of correcting or reducing the assessment made of plaintiff's property for the year 1897.

Pursuant to the provisions of Act No. 92 of 1888, the Board of Commissioners for tne equalization of assessments of railroad, telegraph and telephone lines convened at the town of Lafayette in May, 1897, and proceeded to put a uniform valuation on the roadbed of railroads and on the telegraph and telephone lines running through the parishes the board was authorized to represent.

Having done this, the secretary of the board proceeded to apprise the assessors of the several parishes through which these lines of communication ran, of the action of the board. The letter addressed by him to the assessor of the parish of St. Mary informed the latter that the assessment fixed upon plaintiff's line of railway was $6500 per mile, with a rate of $3500 per mile upon the branch lines thereof.

Having received this communication the assessor proceeded to place the assessment upon his roll. In doing this he first ascertained the number of miles of the main line of plaintiff's railway in the parish, and the number of miles of its branch lines. The result of of his labors as to the assessment of the railway mileage proper appears listed as follows, which we will call List No. 1:

6 miles main line east of Morgan City	$32,000
34 miles main line west of Morgan City	221,000
12 miles of main line double track	78,000
1,784 feet spur track, Barnett's plantation	1,180
3,036 feet spur track, Sorrell plantation	2,010
3,341 feet spur track, Adeline plantation	2,210
1,812 feet spur track, Franklin Refinery	1,200
1.615 feet spur track, Alice C. plantation	1,070
10,918 feet spur track, Barnett's plantation	7,230
1,925 feet spur track, Clark's plantation	1,270
3,276 feet spur track, Berwick Lumber Company	2,170
1,800 feet spur track, Bonvillain plantation, Cypremort Branch	1,190
15 miles Cypremort Branch	52,500
1 mile main line track, Morgan City	6,500
2,976 feet spur track, Morgan City	1,790
Total assessment	$411,500

He, then, independently of the Board of Equalization, and acting

in his capacity as local assessor for the parish, predicating his action upon Sec. 29 of Act No. 106 of 1890, proceeded to assess the depot buildings, station and section houses and the lots of ground upon which the same are located, belonging to plaintiff company and situated in the parish, together with the Morgan City bridge, and listed the same as follows, which we will call List No. 2:

Section house and lot and depot and lot at Sorrell station	$500
Depot and lot at Adeline plantation	500
Section house, depot and lot at Baldwin station	1,000
Section house, depot and lot at Patout plantation	300
Depot and lot at Glencoe	200
Section house and lot at Burgulieres plantation	200
Section house and lot at Franklin	500
Depot and lot at Bayou Sale station	500
Section house, depot and lot at Calumet station	300
Section house, depot and lot at Patterson	500
Section house, depot ond lot at Berwick	500
The Morgan City bridge	250,000
Depot and lot, town of Franklin	2,000
Total assessment	$257,000

The assessor then assessed against plaintiff, on the non-resident list, the following property, which we will call List No. 3:

Lots 11, 12, 13 and 14, square 21, Morgan City	$200
Lots 1 to 7, square 13, Morgan City	2 000
Lots 1 to 7, square 23, Morgan City	150
Depot, wharves, etc., Morgan City	6,000
Aggregating	$8,350

Plaintiff makes no complaint of the action of the Board of Equalization, but does of the subsequent action of the assessor.

Shortly after the adjournment, of the former, plaintiff company filed with the assessor the following list, as showing its mileage in the parish of St. Mary and the proper assessment thereon, according to the rate fixed by the board, to-wit:

Five miles main-line track and all appurtenances, East Morgan City, per mile	$6,500
Thirty-five miles main-line track and all appurtenances, West Morgan City, per mile	6,500
Twelve miles new double track and all appurtenances, per mile	3,500
Fifteen miles Cypremort branch track and all appurtenances, per mile	3,500
One mile main-line track and all appurtenances, corporation Morgau City, per mile	6,500

Whereupon the assessor notified the company that he did not regard the list as a correct one of the property owned by it in the parish, and served upon its agent duplicates of the lists made out by himself, showing values thereto attached.

Plaintiff thereupon filed with the assessors a protest against his listing of its property and valuation thereof, and requested a revision and correction, which application the assessor rejected.

Early in July the police jury of the parish met as a board of review, and plaintiff, through counsel, appeared and filed with that

body a "protest against the legality and correctness of the assessment of its property in St. Mary parish for the year 1897, with a view of securing its correction."

This protest, in substance, recites that the company had theretofore made to the parish assessor full and detailed returns of its property for assessment, etc., which returns it averred to be correct; that the assessment made by the assessor was erroneous; that he had disregarded the valuation adopted by the board of equalization, and in some instances increased such valuation; that he had so assessed some of its property that it amounted to double assessment, and explained how this resulted, etc.; that whereas the board of equalization, in valuing the main line of the company's road at six thousand five hundred dollars per mile and the branch lines at three thousand five hnndred dollars per mile, had arrived at the same by including the value of the spur tracks as well as the value of the superstructures, stations, section houses, etc., the assessor had taken the board's figures for the mileage only, and then had proceeded separately to assess the spur tracks, section houses, depots, stations, superstructures, etc., and listed and returned the same for additional and independent taxation against the company; and that he had so separately and independently assessed the bridge crossing Berwick's Bay, notwithstanding the same is used for no other purpose than to support the rails of the road, and is, therefore, only a part of the roadbed and included in its mileage by the board of equalization in arriving at a uniform rate of valuation for the entire length of the track.

The protest concluded by asking the police jury, sitting as a board of review, to correct the assessment of its property in the parish so as to conform to the valuation certified to the assessor by the board of equalization, thus reducing the assessment on its main line from seventy-eight thonsand dollars to forty-two thousand dollars, deducting and canceling entirely the separate assessment of the spur tracks, as well as of its section houses, stations, depots and superstructures, including the bridge at Berwick's Bay.

To this protest and prayer for correction and reduction the assessor made answer in the form of a written objection filed with the police jury against its consideration for the reason that the formalities of law had not been complied with by the agents of the company, they having failed to file a duplicate list of property, sworn to, as required by act 106 of 1890, within the time prescribed by law.

The jury proceeded to hear counsel representing the respective parties and then adopted a resolution sustaining the assessor's objection to consideration of the company's demand for correction, on the ground of failure to seasonably comply with the law.

This was on the seventh of July, 1897. Nothing further was done by the company until about six months later when one of its agents appeared in the office of the tax collector of the parish, stating he desired to pay the taxes of the company, announcing that the same amounted to a certain sum (naming the figure, something a little over one-half of the sum the tax collector claimed to be due), being the exact amount levied against the company the preceding year. The tax collector replied that the sum named would not cover the amount due by the company, and that he would accept it only as a partial payment of the taxes owing. Saying that he desired to make a legal tender of the amount claimed by the company to be due, the agent proceeded to count out the money in the presence of two witnesses and offered the same to the collector, who refused it, except as a partial payment.

Defendants filed a peremptory exception in bar of plaintiff's demand, setting up two grounds: (1) That the company failed to make out a proper list of its property for assessment for the year 1897, failed to make oath to the list that was presented, as the law requires, and that because of such default whatever right the law gave for contesting the correctness or legality of the assessment was forfeited; (2) that the suit comes too late, the same not having been filed and service thereof made within the time prescribed by law for such suits, to-wit: the first day of November of the year in which the assessment is made.

With the prayer for dismissal of the suit and dissolution of the injunction, is one for ten per cent. on the aggregate amount of the taxes and penalties due as attorney's fees, and two per cent. interest per month from January 1, 1898, upon the amount of taxes due.

This exception was called for trial at chambers, whereupon counsel for plaintiff objected to proceedings at chambers, and upon the objection being overruled, excepted and reserved a bill. We find no error in this ruling. Sec. 56 of Act No. 106 of 1890 authorizes such causes as the present one to be tried at chambers.

The exception was sustained, the action dismissed and the injunction dissolved, with judgment against plaintiff for the special costs provided by law, as stated above.

Plaintiff appeals suspensively and devolutively, and is met here by a motion to dismiss the suspensive appeal on the ground of the insufficiency of the amount of the bond.

The order of appeal fixes the amount of the devolutive appeal bond at one hundred dollars, that of the suspensive appeal "according to law." The amount of the bond is ten thousand eight hundred dollars. Whether it be insufficient in amount for a suspensive appeal depends on the amount of taxes due, and that is the very issue this suit is brought to determine. The judgment of the court on the exception fixes no amount of taxes as owing—the percentage allowed as counsel fees being predicated in general terms "on the amount of taxes due by plaintiff." The latter, figuring by one process, arrived at an amount of taxes it thinks due, and gave a suspensive appeal bond accordingly. The defendants, figuring by another process, arrive at a different and larger amount, and finding the bond not given according to its arithmetic, moves to dismiss.

It would seem to have been a proper case for the court to have fixed the amount of both bonds, since no moneyed judgment was rendered, nor exact amount of taxes due stated. However, we do not find it necessary to enter into a calculation to determine what is the precise amount the suspensive appeal bond should have been given for. Where there is doubt the appeal will not be dismissed. Besides. if the bond be not sufficient for a suspensive appeal, it yet remains good for the devolutive appeal. Chaffe vs. Carroll, 34 La. An. 122.

The motion to dismiss is denied.

ON THE MERITS.

A distinction is to be drawn between suits to correct an assessment, and suits which go to the inherent validity of an assessment and to the legality of the tax based thereon.

In the first class are to be put those suits in which an assessment is complained of and attacked for over-valuation and misdescription of the property listed, involving merely the regularity or correctness of the assessment.

In the second class are to be enumerated those actions attacking an assessment as void on account of radical defects, and drawing into question not the correctness merely of an assessment, but the existence itself of any valid assessment.

In the first class of cases the attack, if successful, results not in destroying but in reducing or correcting the assessment, whereas in the second class of cases the radical defects made the basis of attack, if found to exist, render the assessment null.

It follows that in suits coming within the second class of cases there is involved not only the legality of the taxes based on the assessment attacked, but *the right* to collect any taxes at all predicated on the illegal or void assessment, for the existence of a valid assessment is essential to the collection of taxes.

The time limit invoked in defendant's exception applies to the first class of cases only. Such suits must be brought before the beginning of November of the year in which the assessment complained of is made, first, it would seem, complying with the provisions of Secs. 19, 23 and 26 of Act No. 106 of 1890. Shattuck & Hoffman vs. City, 39 La. An. 206; Union Oil Co. vs. Campbell, Assessor, 48 La. An. 1351; Kansas City, S. & G. R. W. Company vs. Davis, Tax Collector, 50 La. An. —, Acts of 1890, p. 132, Sec. 26. The action in this class of cases (to test the correctness as to description and value of an assessment) is in the nature of an appeal from the decision of the Board of Review in the country parishes, or the committee on assessments in the city of New Orleans.

But such time limit has no applicability to the second class of cases. In Oteri vs. Parker, Tax Collector, 42 La. An. 376, this court said: "The statutes invoked by counsel, which prescribe a limit of time for the action of taxpayers, in the courts, touching the assessment of their property, have reference to suits to 'test the correctness of such assessments,' and, hence, they can not be construed as applying the same limit or restriction to actions or suits presenting questions of alleged radical defects in the assessments, sufficient to operate the absolute nullity of the same."

The want of a legal assessment, one bringing into contestation the legality of the taxes based thereon, the *right* itself to collect any taxes thereon, is a radical defect which may be urged at any time in opposition to the attempted collection of taxes imposed under such assessment. In Gills vs. Clayton, Assessor, 33 La. An. 286, the court declared the legality of a tax to be in contestation when it is claimed that the tax was originally imposed or assessed in violation of some provision of law, or by one without legal authority to make

such assessment. See also Adler, Goldman & Co. vs. Assessors, 37 La. An. 507; State vs. Lundie, 47 La. An. 1596.

The "want of a legal assessment" was said in Hickman vs. Dawson, 35 La. An. 1087, to be a "radical defect."

The case at bar comes within both classes of cases we have been considering. That is to say, as to part of the listing and valuation of plaintiff's property it is undoubtedly an ordinary action "contesting the correctness" of the same and subject to the time limit; while as to another part it must be viewed as an action bringing into question the inherent validity of the assessment and contesting the legality of the tax—*not* subject to the time limit.

So far as Lists Nos. 1 and 3, hereinbefore set forth, are concerned, we hold this to be a suit "contesting the correctness" only of the assessments there shown, while as to the property appearing on list number two it must be regarded as an action putting at issue the legality and validity of the assessment and tax sought to be collected.

The Board of Equalization which met at Lafayette officially communicated to the assessor only the rate per mile for the main line *of* plaintiff's railway, and the rate per mile for all branches thereof, concluding its communication with the following direction: "*Note* above and assess whatever portion of said lines there may be in your parish accordingly."

This communication, which was the official notification of the action of the board, did not attempt to state the mileage of the *main* lines and that of the branches of the several railways running through the parishes the board represented, nor did the board *undertake* to say what tracks were to be considered main line and what branches. All that was left to the several parish assessors. *The* board merely established a uniform mileage rate. It would seem that *only* was the extent of its authority under Act 92 of 1888.

Receiving the communication of the board, the assessor of St. Mary parish proceeded to ascertain the mileage of the main line and branches of plaintiff's railway in his parish. He assessed what he considered the main line at $6500 per mile and what he considered branches at $3500 per mile. These were the board's figures. In estimating the mileage of the main line he added twelve miles of double track, considering that it came under the head of "main line." If this be erroneous it is nothing but an overvaluation, which

should have been the subject of a suit for corrections *seasonably* brought.

So, too, with the branch lines listed. If he made the mileage of such branch lines greater than they should be, or added spur tracks as branch lines which should not have been added, these are rather disputes "concerning the descriptions of the property listed and the valuation of the same as assessed," in the language of the statute, and suit to test the correctness of the assessment should bave been instituted on or before the 1st of November of the year.

Some parts, at least, of such assessments were proper, and if this be so, the assessment was not void, and the errors complained of are not "radical defects," to be taken advantage of by suit filed any time prior to collection of the taxes based thereon.

As to List No. 3, the property included therein appears to be lots of ground in certain squares in Morgan City and wharves there, which are the proper subject of assessment and taxation independant of the assessment of trackage of the railway. With regard to the assessment of such property, contests before the courts over its description and valuation must surely be by suit instituted within the time fixed in the statute.

But as to property included in List No. 2 the situation is entirely different. The question raised is one striking at the existence itself of the right of independent or separate assessment of such property apart from the roadbed or line of railway of which it is claimed to be part. Plaintiff's contention is that section houses, depot buildings, bridges, superstructures, substructures and all erections on its right of way, as well as all parts of the land forming its right of way, are necessarily and legally included in the assessment placed upon its roadbed or trackage, and there is no authority in law for its separate assessment. If this be so, its inclusion in plaintiff's assessment as independent subjects of assessment and taxation is a "radical defect," not subject to the time limit heretofore referred to, and the collection of the tax thereon may be resisted, as is sought to be done in the present action.

The peremptory exception filed by defendants is good and must be maintained, and the suit dismissed so far as the same affects the property and its assessment embraced in Lists Nos. 1 and 3.

But, as to the property and its assessment included in List No. 2, the exception must be overruled and the suit reinstated.

No sufficient tender of payment of taxes due on the property mentioned in Lists 1 and 3 was made, and, therefore, the statutory penalty of two per cent. per month thereon from the first of January, 1898, as well as the ten per cent. on the amount of such taxes as attorney's fees, must be enforced.

It is therefore ordered, adjudged and decreed that the judgment appealed from, in so far as it sustains defendant's exception and dismisses plaintiff's action in its bearing upon the property and the assessment thereof included in Lists Nos. 1 and 3, hereinbefore mentioned, be affirmed, and that the special costs—two per cent. per month interest from January 1, 1898, and ten per cent. as attorney's fees, mentioned in said judgment—be reduced so as to apply only on the taxes due on the property included in said Lists 1 and 3.

It is further ordered, etc., that the judgment appealed from, in so far as it sustains said exception and dismisses plaintiff's suit and dissolves its injunction in its bearing on the property and the assessment thereof included in List No. 2, hereinbefore mentioned, be annulled, avoided and reversed, and that to this extent said exception be overruled and the suit and injunction reinstated, to be proceeded with according to the views herein expressed, and the law-costs of appeal to be borne by defendants and appellees.

No. 12,784.

SUCCESSION OF DR. EUGENE RABASSE.

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Any party in interest may obtain the judgment homologating the account of the executor.

The affidavit of the executor to the correctness of the account suffices for the judgment of homologation. C. C. 1172, 1173; 29 An. 521, 327; 21 An. 511.

The judgment of homologation, when final, precludes subsequent oppositions, and entitles the parties placed on the account to the distribution fixed by the account and judgment. C. C., Art. 1065; 12 La. 121; 4 An. 450; 1 Hennen's *Digest*, p. 759, No. 2.

Reserving enough to cover oppositions, the executor may be required, when the account is homologated, to pay the amounts to the parties placed on the account as entitled to such amounts.

ON APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

E. J. Meral, J. N. Augustin and *Chas. F. Claiborne* for Heirs, Plaintiffs in rule, Appellees.

Succession of Rabasse.

Henry Chiapella and *Solomon Wolff* for Executor, Defendant in rule, Appellant.

Argued and submitted April 23, 1898.
Opinion handed down May 16, 1898.
Rehearing refused June 24, 1898.

The opinion of the court was delivered by

MILLER, J. The appeal is by the executor of the deceased from the judgment directing the payment to the heirs of the deceased of the amount shown by the executor's account homologated to be in his hands accruing to the heirs, the judgment providing that the executor should, however, retain a sufficient sum to cover oppositions to the account.

The executor's account, exhibiting a large sum over the debts of the deceased, was homologated on the application of the heirs. They had previously opposed some of the charges on the account, and oppositions had been made by parties claiming to be creditors. The demand of the heirs on the rule now before us on this appeal is that the executor, retaining enough to cover the oppositions, pay to the heirs the residue in his hand and the lower court made the rule absolute.

The executor's resistance to this judgment is placed substantially, on the grounds that the heirs could not apply for the homologation of the account; that the judgment of homologation was obtained on no evidence, but it is conceded the executor appended the usual affidavit of the correctness of the account when he filed it; that the heirs had opposed the account, and finally that the succession is not closed.

When the legal notices of the filing of an executor's account have been given, as required by law, and the legal delays for oppositions have expired, it is settled that any party in interest may require the account to be homologated. The objection that the account was not proved if the executor could be deemed entitled to take that ground, is answered by his affidavit to the correctness of the account, the usual evidence required by our jurisprudence, and for many years it was considered the codes exacted no evidence to homologate the account. C. C., Arts. 1172, 1173; Succession of Planchet, 29 An.

521; Succession of Cloney, 29 An. 327; Succession of Ross, 21 An. 511; Succession of Dougart, 30 An. 270. We do not understand that the opposition of the heirs to some of the charges in the account, which, if sustained, would increase the amount coming to them, precludes them from demanding payment from the executor of the amount shown by the homologated account to be in his hands, over and above every debt he places on the tableau; provided, enough is retained by him to cover oppositions filed by creditors. Lastly, the judgment of homologation precludes any demand in respect to the fund the account proposed to be distributed, not made by oppositions when the judgment is rendered, and that judgment, when final, closes litigation as to the fund and entitles the parties placed on the tableau to the distribution the account proposes. C. C. 1065; Franklin vs. The Syndics of Warfield, 2 La. 127; West vs. Creditors, 4 An. 450; Ory vs. His Creditors, 12 La. 121.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed at appellant's costs.

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IN RE A. J. INGERSOLL, APPLYING FOR WRIT OF REVIEW TO THE COURT OF APPEALS, FIRST CIRCUIT, IN CASE J. O. TOOLE VS. C. H. MINGE.

Discretionary with this court, on the case as presented, to grant or withhold the writ of *certiorari*, or review, contemplated by the latter clause of Art. 101 of Constitution of 1898.

Not intended by the power there granted to make of the Supreme Court a sort of superior court of appeals over the Circuit Courts, to take jurisdiction of, and hear and determine any and all cases decided by the latter courts.

Nor that the Courts of Appeal should be made merely a stopping place for causes on their way from the District Courts to the Supreme Court.

It was, rather, the intention that the power thus lodged in the Supreme Court should be exercised only in special or extreme cases, whose peculiar circumstances, as to facts or law, justify, in the opinion of this court, a resort to it.

AT CHAMBERS.

Leonard & Randolph for Petitioner.

D. T. Land for Respondent.

Petition filed June 30, 1898.

The opinion of the court was delivered by

BLANCHARD, J. On application of the State of Louisiana on the relation of A. J. Ingersoll, one of defendants, for a writ of *certiorari* or of review, to the Court of Appeals, First Circuit, State of Louisiana.

AT CHAMBERS.

Plaintiff, on a state of facts alleged in a petition addressed to the District Court in and for the parish of Caddo, recovered a moneyed judgment against A. J. Ingersoll, a member of defendant's firm. On appeal this judgment was affirmed by the Court of Appeals of the First Circuit.

The opinion of the latter court was handed down on the 20th of June, 1898.

On the 30th of June application was filed in this court, praying that a writ of *certiorari* or review do issue to the Court of Appeals, directing it to send up the record of the case to the end that the decision may be reviewed and passed upon here.

It is averred that a case is presented for the action of this court under Art. 101 of the Constitution of 1898, and it is asked that meanwhile all proceedings in execution of the judgment be stayed.

It nowhere appears that any notice of intention to apply for the writ was given either to the Court of Appeals or to the plaintiff in whose favor the judgment was affirmed.

The first part of Art. 101 of the Constitution authorizes the Courts of Appeal to certify to this court any question or proposition of law arising in any cause pending before them, concerning which they desire instructions for its proper decision.

The pending application does not come within that provision. The Court of Appeals does not certify any proposition of law to us and asks for no instructions for its guidance in determining the cause submitted to it on appeal.

The latter part of Art. 101 vests in this court the power to require, by *certiorari* or otherwise, any case to be sent up to it by the Courts of Appeal for review and determination here, provided the application be made within thirty days after the decision of the Court of Appeals has been rendered.

It is under this clause that the present application is made.

It is clearly the intention of this part of the article of the Constitution referred to that it should be entirely discretionary with this

court, on the case as presented, to grant or withhold the writ. This is demonstrated by the fact that no particular kind or class of cases is specified as to which the application may be made.

It was not intended by a resort to the power here granted to make of the Supreme Court a sort of superior court of appeals over the Circuit Courts, to take jurisdiction of, and hear and determine any and all cases that may have been decided by the latter courts in the exercise of their legitimate, constitutional jurisdiction. In other words, it was not intended that the Circuit Courts of Appeal should be made merely a stopping place for causes between one hundred dollars and two thousand dollars on their way from the District Courts to the Supreme Court.

It was, rather, intended that the power thus lodged in the Supreme Court should be exercised only in special or extreme cases, whose peculiar circumstances as to the facts or the law governing the same justify, in the opinion of this court, a resort to it.

For example, where the Court of Appeals refuses to be guided, in a clear case, by the well established jurisprudence as defined and laid down by this court, a case would be presented warranting this court in sending down its writ of review to bring up such cause for review and determination. This might be necessary to enforce uniformity of jurisprudence throughout the State in the courts thereof.

Other cases for other reasons may arise justifying a resort to the writ—care being always taken against its abuse, to the impairment of the dignity and power and usefulness of the Courts of Appeal, and protracting litigation and deferring the final enforcement of just rights.

The application now before us presents no such special or extreme case. An ordinary cause of action was prosecuted to judgment in the District Court and this judgment on appeal to the Court of Appeals is affirmed. The party cast seeks to bring the case here for review, taking the chance offered, hoping for its consideration and reversal by this court—evidently regarding it in the light of a further and additional right of appeal. Neither the facts nor the law as presented in the application and accompanying papers make out a case coming within the intendment of the constitutional provision, and the writ sought *is denied.*

No. 12,841.

NORMAN F. THOMPSON VS. S. LEVY, JR.

Plaintiff claimed a special mortgage prior in date on property adjudicated to defendant.

He claimed also that by the adjudication and the fact that by operation of law he, defendant and adjudicatee, was authorized to retain the price, he thereby became personally indebted for the amount of the special mortgage.

Held: that the special mortgagee holding the first mortgage on property has no cause of action to hold the purchaser personally responsible for the amount of the first mortgage.

The purchaser not having assumed the first mortgage is responsible as a third possessor and the property was transferred to him *cum onere.*

The question was passed upon in Bacas vs. Hernandez, 31 An. 86; Trondle vs. DeBouchel, 33 An. 759. It was decided in these cases that the special mortgagee had no personal claims. The fact that a purchaser, who, for purposes of his own, delays payment, may be held personally for interest accruing from date of the sale, as in 29 An. 384, on the special mortgage, first in rank, is not ground upon which it can be held that he is liable personally on the mortgage with interest to the day of sale.

ON APPEAL from the First Judicial District Court for the Parish of Caddo. *J. Henry Shepherd, Judge ad hoc.*

Wise & Herndon for Plaintiff and Appellant.

T. Alexander for Defendant, Appellee.

Submitted on briefs June 3, 1898.

Opinion handed down June 22, 1898.

The opinion of the court was delivered by

BREAUX, J. This is a suit brought by plaintiff, a mortgagee, for a judgment against the defendant, the adjudicatee of the property on which plaintiff's conventional mortgage rested. The purchaser at sheriff's sale, by foreclosure, held a mortgage, second in rank. His bid on the property was for a small amount above the sum total secured as to its payment by the first mortgage. The claim of plaintiff is that by the effect of the adjudication defendant became personally responsible for the debt. Plaintiff does not affirm that the defendant ever by any act or utterance assumed payment of the first mortgage debt. He substantially confined the right he claims as having arisen under the operation of the purchase.

court, on the case as of no cause of action. is demonstrated by plaintiff's suit dismissed. He is specified as to

It was not int that the only question at of the Supre entitled to the position of third Circuit Cou The principle that he is a third possesand all ca decided in a large number of cases exercise counsel for plaintiff, in substance contend, if words only subject to the prior encumbrance be n the part of the purchaser, there would be no dol adjudication, unless the highest bid is large enough to pay their prior encumbrances.

C Counsel further argue: if the purchaser under the circumstances of this case takes the property subject to pre-existing mortgages, and does not incur personal liability for the price, then in case the apparent prior mortgages do not really exist he would get the property without paying the full amount of his bid.

With reference to the second proposition advanced by plaintiff, that in case the apparent prior mortgage does not exist, the purchaser would get property without paying the full amount of his bid.

We think the proposition is answered by the statement, that in any and all contingencies the purchaser is bound for the full amount of his bid. Whatever takes place after the sale he remains bound for the whole of the purchase price.

Recurring to the first proposition: the extent of the adjudicatees' obligation under the effect of the law. We think it sufficient in answer to give the definition of a third possessor: One who buys the mortgaged property without assuming to pay the mortgage. If one buys real estate by notarial or other act and does not assume the payment of the first mortgage, he is bound only as a third possessor. He must either give up the property or pay the amount for which it was mortgaged. He is limited to one or the other alternative. This is the full extent of his responsibility as a purchaser.

In view of the law's silence upon the subject, we think it not permissible to difference the case of one who buys property at sheriff's sale in foreclosure proceeding from the case of one who buys by a conventional sale.

The purchaser, beyond question, is entitled to retain the amount out of the price for which the property was adjudicated. But he

it as a third possessor, not as one who has assumed the pay- of the debt. The amount retained, as we take it, is not an mount which the purchaser assumed to pay. The mortgagee, with special mortgage, is not referred to the amount realized as being in the hands of the purchaser. His claim is secured by special mortgage and not by any personal obligation of the purchaser. The language used in the Code of Practice, in so far as relates to the mortgage, does not suggest any responsibility further than before stated. We are not at liberty to supply the hiatus, if hiatus it is. We do not think it is. The articles of the Code of Practice as we read them, look to the payment of the special mortgages prior in rank to the seizing creditor; if it be not paid it is subject to sale.

The question is not one of first impression.

In a well considered case, this court held, that the purchaser at sheriff's sale is a third person, and cited Art. 709 in connection with Article 68 *et seq.* as applying, and that the proper action was against the purchaser of the property seized as a third purchaser of mortgaged property. Troendle vs. De Bouchel, 33 An. 759.

If the purchaser refuses to pay the price, the mortgagee has immediate recourse against the purchaser, against whom as a third person the hypothecary action lies. Bacas vs. Hernandez, 31 An. 86; Duncan vs. Elam, 1 Rob. 135.

The learned member of the bar, before whom the case before us for decision was tried as Judge *ad hoc*, with more than usual industry, gave clear and elegantly written reasons for his judgment. He, in addition, quoted from Millard's Equity; a quotation we insert here, as applying: "A purchaser who takes a conveyance of land without agreeing to pay such mortgage, only takes the land subject to the charge and if he neglects to pay off the charge, he will lose his land by the foreclosure and sale, or will only be permitted to take the surplus, if any, after paying the mortgage debt, and the expense of foreclosure. But the mortgagee can not have any personal claim against him for the deficiency unless he has made an agreement to pay the mortgage debt either with the mortgagee himself or with some one who is legally or equitably bound to pay such debt to the mortgagee."

Plaintiff's counsel in support of plaintiff's position, refers to Perry vs. Holloway, 10 Rob. 107, holding: "if a special mortgage certified to exist on the property had been extinguished, the alleged

debtor might recover of the purchaser the amount thus erroneously certified," and with some force he propounds the question: How could recovery be made of the purchaser if his only liability as purchaser was that he took the property subject to the mortgage?

We willingly agree with the following, quoted from the last cited decision, *supra:* Equity prohibits the purchaser who has not paid the price from taking the property. He must pay the whole price to some one before the property is completely his.

But in the last cited case the sale was decreed null, and, in consequence, the original owner remained the owner, and it was not adjudged that the purchaser of a title annulled, was responsible personally for the amount of the mortgage. As we interpret the principle applying, had the adjudicatee become the owner under a valid title, the certificate of mortgage of his indebtedness, being in part false, the property would have been encumbered in favor of the original owner for the amount and not the purchaser personally. The purchaser is not bound for any amount over and above his bid.

We take it that this conclusion is an answer to the question propounded.

There is perhaps an expression hastily written in the case (Succesion of Triche, 29 An. 384), to which our attention is invited by plaintiff's counsel; the amount due on a prior special mortgage, the court holds, was assumed as to its payment, by the purchaser.

We think we may fairly infer that the purchaser would not have been held bound in a direct action against him for the price, but that it would have been held that the property was in his possession *cum onere* had the direct issue arisen.

In the last cited case, Succession of Triche, 29 An. 384, there was a question of interest involved. The purchaser, it was held, became personally bound for the interest. He had, for his own benefit, delayed payment of the mortgage. It was in our judgment but just for him to pay for the use of the amount secured by mortgage.

It was, in view of his delays in payment, made his special personal obligation to pay. "Otherwise," said the court, "it would be to the advantage of the purchaser to delay the payment of the portion of the price left in his hands as long as possible and the debtor would be deprived of his property, whilst interest would be constantly accumulating." Yeatman vs. Erwin, 14 An. 147. We think in that case there was a different question from the one here involved.

Before us there is no issue regarding interest growing out of delays for the benefit of the purchaser.

But taking up again the merits of the question all will admit that no purchaser is bound for the mortgages on the property he buys unless he assumes the payment.

The purchaser has not assumed the payment, nor does the law contain the declaration that he shall be considered as one who has assumed payment of the prior mortgage.

Again it is settled that a purchaser takes the place of the seized debtor. He, as relates to the property, stands in his stead. His responsibilities are not greater.

Yet, under plaintiff's theory, if the seized debtor is a third possessor, the purchaser by the mere operation of law would not be a third possessor as relates to the mortgage, but the debtor for its amount. Again, if the purchaser under that theory is made to assume the debt he becomes personally the debtor, and is not entitled to the same subrogation arising from payment that a third possessor would have; and, finally, why should the purchaser be placed in the attitude of having to settle or fix amount due on a mortgage when that is an act which the debtor himself should see to.

For the reason that the law and the evidence are in favor of the defendant we have concluded to affirm the judgment in this case.

It is affirmed.

NICHOLLS, C. J., dissents.

No. 12,831.

THE MIDDLESEX BANKING COMPANY VS. NIEMEYER & DARRAGH.

The truth of plaintiff's averments being admitted by the exception of no cause of action, to warrant a dismissal of the action it must appear that the allegations admitted true are all disposed of by the effect of the plea.

He, defendant, for the hearing having admitted certain alleged rights (without passing upon the question of their validity at this time) the court holds, that the trial of the asserted rights of plaintiff, as against defendants' title, may be had under the pleadings.

The deed annexed by plaintiff to its petition, setting forth defendants' rights of servitude (disputed by plaintiff), gives rise to question which may be determined in this litigation. If defendants have a servitude, it is to the interest of all concerned that it be localized; its character determined and limit

fixed. This can be as well done now under the pleading, as at another time under other pleading,

The multiplicity of actions are not favored. It is even a maxim that *interest reipublicæ ut sit finis litium.*

ON APPEAL from the Fifth Judicial District Court for the Parish of Morehouse. *Potts, J.*

H. R. Boyd for Plaintiff, Appellant.

James Bussey (*Howe, Spencer & Cocke* of Counsel) for Defendants, Appellees.

Argued and submitted June 1, 1898.

Opinion handed down June 13, 1898.

The opinion of the court was delivered by

BREAUX, J. Plaintiff appealed from a judgment sustaining an exception of no cause of action.

Appellant, the Middlesex Banking Company, enjoined the defendants from building levees, dams, ditches, and from thereby flooding the lands adjacent, upon which plaintiff has a mortgage.

Appellant alleged that some time prior to the twentieth day of January, 1891, a Mistress Peterkin was the owner of the "Line Place," embracing a large area of cultivated lands and a large "cypress brake."

At different times, after she became the owner of the plantation, she executed mortgages upon the place to secure the payment of borrowed money. Newton and Cason obtained a judgment against Mrs. Peterkin, in November, 1888, which plaintiff alleged became a judicial mortgage against the plantation; Levy & Sons also obtained a judgment, and C. Newton, also which became judicial mortgages.

With these mortgages resting against the property, she sold the "cypress brake" to the defendants and appellees on the 20th of January, 1891.

The deed contained the stipulation that the vendees, the defendants here, in order to enable them to remove the cypress timber from the land were to have the right to construct and maintain dams and

levees on the land, or on vendor's land adjacent; also the right to flood the land, and do such other acts and make such improvements needful in removing their timber, or in operating their mills.

On the eleventh day of July, 1891, the "Line Place," the part remaining, was sold at sheriff's sale, and was adjudicated to C. Newton, June 20, 1892. He, Newton, mortgaged the same property to appellant to secure a loan.

The "Line Place" (except the "cypress brake," the property of defendant), is now in the hands of the sheriff, under a writ of seizure and sale, issued in accordance with plaintiff's petition to foreclose their mortgage.

The sale has not yet been made, nevertheless plaintiff, alleged that the sale to Newton under a *fi. fa.* relieved the land from the servitude granted to enable vendees to remove the timber imposed upon it by Mrs. Peterkin in the sale to the defendants' vendees on January 20, 1891, and that defendants have no right under the deed to build any levees, dams, tramways, or to make any other improvement in any manner affecting the adjacent land mortgaged to theirs; that the works defendants are making preparations to carry out will obstruct the drainage of the plantation mortgaged, and lessen its value.

Plaintiff further alleged that the property mortgaged was insufficient in value to pay the amount of the debt of the Midlesex Banking Company, amounting to about ten thousand seven hundred dollars, and that the debtor, Newton, is insolvent.

The court *a qua* dissolved the injuction, dismissed plaintiff's petition, and fixed the fee of defendants' attorney for services in matter of dissolving the injunction at fifty dollars. From the judgment the plaintiffs prosecute this appeal.

In this court the defendants answered the appeal and asked for an increase of the judgment allowing damages.

We will not enter upon a discussion of the right a mortgagee has to restrain a mortgagor from committing any act depreciating the value of the property mortgaged, and decreasing the value of his mortgage. The right is too manifest to admit of discussion. It is also evident that cases may arise to justify an injunction in protecting the rights of the mortgagee against acts damaging to him as a mortgagee.

It is, in our judgment, equally as plain, with reference to the right

of servitude, that it may be protected by injunction, if acquired prior to the date of the mortgage; but that injunction will not lie to protect the right, if of a date subsequent to the date the mortgage was given.

We are well satisfied of the correctness of our position. If plaintiff dates its asserted right against the servitude from the day the owner (Newton) purchased at sheriff's sale, that is on the 11th of July, 1891, it has no case. Prior to that time, Mrs. Peterkin, Newton's author, sold to the defendants part of the place with the servitude they now claim. From the date they became owners of the property entitled to a servitude, appellees are not third persons, and therefore they have an absolute right as against all claims of origin since their purchase.

This brings us to a consideration of plaintiff's averments in its petition regarding the dates to which plaintiff traces its right in opposition to the servitude claimed by defendants.

Plaintiff sets forth a number of mortgages bearing on the property, recorded at a date anterior to defendants' title; it also alleges, that the mortgagor to it, C. Newton, obtained a judgment against Mrs. Peterkin, whose property he purchased, and plaintiff avers it (the judgment), "became a judicial mortgage."

Plaintiff describes in its petition the part of the property which was bought by Newton, on which it has a mortgage; pleads the Newton title, and avers that he bought under a *fi. fa.*

These facts are admitted for the time being.

Plaintiff annexed to its petition a copy of defendants' title, in which is set forth the stipulation to the right of servitude, which it, plaintiff, declares is not due by the adjacent property on which its mortgage bears.

Defendants contend that these stipulations regarding the servitude claimed by them have, by the annexing of the copy, become an affirmative allegation of plaintiff's petition, and that if the specifications and stipulations are contrary to plaintiff's averments they destroy his cause of action.

The judicial mortgage of the owner, Newton, prior to his becoming the owner, is temporarily admitted, as well as all the allegations of fact of plaintiff's petition. The *fi. fa.* is before us, and the title under it are all admitted.

If the document annexed, the deed to which we have already

alluded, had not been annexed there would not be the least grounds for an exception of no cause of action.

The issues would be sufficient to require some action on the part of the court.

As we interpret the deed of sale annexed to the petition, it does not have the effect of completely destroying all cause of action.

Conceding for the discussion that a servitude is due, its nature and extent may be established under the pleas presented. To that end, at least, the issues may be heard.

We deem it, in the interest of all concerned, to allow plantiff and defendants to be heard in order that their differences may be settled.

The statements are clear and concise enough to pass upon the claims presented. Even where there is a probability that the demand will be very much reduced there is a cause of action.

We pass to the next ground argued by defendant: Remote are probable damages. They will not justify an injunction.

On this branch of the case, plaintiff's allegations are plain and direct enough to sustain its action.

If defendants' position is erroneous, plaintiff set forth grounds enough for an injunction. The lands on which the servitude is claimed will, by it, be rendered worthless, and the debtor is insolvent, is in substance the allegations made and which we consider as relates to damages ample enough to sustain the action.

We do not infer that they are, if plaintiff is damaged at all, remote and prospective, but actual and present.

It is therefore ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and that this case be remanded to be tried in accordance with the views above expressed. Appellee to pay the costs of appeal.

No. 12,824.

STATE OF LOUISIANA VS. ISRAEL ROGERS.

No bill of exceptions was reserved necessary to attest the supposed error.

There was no error apparent on the face of the record. In the absence of any bill of exceptions or assignment of error of any sort, or error apparent on the face of the papers, the verdict and decision of the trial court are not reviewable.

APPEAL from the Sixteenth Judicial District Court for the Parish of Livingston. *Reid, J.*

M. J. Cunningham, Attorney General, and *D. S. Kemp*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

Defendant, Appellant, unrepresented by counsel in the Supreme Court.

Submitted on briefs June 3, 1898.

Opinion handed down June 13, 1898.

The opinion of the court was delivered by

BREAUX, J. A bill of indictment was found against the defendant charging him with cutting with a dangerous weapon, with intent to kill and murder.

The indictment sets forth all the elements needful to constitute the crime.

So far as the record discloses it was found by a grand jury that had been regularly empaneled.

The accused was arraigned. He plead not guilty.

The case was assigned, and on the day he was tried by jury he was found guilty as charged.

He applied to the court for a new trial on a number of grounds.

The motion was overruled. He was sentenced to the State penitentiary for a period of twelve months. He appealed from the verdict and sentence. The accused reserved no bills of exceptions. There was no evidence taken in support of his grounds for a new trial which required evidence to sustain them.

On appeal no assignment of errors was filed. He is not here represented by counsel.

It is settled by numerous decisions, where there is not of record a bill of exceptions or assignment of error, the judgment will be affirmed.

We have read over the record carefully and have found no ground upon which the accused is entitled to relief.

It is ordered, adjudged and decreed that the judgment appealed from in this case is affirmed.

No. 12,815.

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108 549

THE STATE OF LOUISIANA VS. CORNELIUS KEASLEY.

Act 44 of 1890 is not unconstitutional on the ground that under its terms, one not guilty of an offence might be convicted.

It would be the duty of the court to see that no judgment be rendered which would convict an innocent person whose act of carrying arms for legitimate purposes the statute never intended to denounce.

The word "wilful" contained in the title of the act, but not contained in the body of the statute, was not an illegality rendering it proper or lawful to annul and avoid the statute. The court may refuse to receive a verdict not responsive to the charge.

A verdict finding the accused guilty, following the language of the statute is not defective.

The information charged the defendant with shooting with a dangerous weapon to kill and murder.

The verdict returned, that the accused was guilty of shooting "with intent to kill." Under Art. 44 of 1890, an offence of the same generic class is the offence with which he was charged.

"Whatever conveys the idea to the common understanding will suffice and all fair intendment of the verdict will be made to support it." Bishop, Sec. 1005; 4th Edition.

ON APPEAL from the Twentieth Judicial District Court for the Parish of Assumption. *Guion, J.*

M. J. Cunningham, Attorney General, and *G. A. Gondran*, District Attorney, for Plaintiff, Appellee.

John Marks for Defendant, Appellant, *Beattie & Beattie, amici curiæ.*

Argued and submitted May 7, 1898.

Opinion handed down June 22, 1898.

The opinion of the court was delivered by

BREAUX, J. The information filed against the defendant charged him with having wilfully, feloniously and of his malice aforethought, shot Joseph Antoine with a dangerous weapon (a pistol), with intent the said Joseph Antoine then and there feloniously, wilfully and of his malice aforethought to kill and murder.

The jury returned a verdict of guilty of shooting with a dangerous weapon with intent to kill. Upon this verdict he was sentencep to six months' imprisonment.

He appealed.

Four bills of exception were reserved by him during the trial.

In the first bill he sets forth, that he objected to the judge's charge in which he instructed the jury, that a verdict of guilty of shooting with a dangerous weapon could be found under Act 44 of 1890.

The objections were, that this act is unconstitutional, as it infringes upon the right to bear arms and upon the freedom and liberty to protect one's rights.

Further: That the body of the statute made no provision against wilfully shooting.

In the second bill of exceptions he complained of the court's action in having ordered the jury to change the form of the verdict.

The first verdict read: Guilty of shooting "*at*" with a dangerous weapon with intent to kill. The word "at" italicized by us was not inserted in the second verdict returned by the jury.

Accused through counsel contends, that the first verdict, though not responsive, was one which illustrated the fact that there was merely a shooting at, and that the court was without authority to give the instruction which was given.

The third bill of exceptions relates to the action of the court in overruling defendant's motion for a new trial.

The fourth bill of exceptions, we take it, is closely related to the second bill of exceptions; it was directed against the second verdict after the change had been made under the instructions of the court.

The motions made for a new trial and in arrest of judgment, and the grounds urged as contained of record, are substantially similar to the grounds narrated in the bills of exceptions.

In our judgment, Act 44 of 1890 is not unconstitutional on the ground that the law-making power attempted to denounce as a crime an act which might be consistent with innocence.

Conceding the fact asserted, the only effect of an act of that character would be to impose the duty upon those charged with its enforcement and interpretation of reading out of the law as not intended to be covered by it, all acts not criminal in their nature.

In State vs. Voss, 49 An. 446, we had occasion to consider a similar point and to arrive at the same conclusion as here.

With reference to the absence of the word "wilful" in the body of the law. In our view, the law is not thereby made defective. The

General Assembly has the power to omit that word and denounce as a crime the act here denounced.

Besides the presence of the word "wilful" in the title could not be ignored in the proceedings.

Indictments as to the character of the act charged would have to be made to conform with the requirements of the statute under the title.

We pass to the objection urged to the instruction given by the court regarding the form of the verdict.

Counsel for the accused does not controvert the proposition that a court may decline to receive an illegal or imperfect verdict.

He contends that the result was after the court had given its instructions regarding their power to make a change, the jury instead of making correction and change resumed its deliberations and changed a finding previously announced. That the first verdict showed that the jury had concluded that though defendant had shot at Antoine he had missed him. That this finding was changed in consequence of the court's instructions regarding their first finding.

The following from Bishop's Criminal Procedure directly applies:

"When the jury comes in with a verdict it is not as of course to be immediately received in the form in which it is rendered. And it is probably the correct doctrine that the judge may require the jury to pass on the verdict upon the whole indictment in such form of words as shall constitute a sufficient finding in point of law, or if they refuse decline altogether to accept the verdict. It seems quite plain that in every case of a verdict rendered the judge or prosecuting officer or both should look after its form and its substance so as to prevent a doubtful or insufficient finding from passing into the record of the court." Vol. 1, Sec. 1004.

It was proper for the court to give additional instructions to the jury in order that they might bring in a verdict in accordance with their finding. We did not discover that the court directed the jury what should be their verdict. Hypothetically, as is usual in giving instructions to juries, he gave them the information that they might render a verdict in another form if their finding of the facts warranted such a finding. We do not infer that there was an intimation thrown out by the court to the jury as to the kind of verdict to be returned.

A court may instruct a jury as to the form of the verdict, without trenching upon questions relating to the substance.

He appealed.

Four bills of exception were reserved by him during the trial.

In the first bill he sets forth, that he objected to the judge's charge in which he instructed the jury, that a verdict of guilty of shooting with a dangerous weapon could be found under Act 44 of 1890.

The objections were, that this act is unconstitutional, as it infringes upon the right to bear arms and upon the freedom and liberty to protect one's rights.

Further: That the body of the statute made no provision against wilfully shooting.

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The fourth bill of exceptions, we take it, is closely related to the second bill of exceptions; it was directed against the second verdict after the change had been made under the instructions of the court.

The motions made for a new trial and in arrest of judgment, and the grounds urged as contained of record, are substantially similar to the grounds narrated in the bills of exceptions.

In our judgment, Act 44 of 1890 is not unconstitutional on the ground that the law-making power attempted to denounce as a crime an act which might be consistent with innocence.

Conceding the fact asserted, the only effect of an act of that character would be to impose the duty upon those charged with its enforcement and interpretation of reading out of the law as not intended to be covered by it, all acts not criminal in their nature.

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The following from Bishop's Criminal Procedure directly applies:

"When the jury comes in with a verdict it is not as of course to be immediately received in the form in which it is rendered. And it is probably the correct doctrine that the judge may require the jury to pass on the verdict upon the whole indictment in such form of words as shall constitute a sufficient finding in point of law, or if they refuse decline altogether to accept the verdict. It seems quite plain that in every case of a verdict rendered the judge or prosecuting officer or both should look after its form and its substance so as to prevent a doubtful or insufficient finding from passing into the record of the court." Vol. 1, Sec. 1004.

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A court may instruct a jury as to the form of the verdict, without trenching upon questions relating to the substance.

It is settled by repeated decisions, where the jury returns an incomplete verdict, or one not responsive to any charge in the indictment, the court may direct them to retire and bring in a proper verdict. It follows, that the court may inform the jury—without necessarily suggesting what should be the verdict—why it is that the verdict is incomplete, or not responsive to the charge.

In support of the position, that the first return of the jury should have remained unchanged and should have been entered as the verdict in the case, the accused assumed, that it was the intention of the jury to find him guilty of shooting at, and not of shooting; in other words, that while he had "shot at," he had not actually shot and wounded the prosecuting witness.

He concedes, that the first verdict was not responsive to the charge. This admission, we take it, disposes of the point.

The courts have repeatedly held, that it was proper in the trial judge not to receive a verdict not responsive to the charge.

The defendant is without right to control the verdict by assuming that the unresponsive verdict was really the verdict intended and no other; that it contained a true account or statement of the facts it was the jury's intention to find.

We pass to a consideration of defendant's objection grounded on the illegality of the verdict. It reads, "Guilty with a dangerous weapon with intent to kill."

The verdict is in the language of the statute. It follows, we think, that it was a legal verdict. They found the defendant guilty of the act which the statute denounces. "The verdict being in the language of lay people, need not follow the strict rules of pleadings or be otherwise technical. Bishop Crim. Pro., Vol. 1, Sec. 1005.

Here the jury followed the very words of the statute. While in view of the title of the statute it is proper that the indictment or information should set forth the wilful intent, the verdict which does not contain the words is not, in our view, thereby made defective. The information charged the accused with the intent to kill and murder; they found him guilty of the lesser offence of the same generic class: Intent to kill. To that extent they limited their verdict. It was a partial verdict completely covering the crime, the jury intended to find.

It is therefore ordered, adjudged and decreed that the verdict of the jury and sentence of the court be and they are affirmed.

NICHOLLS, C. J., dissents.

No. 12,802.

BICKHAM & SON VS. W. P. HUTCHINSON AND C. H. BAILEY.

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52 1732

On Motion to Dismiss.—There were substantially two decrees and in consequence, properly, two appeal bonds were furnished, instead of one.

Nothing in the law required the appellants to join in one bond of appeal.

The erroneous substitution of "or" to "and" in the condition of the bond was not cause to dismiss. There was a substantial compliance with the forms required.

On the Merits.—The item of damages set forth may be covered by one amount alleged.

A gross sum may be claimed embracing each item. Hernsheim vs. Levy, 32 An. 340.

The writ of attachment had been dissolved, and the only question remaining for decision was the amount of damages claimed in reconvention by defendants in attachment.

The court considered the question of actual, pecuniary loss, and the different causes constituting damages, and all injury to business and credit.

In view of the limited business of the defendants and their failure to do anything toward minimizing damages, that they might in part have minimized, the court materially reduced the amount of damages allowed each defendant.

APPEAL from the Sixteenth Judicial District Court for the Parish of Tangipahoa. *Reid, J.*

P. B. Carter, Ellis & Ellis, Clay Elliott for Plaintiffs, Appellants.

B. M. Miller and *W. B. Kemp* for Defendants, Appellants.

Argued and submitted May 4, 1898.

Opinion handed down May 16, 1898.

Rehearing refused June 28, 1898.

The opinion of the court was delivered by

BREAUX, J. This was a suit for damages growing out of a writ of attachment obtained by plaintiffs on the allegation that the defendants had mortgaged, assigned or disposed of, or were about to mortgage, assign or dispose of their property, rights and credits with intent to defraud their creditors.

Defendant's motion to dissolve the attachment was sustained by the District Court.

On appeal to the Circuit Court of Appeals, the judgment was affirmed.

The case was tried on its merits after the attachment had been dissolved, and judgment was rendered *in solido* in favor of the plaintiffs and against the defendants for the sum of four hundred and eighty dollars, with interest.

On the reconvention of one of the defendants, W. P. Hutchinson, he recovered judgment for damages against plaintiffs in the sum of two thousand seven hundred and fifty dollars, with interest.

On the reconventional demand of the other defendant, C. H. Bailey, he recovered judgment for damages against plaintiffs in the sum of twelve hundred dollars, with interest.

Plaintiffs appealed.

The appellees moved this court to dismiss the appeal and urge in support of their motion, that the amount of the appeal bond does not exceed by one-half the amount of the judgment rendered against the appellants and besides that the appeal bond does not contain the condition that the appellant shall prosecute his appeal.

Plaintiffs have furnished two bonds, one in favor of W. P. Hutchinson for the sum of four thousand one hundred and twenty-five dollars, and the other in favor of C. H. Bailey, the other appellee, for the sum of one thousand eight hundred and seventy-five doliars.

The conditions of each bond were that the "appellants shall prosecute their said appeal with effect, *or* shall pay and perform such judgment that may be rendered against them."

With reference to the amount of the bond, it is true that only one judgment was rendered in the suit, but it decreed the amount each defendant was entitled to in the opinion of the court *a qua*. The defendants had severed in their defence, each claiming an amount part of which was allowed. There was nothing informal in executing two bonds. There was in favor of each defendant a bond for an amount exceeding by one-half the amount for which the decree was rendered in his favor.

The requirement of Art. 57, C. P., was met by giving two bonds. One appeal bond for the two amounts would not have been greater security.

Now with reference to the conditions of the bond. The erroneous substitution of "or" to "and" is not, in our judgment an error fatal to the appeal. It may be that the words "or" and "and" are not, strictly speaking, interchangeable, and yet in construing statutory enactments even in criminal cases they are sometimes used as convertible words. We will not stop to consider at length the differ-

ence or similarity in meaning of these words. We are satisfied that the mere substitution of the word "or" in the condition of a bond under the jurisprudence of this court regarding the forms of bonds should be adjudged to have the effect for which plaintiffs contend.

In mattor of appeal bonds this court has adopted a liberal construction in order that principals and securities may be held bound as intended when the bonds were executed. That construction we are justifiable, we think, in following. Sedgwick on the Construction of Statutory Law, p. 371; Sutherland on the Construction of Statutory Law, p. 331.

The motion to dismiss the appeal is denied.

ON THE MERITS.

The admissibility *vel non* of testimony offered by defendants to prove damages in support of their reconventional demand presents the first question for decision.

Plaintiffs objected to all of defendants' testimony on the ground that their answer and demand in reconvention were too vague and general, in that a specified amount is not demanded for each item of damage to admit proof. The court overruled the exception.

We have reason to consider it the better practice to itemize the damages, but it is not always adhered to. This court has in repeated adjudications sanctioned pleading in suits for damages in which specific and separate amounts were not claimed for each particular and definite damages. In accordance with these decisions, in our view, it was permissible for the defendants to prove loss of credit and other injuries to their business, amounting they allege to a gross sum, covering each item of damages complained of.

This was the view clearly expressed in Hernsheim vs. Levy, 32 An. 340. It has since been adhered to in other decisions. Western Assurance Co. vs. Uhlhorn, 41 An. 385; Barthe vs. New Orleans, 42 An. 43; Randell vs. Railroad Co., 45 An. 778; Warner vs. Clark & Co., 45 An. 863; Lester vs. Corley, 45 An. 1006; Goldberg vs. Dobberton, 46 An. 1303; Armstrong vs. Railroad Co., 46 An. 1448.

We are not inclined to a change in a matter of pleading as well settled as this is.

DAMAGES.

There were no grounds for the attachment. This was settled by the decision of the court to which we have already alluded. The

nature and extent of the damages give rise to the questions for our determination.

Plaintiffs were actuated by a desire (excessive it may have been) to collect the amount due them by defendants and reconvenors. But we have not discovered, after an attentive consideration of the evidence, that they were prompted by a desire to injure the defendants.

They were greatly disappointed, more than the occasion warranted, by their failure to collect a draft for four hundred and eighty dollars, which they had accepted from one of the defendants, endorsed by the other. Plaintiffs were not ordinarily prudent. They were careless in resorting to the harsh remedy of attachment in view of the facts, or they were too eager to collect the amount due them. One of the defendants was a successful business man; both conducted their business without having given occasion, reasonably, to any one to suspect them of fraud, in the management of their commercial affairs, with the view of defeating creditors of their claims. It is true that one of these defendants was in embarrassed circumstances, and that a writ of attachment had been sued out against him. This was not cause in itself for suing out another writ of attachment, though it may be reason sufficient to lessen the amount of damages he claims.

This fact did not give grounds sufficient for attaching the other who was prosperous enough, and had only failed to properly exert himself to have his paper honored at maturity. This may have been worthy of blame, but not a cause for suing out a writ of attachment.

The attachment here may well be designated as one which issued without cause. It is, to some extent at least, within the reach of the principles of Byrne vs. Gardner, 33 An. 6; McDaniel vs. Gardner, 34 An. 341, and other cases in *pari materiæ* where writs of attachment were issued.

Looking to the results, as testified to by the witnesses, it may be that the business credit of one of the defendants was injured to a small extent, although there is conflicting testimony on the point; as to the other we did not discover that he had any great degree of credit to be injured.

While we do not think that the grounds were sufficient to warrant a suit for attachment, we can not overlook the fact that the defendants made no attempt to minimize the damages. They allowed the

attachment to remain undissolved some ten days and made no attempt to dissolve on bond.

The District Court was in session and a motion to dissolve was heard and granted in that time. It appears that both defendants here could have executed required bonds to dissolve had they chosen so to do. It is true one is not bound to furnish bond to dissolve an attachment. But it affords a reason in our judgment to base the decree as relates to the amount *only* upon abundant proof. In selecting as relates to bonding, to let their property remain *in gremio legis*, they, to some extent, at least, infringed upon the rule which requires that the one injured should reasonably seek to minimize the damages.

THE AMOUNT OF DAMAGES.

Plaintiffs are none the less liable to an amount in damages. The fact of itself that the attachment was dissolved as having been issued without sufficient cause, must be held as having the effect of establishing their claim to some damages.

Part of the damages claimed are speculative, and are not, besides, supported by sufficient evidence. There is no proof, other than general assertions, of the daily gross revenues. They might have been large during the attachment, or small, even less than expenses. It is enough to say that with the evidence before us they can not be ascertained with certainty. It is fair to presume, from the evidence before us, that defendant would have realized some profit, not as much, however, as some of their witnesses seem to think. We have also considered the injury to credit charged, and other items of damages set up. Taking them and deciding them as a whole as pleaded, we conclude that three hundred dollars is an amount sufficient to one of the defendants, and one hundred dollars to the other.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be, and it is hereby amended, by reducing the amount of the judgment in favor of W. P. Hutchinson, from two thousand seven hundred and fifty dollars to three hundred dollars, and by reducing the amount of the judgment in favor of C. H. Bailey, from one thousand two hundred and fifty dollars to one hundred dollars.

As amended, the amount of the judgment rendered upon the demand in reconvention is affirmed.

In every other respect the judgment is affirmed at appellee's costs.

No. 12,799.

UNION NATIONAL BANK OF NEW ORLEANS VS. H. D. FORSYTH ET AL.

The contract of pledge was made to cover the fee of attorney for professional services rendered by pledgee's attorney in court, and for his services rendered out of court, in all matters appertaining to the securities pledged.

The debtor after it had failed to meet and pay its indebtedness at maturity of its obligation, was indebted for the fee of the creditor's attorney, on the amount realized and credited on the pledgee's claim from the sales of the pledged property.

The effect of plaintiff's default in its payment was suspended during the delays granted by defendant to plaintiff after default. No fee is due on collections made during that time. Sale being a condition precedent to the fee, no amount is due as a fee on the collections made on the securities (without sales).

The rule as above indicated applies to the commission claimed to pay the creditor's special agent.

The bank, by the fact, that it closed its doors and suspended payment, did not cause to mature all its unmatured obligations. It was not a case of judicially fixed insolvency. In consequence no fee and commission are due on the assumption that the debt had become matured by the debtor's insolvency.

The special agent of defendants under the contract was not the special agent of the plaintiff as well. He owed a duty to his principal, the defendants. If there was any obligation to report and give notice of sales to the plaintiff debtor, it was due by the pledgees and not by the agent. The pledgees' obligations are in some respects those of agents. But the pledgees, in view of the facts, did not lose the right to fee and commission, because no notice was given by them to the pledgors of sales intended, or of sales made. They are protected by the terms of the contract of pledge. The bank did not give them such evidence of preparation to resume business as required them to suspend sales of bonds.

The sale of the bonds on a depreciated market was permissible under the terms of a contract plaintiff chose to sign, and offers no ground for a set-off against defendants' claims.

Plaintiff having in part succeeded in sustaining its injunction is not bound for any fee of defendants' attorneys for services in dissolving the injunction.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

T. J. Semmes, and *Saunders & Miller* for Plaintiff, Appellant.

Henry Denis for Defendants, Appellees.

Argued and submitted May 7, 1898.
Opinion handed down May 30, 1898.
Rehearing refused June 29, 1898.

The opinion of the court was delivered by

BREAUX, J. Plaintiff brought this suit to sequester and recover possession of securities pledged by it to the defendant.

Plaintiff in the same suit obtained a writ of injunction to prohibit the defendant from disposing of its securities.

The credit needed by the plaintiff bank in England was obtained by depositing these securities with the Baring Brothers & Co., Limited, the defendants, by whom the desired loans were made to plaintiff.

The values thus deposited as securities consisted of local bonds and bills receivable.

A disagreement of some moment arose between plaintiff and defendant growing out of plaintiff's unwillingness to let defendant sell any of the remaining securities at the time in defendant's possession.

The plaintiff bank had suspended payment on the ninth day of September, 1896, and the Comptroller of the Currency had appointed one of the bank examiners to take charge of its affairs.

With the view chiefly of saving these securities from a sale on an unduly low market, the bank, after a reorganization reopened its doors, and resumed business on the seventh day of December, 1896.

The act of pledge under which the defendant held these securities as pledgees, was similar to prior acts of pledge executed at different times preceding the last act of pledge which is now before us for interpretation.

In this last act of pledge it is stated that it provided a credit of sixty thousand pounds sterling to be drawn for by plaintiff from time to time, prior to the eleventh day of August, 1897. The securities were deposited at the time with the representative of the defendant in New Orleans.

It was stipulated by the terms of the pledge that "in case of default in the payment of the amount due, or to become due," that the local representative of defendant would have authority, at his discretion, without any previous demand of payment, with or without notice to the bank, to sell the pledged property at public or private sale for its market value and apply the proceeds of the sale to the payment of the amount due, including commissions of two and one-half *per cent.* on the "amount realized by the sale or from this

pledge, to be paid to the said agents of the payees, and also attorney's fees in case of legal action or proceedings or professional services in or out of court, at the rate of five *per cent.* (5 per cent.) on the amount realized by said sale or by the pledge and all costs and charges attending said sale."

The amount was increased to one hundred thousand pounds, as follows:

In the first place it was increased by an amount of twenty thousand pounds, identified as the supplemental credit, renewable every four months; sixty thousand pounds and twenty thousand pounds were secured by the same act of pledge.

On the 17th of August the bank applied for an additional credit of forty thousand pounds. The defendant refused to grant another credit exceeding twenty thousand pounds. In answer the bank accepted the offered loan of fhe twenty thousand pounds and informed the defendant that it had deposited with its agent here one hundred and fifty thousand dollars of its bills receivable against the twenty thousand pounds allowed it.

The bank contended that the collateral held over under the terms of the previous pledge consisted entirely of State and city bonds and were held against a credit of twenty thousand pounds, and that in consequence these State and city bonds did not fall within the grasp of the pledge requiring the payment of "commission and a fee."

This loan is subject to the additional agreement appended to the act of pledge and dated a few days after this correspondence between plaintiff and defendant.

This agreement related to forty thousand pounds and covered all the loans not included in the body of the pledge. This *addendum* to the contract of pledge recites that the loan was made "on precisely the same terms and conditions as stipulated in the written agreement and is io be covered and secured by the same act of pledge contained in the agreement and securities to be furnished in proportion."

A few weeks after the renewal of the contract of pledge the bank closed its doors and suspended business. It was discovered that a large amount of its capital had been abstracted. Naturally enough the defendant creditors were made exceedingly uneasy about their claims.

There had, to that time, existed between plaintiff and defendant, the confidence and good will which usually exist after years between large institutions dealing one with the other.

Unexpectedly, the good relations were brought to a sudden stop by the disorder in plaintiff's business.

The agent of the defendant in New York, their agent here, and their lawyer, were given directions to put forth their energies to the end of protecting defendant's rights. They, in their respective capacities, rendered valuable services. Needful inquiry was made, interviews held, books were examined and the value of the securities held by defendant investigated. The attorney at law was, during the plaintiff's suspension, frequently called upon for advice. The question which arose involved large amounts and consequent great responsibility.

The agent here, under defendant's interpretation of the contract of pledge, sold bonds pledged to the amount of thirty-nine thousand two hundred and sixty-five dollars, prior to maturity of plaintiff's indebtedness, but after the suspension of the bank. The plaintiff contends: "No commission or fee is due on the amount of bonds thus sold." Further, the plaintiff contends that "no service was rendered nor suit instituted from September 12 to October 20, and that no attorney's fee is chargeable on amounts realized during that period, nor on amounts collected subsequently, during a time stated, granted by the defendant to the plaintiff." The former, the Barings, were informed that it was the plaintiff's intention to resume business in December following. The defendant acceded to a request for an extension to December 14, and did nothing, as far as the record discloses, with a view of foreclosing the pledge. It is with reference to this time that plaintiff chiefly objected to the payment of a lawyer's fee. The bank, it appears, voluntarily paid to the defendant the sum of one hundred and twenty-nine thousand nine hundred and eighteen dollars voluntarily. On this amount also the plaintiff contends that no fee should be charged.

The makers of various notes, deposited in pledge, came forward and paid notes in amount one hundred and sixty-two thousand dollars. Plaintiff resisted the payment of a fee on this amount also, and lastly, plaintiff denied all indebtedness for any fee whatever. The only services, it urged, shown were not services for which plaintiff was bound.

The aggregate amount of commissions and counsel fee to which the defendants laid claim was (seven and a half per cent.) on five hundred and thirty-three thousand dollars.

Defendants at one time proposed to plaintiff to reduce the fee of counsel and commission of the agent to five per cent. The proposal, the defendant asserts, was for the purpose of a compromise, which the plaintiff refused to accept.

The judgment of the District Court dissolved plaintiff's injunction, and condemned the defendants to pay one thousand dollars as a special fee of their counsel for the dissolution of the writ.

The judgment further condemned the Union Bank to pay the defendants the sum of six thousand eight hundred and forty-two dollars and sixty-six cents, together with counsel fee at the rate of five per cent., and commissions at two and a half per cent. on the sum of five hundred and five thousand dollars with legal interest from judicial demand, with privilege on the pledged securities, and rejected defendant's demand for a sum of seven hundred and forty-four dollars.

From this judgment the defendant appealed.

ATTORNEY'S FEE.

We take up for decision the issues tendered by the reconventional demand of the defendant; the first grows out of the claim for attorney's fee.

The defence interposed by plaintiff, against all claims for fees, does not find support in any part of the contract of pledge. It was not stipulated that the attorney's fee was to be paid only in case of legal proceedings in a court of justice, but, on the contrary, it was expressly stipulated that the attorney's fee should be, in certain case, paid, although rendered *out of court*. We surely are without authority to read out of the contract the words "services rendered out of court," by the attorney. These words enter into the contract consented to and accepted by the plaintiff. They refer to professional services rendered out of court. From the text we must conclude that it was the intention of the parties to provide for compensation for professional services in looking after the lender's interest in these securities. No limit was placed upon the nature of the service to be rendered professionally, for the payment of which the plaintiff would be bound. It is not for the court now, because of the great change in circumstances as relates to plaintiff, to impose a limit evidently not thought of when the contract was signed.

It would be greatly erroneous to substitute any other meaning than

that which clearly appears from the words of the act. Having determined that services are due, the amount which should be allowed under the contract of pledge must be considered. A large sum was voluntarily paid by makers of notes that had been deposited in pledge by the bank. The contention of the plaintiff now is, that fees could not be charged on this amount. We did not discover in examining the act closely that it was the intention to bind the plaintiff to pay a fee of five per cent. on all amounts collected under the pledge; that with the collection of an amount due, though voluntarily paid, the fee was exigible. During eighteen years loans had been paid by the bank on pledges similar in form in every respect to the one now before us for interpretation. We are not informed that at any time a fee had been charged, but, on the contrary, we are led to infer with some certainty that no such fee had ever been exacted on collections, which had always been made without the necessity of a sale of the securities. We construe the words "or from this pledge" as written in the contract of pledge were qualified by the previous conditions "in case of default" of the debtor and the sale of the securities pledged, the professional services of the lawyer employed to advise in matter of the sale were then to be paid. We are in the presence of two interpretations; one extensive or comprehensive (*interpretatio extensiva*) in which a fee would have been due on all amounts paid voluntarily either by the debtor or by the makers of notes and bonds pledged, or the other interpretation, not extensive or comprehensive; the true interpretation, in our judgment, limiting the fee to the services rendered in suits or in effecting sales in accordance with the rights of the parties. This, we infer, was heretofore defendant's interpretation of the act of pledge. To some extent, at least, this is made to appear by the basis of settlement they at one time proposed to plaintiff.

There was an amount in addition voluntarily paid by the bank, on which defendant claims a fee. This, in our judgment, is subject to the same interpretation.

It never was, in our view, the intention to hold plaintiff for attorney's fee and to open a regular account after maturity for that fee—the same, for instance, as an interest account to be collected as a matter of course with the capital. The mere maturity of the obligation did not give rise to a claim for the fee beyond the reach of the

effect of subsequent delays and indulgences granted by defendants to plaintiff.

There was, it is asserted by plaintiff, a short rest (indulgence) granted by defendant to it from the twenty-eighth day of October to the fourteenth day of December.

The record discloses that the defendant granted the indulgence alleged. There was, in our view, an abatement of the default during the time extended from October 20 to December 14, 1897. It follows that during that time no fee is due on amounts realized.

SPECIAL AGENT'S COMMISSION.

We pass to a consideration of defendant's claim for commissions amounting to twelve thousand six hundred and twenty-five dollars, that is two and one-half per cent. on five hundred and five thousand dollars.

There was a condition precedent (default in payment of defendant's obligation): To defendant's right to a commission of two and one-half per cent.

This condition had not arisen. Plaintiff's obligations were not due. They matured after the sale of some of the securities. That is, the defendant sold part of the pledged securities deposited to secure the draft of plaintiff that defendant had taken up before the maturity of the pledge, on the assumption that the bank's suspension of business gave to creditors the right to consider as matured all their unmatured claims.

The insolvency of the bank had not been declared by a judicial order or decree. Prior to a declaration of the sort payment of unmatured debts is not exigible.

The article applying reads: "Whenever there is a cession of property either voluntary or forced, all debts due by the insolvent shall be deemed to be due, although contracted to be paid at a term not yet arrived." C. C. 2054. In our judgment Art. 3057, cited by defendants, relating to sureties, does not apply. The defendants were the creditors of plaintiffs and not its sureties. Suspension of payment is not, of itself, evidence of insolvency causing obligations to mature.

Our decisions have given that interpretation to the article cited. Bank vs. Brewing Association, 49 An. 935. The decisions of the French courts, under similar legislation, is virtually the same. Lau-

rent, Vol. 17, Sec. 194. It follows that no commission and no fee is due on sales of pledged securities made prior to default in payment.

This brings us to a consideration of the claim for commission on the bonds pledged, sold between September 12 and October 12, by defendant's local agent, forfeited by the agent (it is contended by defendants) because of the alleged concealment of sales he had made of securities in pledge.

In our judgment, the local agent of defendant was not as well the agent of the bank. He owed a duty to his principal, the defendant, with which he complied.

His name was brought into the contract of pledge exclusively as the agent of the defendant. As agent of defendant he was authorized to sell the bonds. He was bound, under the articles of agreement, to render an account to his principal, and not to the bank. The latter had it in its power to stipulate regarding this agency—*i. e.*, that he would be a joint agent. The bank did nothing of the sort, but agreed to pay a commission to the former's agent.

It was different, it is true, with the pledgees. It devolved upon them to use proper diligence to prevent or minimize the pledgor's loss. If accounting or notice was due after the pledged securities had been sold, it was due by the pledgees. Their obligations are in its nature somewhat similar to those of mandatories and agents. Richardson vs. Mann, 30 An. 1064. We do not find, however, that they were at fault for not having given notice.

After having considered in our decision the principles laid down in a number of decisions relative to the fiduciary relations of the pledgor, we did not think that the defendants had violated their contract by not having given notice to the bank immediately after the sale, or within the time defendant contends it should have been given. The collaterals pledged were sold at market rates. The unfavorable market complained of was not a contingency against which plaintiff had provided in its contract.

The defendants, in view of the facts, can not be held bound for the difference between the price realized on the bonds and the price at which they would have been sold when the bank resumed. They were sold when the bank was in default. The contract gave the right to sell at market rate, though depressed.

Moreover the defendants, in view of the facts, can not be held bound for the difference between the price realized on the bonds and

the price at which they would have been sold when the bank resumed. They were sold when the bank was in default.

It does not appear that there was certainty about the bank's resuming business, or that the bank notified its creditors with any degree of certainty that it would be in a position to pay, and, in consequence, no sale should be made on a depressed market.

Our inquiry as relates to the remainder of defendants' claim for commissions—*i. e.*, two and one-half on the securities sold after default, has resulted in our concluding that they should be allowed on the amounts to which we have determined the defendants have the right to fee of attorney.

It is a case of *eadem ratio, idem jus.*

Defaults and sales were conditions precedent to commissions or fee.

There are conditions that are not very clear in the contract. We note, for instance, that abruptly it is stipulated that a commission shall be due on amounts realized "or from this pledge," without accompanying statement whether this was to be allowed without reference to default or sale. The defendants are the obligees. They seek to compel payment. *In obscuris quod minimun est, sequimur, secundum promissorem interpretamur.* "Still, if a word or sentence of a contract leaves a decided doubt, sound sense dictates that they are to be taken most strongly against the party using it, because it was his affair to word the instrument." Lieber's Hermeneutics, Sec. 7.

There is a decided doubt as to whether all the amounts were collected on the pledged securities. There are grounds for concluding that as to a large portion collected (not by sale of the pledged securities), but from the debtor, that the collection was on defendant's promise to pay and not especially on the pledged securities. The contract did not cover a fee or a commission for collecting the former. It only covered, as we appreciate the issues, a fee and commission in case of sale of securities after plaintiff's default in its payment.

We have noted that an amount was allowed by the judgment of the District Court for professional services rendered by defendants' attorney in matter of dissolving the injnnction.

Plaintiff's injunction was not groundless.

Defendants claimed the right to sell the securities they hold to

satisfy an amount larger than the terms of the contract of pledge sustain.

In our judgment defendants are not entitled to the amount claimed for attorney's fee for dissolving the injunction.

It is ordered, adjudged and decreed that the judgment appealed from is amended; that the demand of plaintiff, the Union National Bank, be rejected with costs to the amount of plaintiff's indebtedness as fixed by this decree.

It is further ordered, adjudged and decreed that writs of sequestration and injunction in this case be dissolved to the amount of plaintiff's indebtedness herein established, and that the amount of one thousand dollars allowed by the judgment for fee of attorney for dissolving the injunction is not allowed; it is rejected, and that the judgment appealed from be further amended by forever enjoining the defendant from selling securities pledged to satisfy an amount larger than here allowed, and to that extent the injunction is made perpetual.

It is further ordered, adjudged and decreed that Baring Bros. & Co., Limited, have judgment on their reconventional demand, condemning the Union National Bank to pay them the sum of six thousand eight hundred and forty-two dollars and sixty-six cents; together with counsel fees at the rate of five per cent. on the sum of one hundred and sixty-six thousand one hundred and eighty–six dollars ($166,186) and commissions at the rate of two and one-half per cent. on the sum of one hundred and sixty-six thousand one hundred and eighty-six dollars ($166,186), with legal interest on the total of these sums from judicial demand, with privilege and preference on the pledged securities.

It is further ordered, adjudged and decreed that no rights of Baring Bros. & Co., Limited, to claim damages are reserved.

As herein amended, it is ordered, adjudged and decreed that the judgment appealed from is affirmed, but in those respects that the judgment of the lower court does not conform with these amendments it is annulled, avoided and reversed; costs of appeal to be paid by appellee. The cost of the lower court to be paid by the Union National Bank.

ON APPLICATION FOR A REHEARING.

BREAUX, J. In the brief for a rehearing by the Union National

Bank, it was stated that by irresistible implication, our opinion in the case holds that the pledgee, in order to establish his right to the attorney's fee was bound to prove affirmatively the actual and precise services or advice for the rendition of which the attorney's fee is claimed.

Counsel for plaintiff further stated that the pledgees, as claimants, were bound to make out their case; they must prove affirmatively, positively and satisfactorily the existence of a state of facts needful to make out a case.

Granted; in view of the large amount involved, the terms and conditions of the contract of pledge, the many complicated questions that arose after the plaintiff bank had closed its doors, the great responsibility resting upon the counsellor in interpreting and explaining the rights of the parties concerned, we are decidedly of the opinion that the fee is not too large in amount.

Now, with reference to the agent named in the contract of pledge, the foregoing, in many respects, apply.

It was through his agency that the loan was made secure and satisfactory to the lender.

We infer that the loan would not have been made at all without the assistance of an agent in whom the lender had confidence.

The amount allowed to the attorney and the agent, in our judgment, does justice between the parties.

We might stop here, but the insistence on the part of plaintiff is that in view of the fact that we have heretofore decided that thirty-nine thousand two hundred and sixty-five dollars of plaintiff's values deposited with defendant's agent, in pledge, were prematurely sold, that in consequence neither attorney's fees nor commission on that amount were recoverable; that we should for the reason of sales prematurely made of other securities decide that no fee or commission is due on other amounts received.

The aggregate amount to which this refers is fifty-four thousand and ninety-seven dollars and fifty cents. This claim for deduction was not originally in argument. The pleadings are silent in that respect. With reference to the fee allowed, which is disputed, there was an issue presented and clearly met. We do not think that in justice we should, presented as the case was, make further deductions. The claim of prematurity urged on rehearing is not sustained.

Application of plaintiff and defendant, appellee and appellant, for a rehearing is refused.

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No. 12,827.

THE SHREVEPORT & RED RIVER VALLEY RAILWAY COMPANY VS. MRS. MARY B. HINDS AND HUSBAND.

Our expropriation laws authorize the taking of the fee, if necessary, for public purposes; but if the public needs do not require it and a less estate will meet the public wants, the fee can not be taken. 32 An. 471, 49 An. 1278.

In expropriation proceedings for a right of way for a railroad company the court should not limit the right of way to the corporate life of the plaintiff. The right once granted becomes part of the property of the company and necessary to the continued exercise of the franchise. The property of the corporation may be seized, sold or disposed of in various ways, and is not lost by the death of the corporation. *Non constat* that the road would belong to the plaintiff at the termination of its charter.

In expropriation proceedings the question of the value of the land, or of the use of the land, to be taken, is distinct and separate from the question of damages. In questioning witnesses with the view of ascertaining the value of the land, the questions asked should be so framed as not to blend damages and inconveniences with value in attempting to fix value.

The value of the land itself is the amount for which it would sell at private sale as part and parcel of defendant's plantation without reference to its being taken for a railroad or for railroad purposes.

ON APPEAL from the Second Judicial District Court for the Parish of Bossier. *Watkins, J.*

Leonard & Randolph for Plaintiff, Appellant.

N. Lawrence Lindsley (*Girault Farrar* of Counsel) for Defendants, Appellees.

Argued and submitted June 2, 1898.

Opinion handed down June 21, 1898.

Decree of this court amended and rehearing refused June 20, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff seeks to have certain land belonging to the defendant, Mrs. Hinds, expropriated.

In its petition it alleged that it was a railroad corporation building a railroad from Shreveport to Coushatta; that its line was located, and that the work of building was going actively on all along the line. That its line, as located and in process of construc-

tion, runs in a southeasterly direction through Mrs. Hinds' land, as would appear by the plan and map annexed to its petition. That said route and right of way, as shown by said map, takes a strip one hundred feet in width and amounts to twenty-four and forty-six hundredths acres of land. That said land was necessary to it and it had been unable to agree with the owner as to the price, etc., and that it had legally tendered five hundred dollars to the defendant, which was refused.

The prayer was that on final hearing there be judgment adjudging the land aforesaid to plaintiff upon payment to the owner of all legal damages she may sustain in consequence of the expropriation.

The defendants answered, pleading first the general issue. Further answering, defendants averred that if plaintiff had the legal right to expropriate the land through the plantation as claimed, then the land so taken and expropriated was worth the sum of one hundred dollars per acre, or the sum of twenty-four hundred and forty dollars for twenty-four 46-100 acres sought to be expropriated.

That in addition to the actual land taken as above set forth, the location and construction of said railroad through her plantation would cause great damage to her property by dividing the plantation into two parts, severing one from the other by the track and embankment of the road, thus rendering the plantation inconvenient and difficult to cultivate by rendering the different portions of the same inaccessible and inconvenient to cross from one side of said railway track to the other in the usual and necessary cultivation and conduct of said plantation, by rendering it necessary to build additional fences and to keep the same in repair; by cutting off small portions of land and rendering the same difficult and unprofitable to cultivate; by interfering with and obstructing the natural and artificial drainage of said plantation; by making a public thoroughfare through said place for the section hands and other employees of said company, and tramps and thieves, who were calculated to disturb and disorganize the labor on said plantation, and cause great loss of time of laborers in stopping to gaze at the passing trains and others passing to and fro on said road; by loss from running away of teams by becoming frightened by passing trains; by clearing away the debris thrown out by said company from the right of way, and by depreciating the value of her property in various ways not specially set forth, but all of which would greatly damage the property.

Railroad Company vs. Mrs. Hinds and Husband.

That in addition to the value of the land expropriated defendant would be damaged, as above set forth, five thousand five hundred dollars, to-wit:

For inconvenience and inaccessibility in cultivation and coming back and forth	$3,500 00
For four miles of fencing and keeping same in repair	750 00
For loss of time by laborers, frightening stock, etc	1,000 00
For cleaning away the debris from right of way	100 00
For damage to drainage, etc., and loss of small strips of land	1,150 00
Making a total of six thousand five hundred dollars	$6,500 00

Defendants prayed in the event of the courts rendering judgment in favor of the plaintiff for the expropriation of the land as prayed for, then at the same time there be judgment in favor of defendant for the sum of twenty-four hundred and forty dollars for the actual value of the land, and the further sum of six thousand five hundred dollars as damages as set forth, and for general relief.

The jury returned as their verdict that "they found in favor of the plaintiff for the RIGHT OF WAY and in favor of the defendant for the sum of two thousand dollars as value of the property taken, and fifteen hundred dollars as damages in addition to the above amount, making a total in favor of the defendant of thirty-five hundred dollars."

Plaintiff moved for a new trial, but the court overruled the same, and rendered judgment in favor of the plaintiff, against the defendant "expropriating the land described in the petition and map attached to the same." It is further ordered, adjudged and decreed that defendant have and recover of plaintiff the sum of two thousand dollars—value of land, and fifteen hundred dollars damages, with legal interest from date of judgment, and decreed that upon payment of said amount to the defendant according to law, the right, title and interest of the defendant in said described land and right of way should vest in the plaintiff."

Plaintiff appealed. Defendant answered the appeal praying that the judgment be amended, and amended in favor of appellee, by limiting the title of appellant *to a right of way* for the period *of its corporate life*, and by increasing the amount allowed as damages to five thousand dollars.

OPINION.

The plaintiff in this suit prayed *for a right of way* over the plantation of the defendant. The latter in her answer asked judgment against plaintiff, for an amount fixed by her as being the value of

the land, and for an additional amount as for damages. The jury rendered a verdict "in favor of the plaintiff for the right of way as claimed and in favor of the defendant for the sum of two thousand dollars, as the value of the property taken, and fifteen hundred dollars as damages in addition to the above amount, making a total in favor of the defendant of thirty-five hundred dollars."

The District Court adjudged that plaintiff have judgment expropriating the land described in the petition and map attached to same (describing it), and that defendant have judgment against plaintiff for the sum of two thousand four hundred dollars, value of land, and fifteen hundred dollars damages with interest. Plaintiff appealed, and defendant on appeal moved that the judgment be amended by limiting plaintiff's title to a right of way, and restricting it as to time to the period of the corporate life of the plaintiff, and increasing the amount of damages to five thousand dollars.

We do not understand plaintiff to seek for more than a "*right of way*," nor the verdict of the jury nor the judgment of the court as *intending to convey any greater right than a right of way*, and it is evident that it is not entitled to a judgment, decreeing to it *the ownership of the property itself*. Railway Co. vs. Gay, 32 An. 471; (Telegraph Co. vs. Railroad Co.), 49 An. 1278. We will, however, place that matter beyond controversy by our decree—we can not, however, limit the right of way to the period of the corporate life of the plaintiff. The right once granted to the corporation, it becomes part of its property, and necessary to the continued exercise of its franchise.

The property of the plaintiff may be seized, sold or disposed of in various ways, and it is not lost by the death of the company. *Non constat* the road will belong to the present company at the expiration of its charter. *Art. 2632* of the Civil Code orders in the matter of expropriation proceedings, that upon the filing of plaintiff's petition asking for expropriation of property, that a jury shall be drawn, and that said jury shall, by a verdict in which at least three-fourths of their number shall concur, determine after hearing what is the value of the land described in the petition, with its improvements, and what damages, if any, the owner would sustain in addition to the loss of the land by its expropriation; while the next article (Art. 2633) directs that "in estimating the value of the property to be expropriated, the basis of assessment shall be the true value which the

land possessed before the contemplated improvement was proposed, and without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work."

It will be seen that the question of the value of the land to be taken is distinct and separate from the question of damages, though both are ordered to be made the subject of examination and decision by the jury. N. O. Pacific Railroad Co. vs. Murrell, 34 An. 537.

The law is perfectly plain when it says that the mere value itself of the land to be taken is to be fixed independently of the the particular improvement contemplated, and without reference to it one way or the other. Under that provision of the law, we do not understand it to be proper for counsel of the land owner, in examining witnesses on that particular branch of the case, to call their attention to the particular direction which the right of way, when granted, is to run upon the plantation—to direct their notice to the fact that it would cut the property in two, that it would interfere with the drainage and cultivation of the crops, that it would cause great inconvenience in varieus ways to the owners; and, having done so, then to ask them what, in their opinion, a small strip of land of one hundred feet or so, running through a plantation, would be worth.

Questions of that character would be perfectly legitimate asked in connection with the establishment of the damages to which the owner would, by reason of a strip of land so running, be entitled, but they confuse the witnesses and render the estimates so made by them as to the value of the land itself of little force, by their blending damages and inconveniences with value, in attempting to fix value. The examination of defendant's witnesses was almost entirely conducted upon this improper line. We are satisfied from an examination of the testimony of the witnesses in the case, that the value of the land itself was at most forty dollars per acre, for cleared land, and twenty dollars per acre (round) for timbered land and land with deadened timber upon it. That is, that that is the amount for which it would be sold at private sale as forming part and parcel of defendant's plantation without reference to its being taken for a railroad, or for railroad purposes. We fix the value of the land at seven hundred and fifty dollars.

We find the testimony on the subject of the damages claimed exceedingly general, and the damages claimed are, in some respects,

remote and conjectural. We think that one thousand dollars will fully cover all damages likely to result from granting plaintiff the right of way asked.

For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment appealed from be amended by ordering and decreeing to the plaintiff a right of way as prayed for by it and adjudged by the District Court, to vest in the plaintiff upon payment to the defendant of the sum of seventeen hundred and fifty dollars, and as so amended the said judgment be and the same is hereby affirmed. Costs of appeal to be paid by the appellee.

ON APPLICATION FOR REHEARING.

BLANCHARD, J. The law directs that when private property is sought to be expropriated for public purposes, a jury of freeholders must be called to sit in judgment upon the value of the property to be taken and the *quantum* of damages the owner may suffer in consequence of such taking. Undoubtedly the award of such a jury is entitled to the highest consideration, but it is not intended by the law to be conclusive as to the amount of value of property and damages to be paid defendant in expropriation.

This is shown by the fact that an appeal from such award and from the judgment based thereon is given by the law. What would be the object, or the value, of such appeal if the power of revision of the award is not in the appellate court? It is beyond controversy that this court on appeal may and should diminish such award, if, in its judgment on the facts and the law, it be too large, or increase it if, in its judgment, it be too small.

There is no foundation either in the law or practice of the courts of this State for the contention of counsel for appellee that if the award be found excessive the case should be remanded for a second trial by jury under proper instructions. If the evidence in the record justifies it the court should proceed to render such decree as is warranted and proper under the circumstances.

With regard to the contention that J. W. Atkins holds a lease for several years on the plantation through which the right of way is expropriated, and that by the expropriation he loses the use of twenty-four and forty-six one hundredths acres, worth, it is claimed, five dollars per acre per annum, or one hundred and twenty-two dollars and thirty cents per annum, which he may claim as *rebate*

against defendant, thus largely diminishing the amount awarded the latter, it suffices to say, first, that defendants' answer filed herein does not mention the Atkins lease at all as an element of damage arising in the case, and, second, that Atkins is no party to the suit and his rights are in no manner concluded by the judgment rendered herein. This court said *In re* Morgan R. R. and S. S. Co., 32 La. An. 375, speaking of the rights of a lessee in a case when the property under lease was expropriated: "The right of a lessee is substantive and is independent of changes in the ownership of the thing. C. C. 2733. The purchase, or expropriation, of the rights of the owner does not therefore necessarily embrace or operate upon the right of the lessee. That right in order to be affected must be itself the object of purchase or expropriation. If the rights of the owner are alone the objects of the purchase or expropriation, the right of lease is unaffected and continues. The purchaser gets only the thing encumbered by the lease. That is all he can get, for that is all the owner has."

It was held, in that case, that if the right of a lessee is worth no more than he has agreed to pay *in futuro* for it, the expropriation of that right would pay him nothing, as it is worth nothing. But if the right of lease will bring a greater sum than it is to cost the lessee, the latter is entitled to be paid the amount of such excess, which amount can not be charged upon the sum fixed for the rights of the owner, unless the owner has received the rent in advance, or unless the value of his right has been fixed by reference to the present actual value of the lease.

It is clear, therefore, that since, in fixing the amount we think the defendant should recover for value of land and damages, no reference is had to the Atkins lease, the value of the latter, if any, over and above the rental he is obligated to pay, is not a charge upon the sum awarded the defendant, but is a matter to be settled between the railway company and the lessee by amicable adjustment, or by proper proceedings at law.

With regard to the contention that the judgment appealed from awards the *fee* of the land when there is no necessity for expropriating more than a servitude over it, and that while in the body of the opinion of this court heretofore rendered language is used which declares plaintiff company is not entitled to a judgment investing it with the ownership of the strip of land taken for right of way pur-

poses, the *decree* of the court itself does not make this plain, it suffices to say that our construction of the judgment appealed from is that the fee of the land is not conveyed or intended to be conveyed by it. However, we will make this beyond dispute by amending the decree of this court in that particular.

It is proper to add, however, that this issue is by no means squarely made in the answer of defendant. It should have been. Railway Co. vs. Gay, 32 An. 474.

Plaintiff company is entitled, we think, under the facts of this case, to a servitude, or right of way only, through the plantation of defendant. A right of way, in legal parlance, is held to be an easement on the lands of others. Telegraph Co. vs. Railroad Co., 49 An. 1278. Plaintiff, therefore, pays not the value of the fee of the land, but only the value of the use and occupation of the land. *Ib.* 1279.

If the fee were being taken, since it is the more valuable right of the two, the award would perhaps be higher.

This right of way, servitude or easement over the lands of defendant's plantation is to endure so long as utilized for railway purposes, so long as a railway track is laid there and operated by plaintiff company, or its successors or assigns. When the strip of ground which is the subject of this expropriation ceases to be used for this purpose, it will revert to the owner of the plantation.

With regard to the contention that the amount allowed defendant by our decree for the value of the use and occupation of the land taken and damages to the plantation is too small, it suffices to say that, as we appreciate the evidence, it is all that can be reasonably justified.

The servitude awarded plaintiff occupies about twenty-four and a half acres, much of it in the woods at the time of taking. For value of this occupancy and damages something more than seventy dollars an acre is allowed, or seventeen hundred and fifty dollars.

The rehearing applied for must be refused, but the decree heretofore rendered is amended so as to read as follows: For the reasons assigned it is ordered, adjudged and decreed that the judgment appealed from be amended by awarding to the plaintiff company a right of way or servitude for railway purposes over and on the lands described in said judgment, and to the extent therein described, and vesting in the plaintiff company the right of the use and occupation of the said lands for such servitude upon payment to the defendant

of the sum of seventeen hundred and fifty dollars, reserving to J. W. Atkins, lessee, against the plaintiff, whatever rights he may have growing out of his lease of the lands so taken and occupied, and as thus amended the said judgment be and the same is hereby affirmed—costs of the lower court to be borne by plaintiff, those of appeal by the appellee.

No. 12,711.

IN RE MOSS CIGAR COMPANY, LIMITED.

Where an *ex parte* order is granted appointing a receiver, it is not the proper practice for a complaining creditor to appeal directly from such order.

The correct course to pursue is for such creditor to appear in the cause and move that the order be vacated and set aside, or take a rule to set aside and vacate, and if the motion be refused, or the rule denied, to appeal from the decision and such appeal, if suspensive, would stay further proceedings in the receivership and hold matters in *statu quo* pending the appeal.

ON REHEARING.

Appeal by creditor, whose claim exceeds two thousand dollars, from order appointing receiver and staying proceedings against insolvent corporation. Motion to dismiss appeal on ground that assets of corporation do not equal two thousand dollars in value—*Held:* That the question of jurisdiction is determined by amount of creditor's claim on which the right of action is suspended rather than by the sum of the assets as shown by the schedule.

Further motion to dismiss, on ground that the appeal will not lie from order appointing receiver as herein made—*Held:* The appeal does lie, differentiating the case from Brewing Company vs. Judge, 46 An. 100, and Harrod vs. Sewerage Company, 49 An. 1595.

There is no direct authority of law for appointment of receiver as herein made and for the order staying proceeding against the corporation, and the facts and exigencies of the case do not bring it within the category of cases where, under their inherent powers, such appointments have been made by the courts in aid of their jurisdiction or as as a conservatory process incidental to a main demand.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*, of Division E, acting for *Monroe, J.*, Division C, now absent.

Solomon Wolff for Receiver, Appellee.

E. Evariste Moise for Gonzales, Mora & Co., Creditors, Appellants.

50 789
51 144
51 162
51 1259
50 789
f52 1319
50 789
105 177
50 789
108 536
50 789
119 520
o119 522

Submitted on briefs on motion to dismiss January 10, 1898.
Opinion handed down January 24, 1898.
Rehearing granted March 7, 1898.
Reargued and resubmitted April 5, 1898.
Opinion on rehearing handed down April 18, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The Moss Cigar Company, Limited, presented a petition to the District Court setting forth that its capital stock was greatly impaired by reason of losses incurred in the conduct of its business, its credit weakened and its condition insolvent. It represented that its creditors were pressing for payment of their claims, and a multiplicity of suits was threatened. It exhibited schedules of its assets and liabilities, which show its insolvent condition. It averred that the interest of all concerned would be best subserved by the appointment of a receiver to take charge of its affairs. It prayed for the appointment of such receiver, for an inventory and appraisement of its assets, and that all proceedings against the corporation and its property be stayed.

It annexed to its petition what purported to be telegrams and letters from its directors and stockholders consenting to the proceedings taken.

Upon this showing, the District Judge made an order appointing William Moss receiver, fixed the bond he was to give at two thousand dollars, directed an inventory of the property of the concern to be taken, appointed a notary to take the same, and appraisers to fix the value of the property, and decreed that all proceedings against the corporation and its property be stayed.

About six weeks later Gonzalez, Mora & Co. appeared in the case, represented they were creditors of the Cigar Company in an amount exceeding two thousand dollars, suggested to the court that the order hereinbefore set forth contained error to their prejudice, and moved for a devolutive appeal therefrom, returnable to this court.

An order of appeal was granted, the bond given and the appeal is before us.

It is met here by a motion to dismiss on the ground that this court is without jurisdiction *ratione materiæ*, and that an appeal will not lie from an order appointing a receiver as herein made.

We express no opinion on the ground first averred.

That last averred is fatal to the appeal.

It may be the order sought to be appealed from is improvident and without warrant; that there is no basis for it in fact or in law; that it ought to be set aside and vacated.

These are matters we will not pass on now. They should be first presented to the court granting the order in a motion, or on rule taken to vacate.

It will be time enough for this court to pass on them when they come here in the regular way by appeal from the judgment on the motion or rule to vacate.

Such was the practice commended, and the rule laid down in regard to *ex parte* orders like the present one, in State *ex rel.* Brittin vs. City, 43 La. An. 831; State *ex rel.* Brewing Co. vs. Judge, 46 La. An. 100; Harrod vs. Sewerage Co., 49 La. An. (decided December 13, 1897, not yet reported).

Some difficulty suggests itself in this, that should a creditor, or other interested party, objecting to the *ex parte* order appointing a receiver, take a rule to vacate such order and judgment goes against him thereon and he appeals suspensively, would such appeal operate to suspend further proceedings under the order appointing the receiver? We hold that it would; that pending the appeal further proceedings in the receivership would be stayed and matters held in *statu quo.*

The motion to dismiss must prevail.

And it is ordered that the appeal herein taken be dismissed, reserving to appellants the right by appropriate pleas in the court *a qua* to test the sufficiency and legality of the order complained of.

NICHOLLS, C. J., dissents.

MILLER, J., dissenting in separate opinion.

ON REHEARING.

The opinion of the court was delivered by

BLANCHARD, J. When this cause came before us recently the appeal was dismissed on a question of practice submitted in the motion.

A rehearing was granted for further argument on the point presented, and for further time to consider.

of cases, adopted and established the practice of appointing receivers. But this has not proceeded further, and should not, without legislative enactment, proceed further than in making such appointment in cases where the parties litigant agree that it be done, or when it is necessary to the execution of a judgment of the court, or in a case where the property in controversy being under seizure by a writ of the court and in custody it is necessary as a conservatory process to care for or administer the same, or where the property of a corporation is abandoned, or there are no persons authorized to take charge of and conduct its affairs, or where it is done in aid of proceedings pending before the court for the liquidation of the affairs of a corporation and rendered necessary for the preservation of the interests of all concerned. See 34 La. An. 754; 5 *Id.* 740; 6 *Id.* 456; 3 *Id.* 182; 30 *Id.* 162; 35 *Id.* 199; 44 *Id.* 570; 49 *Id.* 301; 5 R. (La.) 517; 11 R. 418.

There being no direct authority of law to sustain the appointment of this receiver and for the order staying proceedings against this corporation, and the facts here presented and the exigencies of the case not bringing it within the category of cases mentioned above, where, under their inherent powers, such appointments have been made by the courts in aid of their jurisdiction, or as a conservatory process incidental to a main demand, the apointment and order staying proceedings can not be maintained. Baker vs. Portable Railroad Company, 34 La. An. 756.

It is, therefore, ordered that the decree of this court hereinbefore rendered, dismissing this appeal, be set aside, and it is now adjudged and decreed that the order ef the Civil District Court, parish of Orleans, made in this proceeding, appointing a receiver of the Moss Cigar Company, Limited, and staying proceedings against the said corporation, be vacated and annulled—costs of both courts to be borne by the corporation, appellee.

MR. JUSTICE BREAUX dissents.

No. 12,715.

SUCCESSION OF THOMAS DUFFY.

50	795
51	1307
50	795
52	1140
50	795
104	319
104	577
50	795
105	668
50	795
112	133

ON MOTION TO DISMISS.

The Supreme Court does not anticipate on a motion to dismiss, the issues which the appellant proposes to submit to it. On a trial of the merits it can announce certain issues as not having been properly brought up on appeal, and others as having no merit. Appeals are frequently dismissed after hearing when it would be improper to dismiss them on a motion *in limine*. Brown vs. Land Company, 49 An. 1780; Saw-Mill Manufacturing Company in Liquidation, 48 An. 715.

Where the matter before the Supreme Court is an appeal by a creditor of a succession, which is still under administration, from a refusal by the District Court to order the administrator or executor to file an account, the appellate jurisdiction of the court is tested by the value of the succession, not the amount of the claim of the creditor asking the account. It is the right to the account, and not the effect of the account which is the matter in dispute. 35 An. 19; 38 An. 244; 48 An. 418.

ON THE MERITS.

Under our law the right of the heirs to be recognized and put in possession is not dependent upon or deferred until the executor files his account; they may require or waive. Code of Practice, Art. 1003 *et seq.*; Civil Code, Art. 1671; Revised Statutes, Sec. 3678; Succession of Fisk, 3 An. 707.

When the heirs have been recognized and put in possession the creditors of the succession can not require the executor to file an account, but must seek payment of their debts from the heirs.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Wynne Rogers for Plaintiffs in Rule, Appellants.

Geo. W. Flynn for Defendant in Rule, Appellee.

ON MOTION TO DISMISS.

Submitted on briefs January 10, 1898.
Opinion handed down January 24, 1898.

ON THE MERITS.

Argued and submitted May 19, 1898.
Opinion handed down May 30, 1898.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 29th of October, 1897, upon the application of Rogers and Dodds, a rule was served upon John Fitzpatrick, as testamentary executor of the last will and testament of Thomas Duffy, to show cause why he should not, as such testamentary executor, file an account of his administration of said estate, and place movers on said account as a privileged creditor, for the full sum of fifteen hundred dollars, for professional services.

The rule issued upon allegations of the movers that they were creditors of the succession of Duffy in the sum of fifteen hundred dollars, for services rendered in the opening of said succession and probating the last will of the deceased. That John Fitzpatrick was duly appointed and qualified as the testamentary executor of said last will and testament; that he had failed to furnish and file an account of his administration of the property and effects of said succession and had no intention of filing the same.

The defendant in rule answered:

1. That the succession of Thomas Duffy was closed, and defendant was without the right or authority to file an account, the heirs having been put into possession by judgment of the court, rendered and signed on the 4th of October, 1897.

2. That plaintiffs in rule had mistaken their action, as the rule taken was not the *proper* remedy.

3. That defendant had no right as an individual to file an account after the heirs had accepted unconditionally.

He prayed to be dismissed with costs.

The District Court on hearing sustained the exceptions and dismissed the rule without prejudice to movers to bring a direct action for the alleged claim against the heirs of the deceased, or the executor of the succession, or both.

Plaintiffs in rule appealed.

Appellee moved in this court to dismiss the appeal on the following grounds:

1. The Supreme Court is without jurisdiction, as the only question for consideration is the right of plaintiffs in rule to compel a settlement of their claim for fifteen hundred dollars by compelling the filing of an account in a succession which has been finally disposed

of by a final judgment, putting the heirs into possession in accordance with the plain provision of the law.

2. The rule taken herein is not in the nature of a *concurso*, no account has been filed and on the face of the judgment putting the heirs into possession no account could be filed, as there is no one authorized or empowered to render and file an account. The motion, therefore, of the plaintiffs in rule must be considered as a separate and independent measure for the collection of the amount claimed by them, and the amount of the claim, fifteen hundred dollars, must determine the question of jurisdiction.

3. The final judgment putting the heirs in possession is conclusive as to all matters connected with the succession, and the amount of the inventory which had been settled by said judgment can not be taken into consideration in fixing the jurisdictional limit.

4. The plaintiffs in rule being the only creditors, the amount of their claim must determine the question of jurisdiction.

Of the various assigned grounds for the dismissal *in limine* of this appeal, the only one which, in our opinion, can be properly considered at this time is that in which it is urged that we have no jurisdiction of the cause by reason of the amount involved in the controversy.

The other reasons set up will be passed upon hereafter, after we shall have examined into the issues and facts of the case as disclosed by the record. As we said *In re* Saw-mill Manufacturing Company, 48 An. 714, "should the case be one where either improper issues or untenable issues be presented, appellee will suffer no injury by having our conclusion announced after full presentation."

With respect to the jurisdictional question, we have to deal with matters for the time being on the theory of appellant being a creditor of the succession for fifteen hundred dollars, and of the succession being still in the hands of the executor. The matter before us, therefore, takes the shape of an appeal from the refusal by the court of an application made to it by a creditor of a succession which is still under administration for an order to compel the succession representative to render an account as such. The succession exceeds in value the amount necessary to give this court appellate jurisdiction, should the value of the succession be the fact which is determinative of the jurisdiction.

No decision upon this precise point has been cited to us, and we know of none ourselves.

The proceeding in its features is akin to an application made by a creditor of a succession to have it placed under administration.

In such case the value of the succession, and not the amount of the claim of the creditor, would be the test of jurisdiction.

If the necessity for an administration were called in question, "the right to an administration," and not the ultimate result of that administration in its bearings upon the applicant, would be the matter in dispute.

So here the "right to an account," and not the effect of an account is the matter at issue.

We are of the opinion that if there be on the part of a succession representative a liability to account, that liability is entirely independent of the amount of the claim which may be held by the party who asks the enforcement of the right of account.

A party holding a claim for a hundred dollars is as much entitled to call for an account as one holding five thousand dollars, if the liability to account exists at all (R. S. S., Sec. 8). Whenever an application is made to a court for an order bearing upon the succession in its entirety we must, by reason of the subject matter of the application, rest our jurisdiction upon the value of the succession. Succession of Thomas, 35 An. 19; Succession of Bedford, 38 An. 244; Succession of Rose, 48 An. 418.

The motion to dismiss is overruled.

ON THE MERITS.

The opinion of the court was delivered by

MILLER, J. This appeal is by the plaintiffs in the rule on the testamentary executor of the deceased to compel him to file an account with the view to the payment by the executor of the fee of plaintiff as attorneys of the succession. The judgment of the lower court dismissed the rule on the ground that the heirs of the deceased had been put in possession on their application for that purpose to the court.

It is urged that the plaintiffs in rule, as creditors of the succession, have the right to compel an administration by the executor, and the payment of their demand in due course of his administration; hence, are entitled to call for his account as executor, of which they can *not* be deprived by the *ex parte* order recognizing the heirs and putting them in possession of the property of the succession. In this con-

nection we are referred to the decision in the Succession of Sterry, 38 An. 854. In that case the executor had rendered an account under the order of the court, and it was opposed by the creditor. The court held that though the account was directed to be rendered on the application of the heir, and though they were recognized and ordered to be put in possession, still a creditor could oppose the account. Here, no account has been called for by the heirs; none has been filed, but the heirs have been content to go at once in possession. Under our law the right of the heir to possession, notwithstanding there is an executor, is conferred on the conditions only that the heir will furnish the money to pay the movable legacies, and give security to creditors in pending suits, if the creditors require it. Civil Code, Art. 1671; Revised Statutes, Sec. 3678; Succession of Fisk, 3 An. 707. The heirs are bound for the debts. But, under our Code, their right to possession is not dependent on the account to be filed by the executor; in other words, without any such account they are entitled to possession, and when put in possession the administration of the executor ends. No account can be required of him by creditors, but the law preserves their full recourse on the heirs and to that relief we must remit plaintiff in rule.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

No. 12,790.

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109 1074

AGRICOLE FUSELIER VS. THE GREAT SOUTHERN TELEPHONE AND TELEGRAPH COMPANY.

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f118 1005

A telephone company, through its employees, had been placed in possession of a line of way, and of telephone posts upon the property of another, which it would have had really the legal right to possess under expropriation proceedings properly conducted. It had obtained the same, however, without the consent of the owner or any order of court. A prayer by the owner for the removal of the posts will not be granted when the evidence establishes the fact that the company would be entitled to have the same line re-established as its right of way, and the posts immediately replaced in the same position. The company, however, will be compelled to pay the value of the right of way and damages for the illegal invasion of the owner's right of property.

APPEAL from the Twenty-fourth Judicial District Court for the Parish of St. Mary. *Allen, J.*

J. Sully Martel and *D. Caffery & Son* for Plaintiff, Appellee.

Weeks & Weeks and *Denègre, Blair & Denègre* for Defendant, Appellant.

Argued and submitted May 4, 1898.
Opinion handed down May 30, 1898.
Rehearing refused June 28, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff alleged that he was the owner of a certain sugar plantation in the parish of St. Mary, which he described.

That along the front of said property, on the line of the Southern Pacific Railroad, there were a number of trees valuable for shade and ornamental purposes, and of different varieties, such as oak, ash, hickory and pecan trees; that opposite thereto, the Southern Pacific had recently established, on the line of its railroad, a new station or depot called Adeline, about which is about to be built a town, and that in anticipation of a demand for town lots he had reserved the front of his said property for subdivision—the said trees giving to said front a great value therefor.

That on or about the —— day of December, 1896, several employees of the defendant company came to petitioner's property, during his absence therefrom, and, without his knowledge, entered thereupon and began to build across the front of same a telephone line consisting of poles and wires running parallel with the track of the Southern Pacific Company; that petitioner discovered the trespass and ordered them to withdraw from his land, which they did; that petitioner then left two men on his property to guard against any further trespass; that on the following day, being Sunday, the said employees finding the said men on guard, enticed them away on some false statement and fraudulent pretence, and during their absence they secretly entered upon the said land and hastily completed the erection of said telephone line, and in doing so they wantonly and maliciously cut down trees along the mile of front owned by petitioner, and mutilated others by cutting off branches and limbs; that the trees cut down and mutilated before petitioner discovered the said trespass, made during the absence of his guards,

numbered at least fifty, so that the appearance of his said front was much damaged, and the value of his property greatly lessened. He averred that said trespass and destruction and mutilation of trees was a gross, flagrant and malicious violation of his rights, and that the acts complained of constituted a tort originated and executed in malice and fraud.

That he was damaged in the destruction and mutilation of his trees in the sum of fifteen hundred dollars, and in the digging of holes and the erection of poles thereupon in the sum of five hundred dollars. That he was entitled to exemplary and vindictive damages in the sum of one thousand dollars.

Defendant first excepted that plaintiff's demands were inconsistent in claiming compensation in damages for the alleged taking and occupation of the land, and the erection of telephone poles thereon, and at the same time praying for the removal of the poles. He prayed that he be ordered to elect.

It then, under reservation, answered by a general denial.

Further answering it averred that no telephone lines belonging to it were on any property of the plaintiff, but that its poles on said front were erected upon the land and right of way belonging to Morgan's Louisiana & Texas Railroad and Steamship Company, and adjacent to plaintiff's land, all as the law permitted. It averred that if any entry was made on plaintiff's property (which was not admitted) it was not in trespass, but only such lawful and necessary entry upon the boundary as was required to properly handle the material used in constructing said line. That no trees were cut by it, save valueless shrubs and branches on the railroad property overhanging and interfering with the passing of the wires, and of these so much only as was absolutely needful and proper. It averred that while its line was being constructed plaintiff obliged its employees to stop their work, claiming that they were building same upon his land, but afterward authorized and consented to the completion of said line, which defendant's employees then did, with the understanding that whatever claims for compensation plaintiff might have should be considered, and, if valid, amicably adjusted at a later date.

That under said understanding considerable expense was incurred by defendant in completing said line, and it pleaded that even if it should be found that said line was on plaintiff's land (which it was not) plaintiff was estopped by said conduct and con-

sent (which had been acted on) as set forth from bringing the suit.

It averred that plaintiff's land was wild and partly timbered. That there were no shade or other trees of any value along the locality of the telephone line, and it averred that it had never been put in default.

Defendant subsequently applied for and obtained an order for the survey of the plaintiff's property, and that of the railroad company, alleging that it was necessary that the boundary between said properties be ascertained in order to determine upon whose lands the poles were situated. A survey was accordingly made and returned.

The District Court rendered judgment in favor of the plaintiff for the sum of five hundred dollars, with legal interest from 3d April, 1897, until paid. The judgment was silent as to the demand for the removal of the poles.

Defendant appealed.

In the Supreme Court plaintiff moved that the judgment be amended by increasing the amount thereof to twenty-five hundred dollars, and by ordering the removal of the poles.

The evidence establishes conclusively the fact that the telephone poles erected on the land by the defendant were placed there without the prior consent of the plaintiff. Defendant does not deny this, but attempts to explain it by saying that its employees had done so under the erroneous impression that such consent had been obtained. It would appear that a Mr. Millard, acting on behalf of the defendant, had gone along the proposed telephone line soliciting a right of way from the owners of the land over which it would pass. That when he called at plaintiff's residence, he was temporarily absent, but expected soon to return. That on ascertaining this fact Millard told one Mitchell (who had immediate charge of the work as it progressed) that he would place himself in communication with plaintiff and let him know what to do. That the work progressed faster than had been expected, and Mitchell, not hearing from Millard, assured that everything had been arranged, under that impression went upon the land, dug the holes for the poles, and placed the latter in position, before information was received by him that plaintiff objected to the work. On receiving this information, he notified Millard, and the two called upon the plaintiff in regard to the matter. Millard and Mitchell's version of what took place at the interview between the parties differs from that given by Mr. Fuselier. The

former both testify that the poles having been erected at that time, and nothing remaining to be done to finish the work but to string the wires upon them, Mr. Fuselier consented, at Millard's request, that the work should be completed, leaving open the matter of compensation to be thereafter settled, between Mr. Martel, the counsel of the plaintiff, and Millard and Mitchell. Plaintiff testifies that he gave no such consent, but simply referred the parties to his attorney.

Millard and Mitchell admit that, anticipating the possible change of mind on the part of the plaintiff which actually took place, they, in view of that fact, hurried forward the work upon the next day. Mitchell declares, however, that when on that day he was notified that plaintiff wished him to desist, everything had been finished except the stringing of wires upon two panels. He testified that, upon receiving this notification, he instructed his workmen to pull up the slack of the wires already upon the poles, and tie the end, and immediately started for plaintiff's residence with the messenger who had given the notification. That the workmen, not understanding the import of the order given to them, proceeded to close up the unfinished gap covering only a few hundred feet and closed the whole line. That this was done without any knowledge or suspicion on his part that it would be done. While the testimony of the plaintiff is directly opposed to that of Millard and Mitchell, in respect to the former's having consented to the completion of the work by the hanging of the wires upon the poles, we think that we must, under the evidence, assume that the conversation between the parties was of such a character as, at least, to have impressed Mitchell and Millard with the belief that such consent had been given. The action of Mitchell, in ordering the hanging of the wires on the poles the following day, must be viewed from that standpoint, up, at all events, to the moment when notice was given to him to stop work. The digging of the holes and the erection of the poles upon the land were accomplished facts before the parties met at plaintiff's residence. At what precise time plaintiff came to a knowledge of what was going on is not shown. He testifies to having seen workmen of the company when digging holes upon the land. It is not shown that on ascertaining that fact he at once complained to Mitchell, nor is it shown that after such complaint was made that either holes were dug or poles

erected. Plaintiff does not claim that the telephone line, as presently established, is an improper place, or in a place other than that which the defendant could have legally exacted for its line had legal proceedings been resorted to. It is not charged that the trees cut were not upon that line, nor that they were unnecessarily cut down. The line was established as near the right of way of the Morgan Railroad Company as well could be, and the trees had to be removed or trimmed in order to make way for the poles and wires. We think it very obvious from plaintiff's own testimony that his ground of complaint was based more upon an ignoring of and an invasion upon his rights of ownership than upon a pecuniary loss suffered by him in the premises. On cross-examination, being asked in one place the question, "whether the cutting of the trees had damaged him one thousand five hundred dollars," he answered, "that he did not think the trees were worth that much, but it was cutting the trees without his permission;" and on his being asked what each of the trees was worth, said he could not say exactly what each was worth, that the damage of cutting the trees was what he was complaining about. They were an ornament to his place.

The following questions and answers followed:

"Q. Then really it is not so much the damage that you complain of as it is the getting on your place?

"A. Yes, sir; the damage to my property.

"Q. How much do you estimate the actual loss to your property?

"A. Well, about five hundred dollars damages for the trespass.

"Q. But I mean, what is the actual lessening of the value of your property?

"A. Well, I could not say.

"Q. You could not say?

"A. No, sir.

"Q. Then what do you mean by the five hundred dollars damages?

"A. They had a gang of white men with negroes digging holes all over the place, going over my cane field and corn field and all over.

"Q. You have just stated that you were not cultivating that land; how could they have injured any crops?

"A. Half of the front of the place is field and half timber."

We find nothing going to establish the fact that holes were dug upon the place other than those upon the line of way for the reception of the poles, nor to show that defendant's workmen went all

over plaintiff's place. The reverse is shown. No crop of plaintiff was interfered with. The evidence shows that most of the trees which were cut down were along a trench which the railroad company had dug in making its road, and also very near a fence with with which it had enclosed its right of way. If plaintiff should hereafter sell lots or tracts facing the railroad property, as he asserts it to be his intention to do, the trees, were they still standing, would not serve as ornaments to the same, as they would not be inside of any of the enclosures of the properties, but upon the outer edge of the road, which would have to be left between the fences of the properties and the railroad fence. The trees appear to be, most of them, small; many of them with their roots exposed from the cutting of the trench referred to, and none of them calculated to increase the value of land as being ornamental. As matters stand, the plaintiff's property runs up to the railroad right of way; part of the front has timber upon it and part has open field. No "settlement" has as yet sprung up. Whether there will ever be, in fact, such a "settlement" is purely speculative, as is also its future extent, should one be made. We do not think there is much analogy between this case and that of Tissot vs. Telegraph and Telephone Company (39 An. 996).

There the workmen left their line of work to enter the yard of a private residence and unnecessarily cut off branches from ornamental trees therein; here the workmen were upon the exact line which defendant could have legally exacted as its line of way and cut down no trees other than those which defendant would have been authorized to have had destroyed.

While defendant's employees placed it in a position which it was really entitled to occupy, they caused this to be done prematurely, and without the consent of plaintiff or an order of court, in unwarranted disregard and violation of plaintiff's rights of property.

We can not recognize the right of a corporation to enter upon private property and exercise the right of appropriating the same to its own use upon the grossly unauthorized assumption that the owner might thereafter consent to the same. Parties attempting to exercise the right of eminent domain should be made to know that that right to the extent at least of its being utilized in favor of private corporations, is in derogation of common right, and can only be enforced by strictly following out of the requirements of the law.

Assuming as true that plaintiff after ascertaining how near defendant's line was to completion had consented to interpose no obstacle to the stringing of the wires upon the poles already erected on his land, we do not give to this consent the force and effect which defendant claims for it. If given, it might estop him from contesting the proper location of the line and from seeking to have undone that which had reached the point of accomplished facts, but we do not think it would go so far as to constitute a waiver of his right to ask damages for the prior unlawful entry upon his premises. It is fortunate for the defendant that in prosecuting its work it did so (so far as the evidence shows) in a manner not in itself open to special objection. We do not think defendant should be made to remove the poles it had erected for the same reason as that for which courts refuse to set aside an injunction when it is manifest to them that immediately upon the dissolution of the same the plaintiff would be entitled to have a second one issued. Were we to order the poles erected by defendant upon the land removed, it would be entitled to have the same replaced, and in the meantime a business, *quasi*-public in character, would be greatly impeded and interfered with.

We are of the opinion that plaintiff is entitled to recover from defendant an amount sufficient to properly cover the value of the right of way which it has now acquired and damages for the unlawful entry upon plaintiff's property.

We think two hundred and fifty dollars not too high an estimate for that purpose.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby amended by reducing the amount for which judgment is given in favor of plaintiff against defendant, from five hundred dollars to two hundred and fifty dollars, and that as so amended said judgment is affirmed. Costs of appeal to be borne by the appellee.

No. 12,792.

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STATE EX REL. GEORGE MORGAN VS. DANIEL W. VOORHIES, JUDGE AD HOC AND THE JEANERETTE LUMBER AND SHINGLE COMPANY, LIMITED, THROUGH J. W. STOKOE, PRESIDENT, PLAINTIFF IN RULE.

The authority of a judge *ad hoc* over the judgment which he had rendered does not end with his signature to the judgment. So long as he has not resigned nor vacated the position in some legal way, and the case is before the court which made the appointment, he retains control over it. The cause in a limited sense may be considered terminated, but for many purposes it remains a pending suit until finally disposed of (Brown vs. Pontchartrain Land Company, 49 An. 1779; State *ex rel.* Ludeling vs. Judge, 39 An. 794).

He is the proper person to take cognizance of an application to have defendant in injunction, who has violated the injunction, ruled into court for and punished for contempt.

APPLICATION for a Writ of Prohibition.

Edward Simon for Relator.

Respondent Judge *pro se; Foster & Broussard* for Lumber Company, Respondent.

Submitted on briefs April 9, 1898.
Opinion handed down April 18, 1898.
Rehearing refused May 2, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 15th of July, 1895, the Jeanerette Lumber and Shingle Company brought suit against the relator in the Nineteenth Judicial District for the parish of St. Martin alleging that he had trespassed and was still trespassing upon property belonging to it—cutting down trees, etc. The company applied for and obtained from the clerk of the District Court (in the absence of the judge) an injunction restraining Morgan from going upon the land or removing or causing to be removed the timber which had been cut down by him or through his orders.

The District Judge recused himself by reason of interest and of having been consulted in reference to the issues involved, and appointed Daniel W. Voorhies, *judge ad hoc.*

Defendant having answered the case went to trial, and judgment was rendered in favor of the plaintiff, perpetuating the injunction. Subsequent to the signing of the judgment, plaintiff applied to the court for a rule upon the defendant to show cause why he should not be punished for contempt of court, it being alleged that he had violated the injunction. The judge *ad hoc* took cognizance of the application, and under his signature directed the rule to issue as prayed for.

Defendant as a relator has applied to this court for a writs of *certiorari* and prohibtion—urging that the authority of the judge *ad hoc* ceased with his signature to the judgment.

We are not of that opinion. So long as he has not resigned or vacated the position in some legal way and the case is before the court in which the appointment was made, the judge *ad hoc* retains control over it. The cause, in a limited sense, may be considered terminated, but for many purposes it remains a pending suit until finally disposed of. (Brown vs. Pontchartrain Land Co., 49 An. 1779; State *ex rel.* Ludeling vs. Judge, 39 An. 794.) We see no good reason in support of relator's position. The grounds upon which the District Judge recused himself still existing, he would be as unable to take action in the case as he was before, and it would be a useless formality (to say the least) to require the court to make a reappointment of the same attorney in order to authorize him to control and supervise the execution of the judgment which he had himself rendered.

For the reasons assigned it is hereby ordered and decreed that the orders and writs heretofore issued herein be set aside and relator's application is dismissed at his costs.

No. 12,803.

SUCCESSION OF HENRY T. VENNARD; HENRY VENNARD SMITH VS. GEORGE H. VENNARD.

The law requires under penalty of nullity that any agreement made between a tutor and his ward on reaching the age of majority shall have been preceded ten days before the making of the same not only by the delivery by the tutor to his ward of a full account of his gestion with the vouchers in support of the same, but also by the giving at such prior date by the ward to his tutor of a receipt by which said facts are made to appear. C. C. 361, corresponding to Art. 472, C. N.

Succession of Vennard and Smith vs. Vennard.

A settlement of accounts between tutor and ward made without a compliance with these requirements is subject to be reopened by a direct action of nullity though the same may have been evidenced by a notarial act and confirmed by order of court.

There is no obligation on the part of the ward as a condition precedent to the institution of such a direct action of nullity for the purpose of reopening of accounts to tender back to the tutor bonds and property admittedly belonging to him which he had received from his tutor at the time of such settlement. Rist vs. Hartner, 44 An. 373; Rist vs. Hartner, 44 An. 480.

The rule which exempts a married woman from the general operation of the doctrine of estoppel is applicable to a minor seeking the protection of a provision of the Code made specially in his interest to guard him from the presumed influence of his tutor over him. Recitals made in a notarial act between tutor and his ward on reaching majority which would cut off the right of the latter to avail himself of a declared nullity can not stand.

Mere acknowledgment made by a ward on reaching his majority that he had received payment in full from his tutor of all moneys due him and all property belonging to him and releasing the tutor from all responsibility does not conclude the minor though made in a notarial act. The ward can disprove the truthfulness of the acknowledgment by parol evidence. 49 An. 1402.

A minor seeking to reopen by suit a settlement of accounts made between himself and his tutor whom he had released under the provisions of Art. 361 of the Civil Code is not called on to allege error and misrepresentation to authorize his action. It is sufficient to open the door to examination into the state of accounts if he alleges the non-existence of the fact whose existence the law has made a necessary condition precedent to the release of the tutor.

APPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Ben. T. Waldo (*Omer Villeré* of Counsel) for Plaintiff, Appellant.

Edgar M. Cahn for Defendant, Appellee.

Argued and submitted May 7, 1898.
Opinion handed down May 30, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff in this suit brings a direct action of nullity to set aside an act signed by him on his reaching majority, in which he gave to his tutor, George H. Vennard, a full and complete discharge as tutor, releasing and relieving him of all responsibility resulting from all acts of his administration, and acquitted and discharged and released him from all claims and demands whatever

which he might have against him on account of said tutorship. In this act plaintiff acknowledged that he had settled and adjusted all accounts with his tutor, George H. Vennard. That the latter had rendered him a full and complete accounting of all transactions and doings in connection with his tutorship. That he had paid him the full share, portion and interest to which he was entitled in the succession of the late Henry T. Vennard, and in all other successions and from whatsoever sources they might be, as well as all moneys and property of whatsoever nature and kind to which he was entitled; that he had received from his tutor a true and correct statement and account of his administration, together with the delivery of all the papers and vouchers in connection therewith. That he had continuous possession and control and custody in his hands of all of said vouchers, papers, accounts and statements for more than ten full days prior to signing the act; that he had carefully examined the same, was satisfied therewith and ratified and approved the same throughout.

Plaintiff seeks additionally to have set aside a judgment of court based on said act of release by which the tutor was discharged.

The action is based upon Art. 361 of the Civil Code, corresponding to Art. 472 of the Code Napoleon, which declares that "every agreement which may take place between the tutor and the minor arrived at the age of majority shall be null and void unless the same was entered into after the rendering of a full account and delivery of the vouchers, the whole being made to appear by the receipt of the person to whom the account was rendered ten days previous to the agreement."

The District Court was of the opinion that the action could not be maintained for the reason, *first*, that the minor had not tendered back to the tutor twenty-seven thousand one hundred dollars in Louisiana bonds, which he had acknowledged to have received from his tutor at the time of the settlement; *second*, because the minor could not contradict his solemn declarations made in a notarial act; *third*, because the error which the minor assigned as that on which he sought to set aside the acts was an *error in the motive;* that in order that such an error should be available as a ground for setting aside a contract, it must be on the principal cause when there are several. That the error in the motive assigned by plaintiff was not an error on the principal cause of plaintiff's signing the act.

That the principal motive for his doing so was his desire on reaching the age of majority to obtain from his tutor his property in order "as he was on the eve of getting married and required ready funds," he could manage the same. That plaintiff was under no error as to this motive, nor did defendant do anything to mislead him. That the statement made by defendant, that if a settlement was not then made the matter would then be in litigation for an indefinite time, whether true or not, was not the principal motive—that it was not alleged that defendant knew the statement to be false. That, besides, if plaintiff at the time believed it to be true, he signed the act to avoid future litigation; that error of law as well as error of fact invalidates a contract where such error is its only, or principal cause, subject to the modification that a contract made for the purpose of avoiding litigation can not be rescinded for error of law (C. C., Art. 1846).

Plaintiff was of full age, his allegations of ignorance of the law were of no avail and were not consistent with the other allegations of the petition.

4th. Because the allegations of the petition offered would not be sufficient to set aside the notarial act of settlement.

The court erred in supposing that there was any obligation on the part of the plaintiff to tender back to the defendant the twenty-seven thousand one hundred dollars of bonds which he had received from his tutor. There is no claim or pretence that these bonds did not properly belong to the minor—the tutor formally acknowledged that they did so belong to him. There is no pretence made by the tutor that there was any error in that acknowledgment. The act sought to be set aside evidences no contract or compromise between the parties. It is simply a receipt for money accompanied by a consent that the tutor be discharged from further liability. Plaintiff received no consideration from the defendant to serve as a basis for a contract—what he received was avowedly nothing but his own. No tender back of the amount received was necessary as a condition precedent to instituting this suit. Rist vs. Hartner, Tutor, 44 An. 480; Rist vs. Hartner *et al.* 44 An. 378.

2. If plaintiff's allegations be true, the act in question was violative of a provision of law which was enacted expressly for the protection of minors just reaching majority, and was subject to attack

as a nullity. Recitals made in a notarial act, which would cut off the right of a minor to avail himself of the benefit of a declared nullity can not stand.

The plaintiff not only alleges facts going to make the acts complained of a nullity under Art. 361, C. C., but he alleges error and misrepresentation, which of themselves would entitle him *to seek at least to have* the act set aside. The fact that a mere acknowledgment of receipt of money is made in a notarial act does not, of itself, preclude the party making ihe acknowledgment from disproving its truthfulness by parol evidence. The act in question, as we have said, evidences no contract—it is a mere receipt (Equitable Securities Company vs. Talbert, 49 An. 1402) followed by a release without a consideration. Plaintiff, at the time of making the acknowledgment he did, was over twenty-one years of age, but for the purpose of the act we are now considering he was still under the protection which the law throws around minority.

The law would be a dead letter if a tutor, by simply causing his ward to appear before a notary and acknowledging away his causes of action could succeed in shutting the doors of the courts against him. The rule which enables a married woman to attack a confession of judgment made by her, and which exempts her from the general operation of the doctrine of estoppel, is applicable to a minor seeking to avail himself of a provision of the Code made especially in his intorest to guard him from the presumed influence of his tutor over him.

3. The court erred in applying to this case the rules of a contract as to error of motive therein. There is no contract and no compromise involved in this matter. Plaintiff avers the non-existence of certain facts whose existence the law makes necessary conditions precedent to the release of a tutor. If these facts do not exist, the act whose validity is dependent thereon fails as a legal consequence. The allegations as to error and misrepresentation, while they strengthen the plaintiff's case, are not essential to it when founded on the provisions of Art. 361 of the Civil Code.

4. We are of the opinion that the allegations of the petition, if true, are sufficient to support an action, the object of which is to test the validity and effect of an act signed by a minor on reaching his majority, giving his tutor a full acquittance, and releasing him from all further liability as such.

The lawmaker has, through Art. 361 of the Civil Code, manifested strongly its disapprobation of hasty settlements and releases between parties standing so related. An exception, the effect of which would cut off inquiry into the merits of such a case, is one which courts should not sustain unless absolutely required so to do. As between these parties, where error and misrepresentation have been set up, as well as a failure to comply with legal requirements precedent, it is desirable, as we said in the Succession of Troxler, 46 An. 749, that light should be permitted to be thrown in as far as possible in aid of right. Both parties should desire a full investigation.

The act signed by the plaintiff, which is relied upon by defendant as estopping him from instituting the present action, fails to show that *by a receipt of the minor* to whom the account was rendered *given ten days previous to that act*, that the vouchers, in support of the account were then, or had been prior thereto, delivered to the ward.

Pretermitting any discussion as to what the situation would have been had the act in question contained such a recital, we think that in its absence the act, though it may not be absolutely null, is open at least to attack and inquiry. C. N. 472, Aubrey et Rau, Vol. 1, page 493, par. 121; Toullier, Vol. 2, No. 1249, Vol. 10, No. 59; Magnin, Vol. 1, Nos. 675, 732; Laurent, Vol. 5, No. 151; Zacharie, Sec. 116, texte et note 6; Demolombe, Vol. 8, Sec. 63; Marcadé, Vol. 2, Sec. 281; Baudry-Lacantinerie, Vol. 1, Sec. 111; Mourlon, Vol. —, Sec. 1217.

We are of opinion that the court erred in sustaining the exceptions filed herein by the defendant, for the reasons herein assigned:

It is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the exceptions filed herein by the defendant be and the same are hereby overruled; that the cause be remanded to the District Court and and there reinstated on the docket and proceeded with according to law.

No. 12,798.

JOSEPH L. LEBOURGEOIS VS. GRAMERCY COMPANY, LIMITED.

A sugar refinery company entered into contracts with its customers being sugar planters (among others with plaintiff) by which the planters agreed to sell and deliver to the company on cars or switch nearest their respective plantations their crops of sugar cane, and the company bound itself to purchase and

receive said crop, to pay all railroad freights delivered under the contracts, and to pay cash to the planters at the rate of ninety cents per ton (less freight) of the price for each cent of the price of prime yellow clarified sugar according to official quotation of price.

Plaintiff's plantation being near the refinery, his particular contract was modified so as to permit him to deliver his crop at the refinery with his own carts, the refinery company agreeing to pay him twenty cents per ton more—*Held:* That the freight rate was not a mere deduction from a charge upon an otherwise fixed price for the cane per ton. It was one of the two factors upon which the company fixed the price itself. The price itself agreed upon was what would remain after deduction of a fixed rate of freight conventionally agreed upon between the parties from the second variable or sliding factor.

The agreement of the company with the plaintiff was that he should receive twenty cents net more than the other planters.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

W. S. Benedict for Plaintiff, Appellant.

Saunders & Miller and *Farrar & Lemle* for Defendant, Appellee.

Argued and submitted May 5, 1898.
Opinion handed down May 30, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff seeks a judgment against defendant for two thousand six hundred and forty-one dollars and eighty cents under the following allegations:

That on the 20th of July, 1896, he entered into a written contract with the Gramercy Company, Limited, to sell and deliver to said company a crop of sugar cane for the grinding season of 1896, and in consideration thereof said defendant company agreed to pay weekly in cash therefor at the "rate of ninety (90) cents per ton (less freight) on the price for each cent of the price of prime yellow clarified sugar;" any balance remaining due to be paid at the end of the season. That it amended said contract, which was by petitioner fully executed. That he delivered four thousand four hundred and two tons, one thousand nine hundred and seventy-five pounds (say four thousand four hundred and three tons of cane) to defendant, and for which weekly payments were made, leaving unpaid a balance

of two thousand six hundred and forty-one dollars and eighty cents, which remained due and owing to petitioner by defendant.

That the estimated price per ton for cane delivered was two dollars and ninety-two cents, but defendant deducted therefrom *freight* at sixty cents per ton, making cash payments of two dollars and thirty-two cents per ton, whereas said cane was delivered free of freight by cane carts of plaintiff, and no deduction was contemplated except when paid by defendant, and at the rate of sixty cents per ton, said balance was justly due and owing petitioner by defendant, for which amicable demand had been made without avail.

Defendant answered pleading first the general issue.

Further answering he averred that it admitted that on the twentieth day of July, 1896, it entered into the contract with plaintiff, which was annexed and made a part of plaintiff's petition. That by Section first of said contract, it agreed and obligated itself to pay for all cane delivered upon the conditions of the contract, the prices indicated in the schedule appended to said contract, less sixty cents per ton railroad freight, based upon the weekly average of the actual sales of prime yellow clarified sugar, as reported by the New Orleans Sugar Exchange, for the week in which the sugar was delivered, the average of the first week after the cane was delivered to be taken.

Respondent further answering averred that its agreement to pay the prices named in said contract was based on plaintiff's agreement to load and deliver the cane in cars on switch, nearest to his plantation, and not less than thirty-five tons per day. That respondent's object in requiring plaintiff and all parties that sold cane to it, to deliver by rail was, to do away with the expense and labor necessary to load the carriers and handle the cane where it was delivered by cart or wagon, it having provided machinery for the unloading of cars directly to the carrier when delivered by rail, and in addition thereto, to increase the receipts of the railroad company, the stockholders of the Gramercy Company, Limited, being large stockholders in its railroad company.

Further answering respondent averred that during the year 1895 it had contracts with plaintiff and others to purchase their cane in effect the same as in 1896, by which plaintiff and all others were to deliver their cane by rail, and that it settled in accordance with agreement with plaintiff and all others delivering by wagons and carts, by paying them twenty cents per ton net, more than was paid

net to those delivering by rail. That in 1896, in accordance with agreement it again settled with plaintiff and all others delivering by wagons and carts by paying them twenty cents per ton more than was paid to others not delivering by rail, as was done in 1895; but respondent repeatedly during the years 1895 and 1896, urged upon the plaintiff to deliver by rail in accordance with his contract.

Respondents further answering averred, that during contract with plaintiff, it was to make a settlement with him weekly for the cane delivered by him, and that in settlement of the first week respondent sent a check and voucher to be signed in full settlement of amount due him, based on thirty-five thousand-ton receipt, the price being twenty cents per ton, net, more than was paid others not delivering by rail, and that thereupon the said plaintiff complained that the settlement and check were not correct, and returned it. That on November 16, respondent wrote plaintiff, as per letter annexed. It subsequently returned the check and voucher to be signed in full settlement, and plaintiff received said check and cashed it, and still retained the proceeds thereof.

Further answering respondents averred that, after the receipt of this letter, plaintiff continued to deliver cane, and respondents continued to settle with him weekly, at the rate of twenty cents per ton, net, more than was received by other parties not delivering by rail, by forwarding to him weekly statements, stating that it was in full settlement, with checks attached to each statement, and plaintiff having accepted and cashed the checks, they being paid coupled with the condition that it was in full settlement, was now estopped from claiming that there was any balance due him, which estoppel it specially pleaded.

Further answering respondent averred that it had paid and settled in full for all cane received from plaintiffs.

The District Court rendered judgment rejecting plaintiff's demand, and he appealed.

In the contract between the parties, plaintiff (referred to therein as the party of the first part, and defendant as the party of the second part) agreed and bound himself to sell and deliver to the party of the second part, all of his crop of sugar cane which he might raise, except so much thereof as might be necessary to be retained for seed, and the party of the second part agreed and bound itself to purchase and receive from the party of the first part, not less than

two thousand and not more than four thousand tons of sugar cane during the grinding season of 1896, on the following conditions: First, the party of the first part agreed and bound himself to commence cutting and shipping cane, and to complete the same on dates to be thereafter agreed upon by both parties to this contract; and agreed and bound himself to load and *deliver on cars* on switch nearest to his plantation not less than thirty-five tons and not more than —— tons of cane per day, provided that any days lost through storms which interfered with loading shall not be counted.

Fifth—The party of the *second part agreed to pay all railroad freights* and produce taxes on all cane delivered under this contract.

Sixth—The party of the second part agreed to pay in cash to the party of the first part, or to his written order, at the rate of ninety (90) cents per ton (less freight) of the price for each cent of the price of prime yellow clarified sugar, one week intervening between the delivery of the cane and the payment therefor, this time being allowed for the purpose of obtaining official quotations and adjusting accounts. The balance due would be paid at the end of the season when the company had determined the total of cane delivered at the factory.

Seventh—The party of the second part agreed to pay the party of the first part for all cane delivered under the conditions of this contract, the prices indicated in the schedule appended to the contract, *less sixty cents per ton for railroad freight*, based upon the weekly average of the actual sales of prime yellow clarified sugar as reported by the New Orleans Sugar Exchange for the week in which the cane is delivered; provided that if there were no sales reported by the New Orleans Sugar Exchange for the week in which the cane was delivered, the average of the first week after the delivery of the cane should be taken.

Cars should be loaded with not less than fifteen tons of cane and might contain twenty tons. Not less than nine dollars per car (or sixty cents per ton on fifteen tons) should be deducted as the minimum freight on every car.

Plaintiff claims that the contract between defendant and himself, after being signed, was verbally modified, the modification consisting in an agreement that the plaintiff should deliver his cane at the mills of the defendant in his own carts, and that plaintiff should pay him twenty cents more per ton. Plaintiff's contention as to the

effect of the modification is that it entitles him to disregard entirely any reference to the deduction for railroad freights and to add twenty cents per ton to the price which would be payable if the railroad freight should be left out of view. Plaintiff's theory of the case is that the railroad freight referred to was not a factor in establishing the price fixed per ton for cane, but a deduction made as a charge or expense upon a price already fixed. The conclusion drawn is that if the expense for railroad carriage was not entailed for the reason that the planter himself delivered his cane, the *entire price fixed* would be due without deduction. That the defendant in this particular case not only agreed to this, but agreed that he would pay him twenty cents per ton more. The evidence on the subject of the modification of the contract is found in the testimony of the plaintiff and of Mr. Spelman, the president of the defendant company. On cross-examination of the plaintiff the following questions and answers were asked and made:

"Q. You say that prior to the hauling season of 1896, that Mr. Spelman stated to you that you would get twenty cents a ton more if you hauled it?

"A. Yes, sir; he said to me one day: 'Well, Joe, you will get twenty cents a ton if you haul it.'

"Q. If you haul it?

"A. If you haul it, and that was all he said.

"Q. What did you say to that?

"A. I didn't say anything; I left."

Mr. Spelman's testimony was to the effect that in the month of September of 1896, the plaintiff spoke to him, saying that he wanted, as he had done the year before, to deliver the cane by cart rather than by rail. That he (Spelman) urged him, as he had the year before, to deliver by rail, because all the company's system was rail work and it wanted to get all the cane that way. Plaintiff preferred, however, to deliver by cart rather than deliver by rail, and got his twenty cents extra per ton, and the company permitted it to be done, as it had been done the year before without any (written) modification or endorsement on the contract. He did not know that LeBourgeois said anything when he told him he would get twenty cents more per ton. It was understood that he was to go on the same as he had the year before. He did not know that any specific words were used. He urged him to deliver by rail, but

he preferred not to do so. The company's object in having cane delivered by rail was because its whole system was for rail and not cart delivery. It preferred to have it come in by rail because it had special machinery for unloading the cars and putting the cane on an incline which it had put up at great expense. That method of unloading the cars was far more economical to the company than handling the cane from carts. The company wanted to utilize its machinery for unloading. The object of rail delivery was not to force people whose places were only a mile or two off to ship by rail, but it was to avoid if possible any handling at all by hand, as a great part of the cost of making sugar was the handling on cane to a carrier. The company had machinery for putting the cane on the carrier, and it wanted to avoid doing any handwork. The company had a contract with plaintiff for 1895 calling for delivery by rail. Mr. LeBourgeois had a derrick and a switch for delivery by rail, but he preferred to deliver by carts provided he got paid for hauling instead of paying railroad freight. Therefore the contract for 1895 was modified to the extent that the company paid Mr. LeBourgeois twenty cents per ton more than it paid others net that shipped by rail. Twenty cents per ton net (was) to cover the cost of hauling instead of shipping by rail, so that although that contract called for rail delivery, by the personal contract Mr. LeBourgeois afterward delivered and the company accepted what he hauled in carts, and paid him twenty cents per ton more than if he had delivered by rail. It would have cost the company or any one else sixty cents a ton to have taken the cane by rail from Mr. LeBourgeois' place to the factory. The company had in 1895 and 1896 with a Mr. Shepp (who had a plantation near Mr. LeBourgeois') contracts similar to that with Mr. LeBourgeois and had settled with him both years precisely as it had done with Mr. LeBourgeois—that is, twenty cents per ton more than it paid other shippers. Mr. LeBourgeois on direct examination testified that after the grinding season of 1896 had commenced and upon the first settlement with the defendant company disclosing that it claimed he was only entitled to twenty cents per ton net more than it was paying to parties who shipped cane to it by rail, he went over to see Mr. Spelman about the matter. Spelman said, "LeBourgeois, you are paid exactly as you were in 1895." He answered "that he did not expect to be paid in 1896 as he had in 1895, not at all." Then Spelman said, "But you are." He replied,

"Why did you not give me a duplicate of the 1895 contract to sign instead of the 1896 contract, which is entirely different?"

Mr. Spelman said: "Come to the office and you will find you are getting as much money for your cane as you were in 1895." He (LeBourgeois) answered, "That cuts no figure, whether I am getting as much or more, but I expect to be paid on the basis of the contract I have signed." Spelman said, "You certainly understood there would be a deduction of sixty cents freight," and he replied, "No, sir." He testified that he recalled to Mr. Spelman a remark he had made to the effect that "He did not see why he would persist in killing off his mules and wanted to haul that distance, when it would be more convenient for him and for the factory to receive his cane by rail;' to which remark he (LeBourgeois) had replied "that if he could deliver four thousand or four thousand five hundred tons, as he expected, it would be a net saving to him of one thousand eight hundred or two thousand five hundred dollars;" and Mr. Spelman shrugged his shoulders and said, "You know best." That though Mr. Spelman said he did not recollect that conversation, it did, in point of fact, take place the first week before delivery. He testified that when he saw the company persisted in placing the construction it did upon the contract, he went to see his attorney, who told him it was so late in the season that he had better go on, and he had done so under protest.

Defendant's counsel presents its view of the situation as follows:

"Plaintiff entered into a written agreement to sell his cane in 1896 to defendant. The contract expressly stipulates that the cane so sold should be delivered on cars. Mr. Spelman, the president of the refinery company, testifies that special arrangements were made at the refinery for unloading the cane from the cars by machinery, and that it was more convenient and cheaper for them to handle the cane from the cars than from carts. As between cane delivered on cars and cane delivered by carts, the company preferred to receive it on cars and could afford to pay for cane so delivered a higher price than it could afford to pay for same delivered by carts.

"The printed form of the contract with the company signed in 1896 by Mr. LeBourgeois contains, in the seventh paragraph, a stipulation that the company will pay the prices shown on a subjoined table for cane delivered on cars, less sixty cents a ton for freight. In order to ascertain the price therefore the sixty cents a ton must

be deducted. And the price as thus ascertained was for cane delivered on cars; this is for cane which cost the company least to handle when delivered, and for which it could therefore afford to pay the highest price.

"The net price to the planter—what he really got for his cane—was found by deducting sixty cents a ton from the figures given in the table.

After signing, in July, 1896, a contract binding him to deliver his cane on cars, Mr. LeBourgeois determined to deliver his cane by carts. He met Mr. Spelman just before the grinding season began and told him of this determination. Mr. Spelman, who was in a hurry, remarked that he would then give Mr. LeBourgeois twenty cents a ton more, and Mr. LeBourgeois assented.

"Mr. Le Bourgeois claims that by this he understood that he would get twenty cents a ton more than the price stated in the table without deducting the sixty cents a ton for car freight.

"For example, the price stated in the table, when sugar sold at four cents, was three dollars and sixty cents per ton. The planters who delivered by rail would get only three dollars per ton, at this price, and the total cost of the cane to the refinery was the three dollars paid the planter, plus sixty cents paid for the freight, or three dollars and sixty cents in all. And for this price of three dollars and sixty cents per ton the refinery got the cane on cars in the manner it had been contracted for, and in the shape which cost it least to handle. Now, Mr. LeBourgeois claims that Mr. Spelman meant that the refinery would pay him three dollars and eighty cents per ton for his cane delivered in carts, when the cane of other planters was costing only three dollars and sixty cents delivered on cars. In other words, he says that he understood Mr. Spelman to mean that the company would pay him three dollars and eighty cents per ton for cane in carts, while it paid only three dollars and sixty cents per ton for cane in cars. That is, the company was to pay a higher price for the cane that cost it most to handle. We submit that reflection should have precluded Mr. LeBourgeois from attaching any such interpretation to Mr. Spelman's words. He knew that the refinery did not want the cane delivered in carts; he knew that it had expressly stipulated that the cane should be delivered in cars; he knew that the cane delivered on cars cost the company less to handle, and yet he says that he inferred that the

"Why did you not give me a duplicate of the [illegible] comparatively instead of the 1896 contract, which is entirely [illegible]y little.

Mr. Spelman said: "Come to the office [illegible] company three getting as much money for your cane as [illegible] planters cost the (LeBourgeois) answered, "That cuts n[illegible]e transportation of as much or more, but I expect to be [illegible]ny eighty cents, while have signed." Spelman said, "Yo[illegible]anters was costing only be a deduction of sixty cents [illegible]d be paying more for deliv- He testified that he recalled t[illegible], notwithstanding the fact that to the effect that "He did n[illegible]d at less cost than that delivered his mules and wanted to [illegible] convenient for him and [illegible], that it was impossible for Mr. LeBour- to which remark he [illegible]ted when he supposed that the company meant deliver four thous[illegible] for his cart cane than it paid other producers for expected, it woul[illegible] And as Mr. LeBourgeois' conclusion in this matter hundred or two [illegible] without reflection, he can not be upheld in it, but will shrugged his [illegible]d by that sense which the words clearly meant in the situa- Mr. Spelm[illegible] which they were spoken. And that sense very evidently point of f[illegible] that Mr. LeBourgeois should receive twenty cents net more that w[illegible] than the other planters. That is, in the case supposed, where the it did[illegible] other planters on the basis of 3 5-16c. sugar, were getting 3 12-60, it w[illegible] or $3.61 per ton net, Mr. LeBourgeois would get $2.81 per ton net, d[illegible] or 20 cents a ton more than the other. And he was settled with on this basis.

"That this was a proper and just basis is corroborated by the fact that in 1895 Mr. LeBourgeois and Mr. Shepp were both paid in this manner. In 1895 they received for hauling their cane in carts twenty cents per ton more than the other planters. This shows that they regarded twenty cents a ton as a suitable compensation to them, under the circumstances, for hauling their cane. Presumably, the same compensation for hauling would be just in 1896."

We are of the opinion that the judgment appealed from is correct. It is difficult to imagine upon what ground or from what motive defendant would have departed from the terms of its advantageous written contract to give plaintiff several thousand dollars more than the contract called for for a less desirable delivery of cane. In the general contracts (similar to the written one between plaintiff and defendant) made by defendant with its customers, the latter obligated themselves to load and deliver the cane sold on cars, on switch

espective plantations, defendant itself paying axes.

supposing that the freight rate was a mere e upon an otherwise fixed price for the he two factors upon which the company e itself agreed upon was what would ixed rate of freight conventionally agreed ies from the second variable, or sliding factor. d said it would pay plaintiff twenty cents per ton paid to other shippers, the obvious meaning of what was, that plaintiff should receive for his cane twenty cents on more than the other sellers would actually receive for theirs—that is to say, twenty cents more than what may be called the net price fixed in the written contracts. The judgment of the District Court is hereby affirmed.

No. 12,602.

M. L. McNEELY, TUTRIX, VS. J. H. McNEELY, EXECUTOR; SUCCESSION OF L. McNEELY, DECEASED. OPPOSITION TO ACCOUNT OF EXECUTOR BY M. L. McNEELY, TUTRIX TO MINOR.

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Clerks of the District Courts throughout the State of Louisiana, the parish of Orleans excepted, are authorized by Act No. 106 of 1880, and Act No. 43 of 1882, in the absence of the District Judge from the parish, or in case of his recusation, to order the execution of wills and to confirm testamentary executors.

Creditors and legatees of a succession accepted under benefit of inventory are at liberty, if the beneficiary heir does not come forward within the legal delay to claim the administration of a succession for himself, to have the succession placed under administration in other hands. C. C., Arts. 1034, 1035, 1036, 1041, 1047, 1058, 1101. The executor appointed by the will of the deceased, though not given seizin, properly takes charge of and administers the succession under such circumstances, assuming that the tutrix of a minor forced heir would have had, on a contest, a preference over him.

The powers, duties and responsibilities of testamentary executors in Louisiana under existing laws, run closely to those of curators and administrators. Parties in interest have the right to exact security at their hands for the faithful performance of their duties. C. C., Arts. 1670, 1678; McGehee vs. McGehee, 41 An. 660.

Article 1607 of the Civil Code, which declares that " when at the death of the testator there are heirs to whom a certain proportion of the property is reserved

company was willing to pay more for what cost it comparatively much than it would pay for what cost it comparatively little.

"Now, if the cane of Mr. LeBourgeois cost the company three dollars and eighty cents and the cane of the other planters cost the company three dollars and sixty cents, then the transportation of Mr. LeBourgeois' cane would cost the company eighty cents, while the transportation of the cane of other planters was costing only sixty cents. That is, the company would be paying more for delivery in carts than for delivery in cars, notwithstanding the fact that cane delivered in cars was handled at less cost than that delivered in carts.

"We submit, therefore, that it was impossible for Mr. LeBourgeois to have reflected when he supposed that the company meant to pay him more for his cart cane than it paid other producers for railroad cane. And as Mr. LeBourgeois' conclusion in this matter was reached without reflection, he can not be upheld in it, but will be bound by that sense which the words clearly meant in the situation in which they were spoken. And that sense very evidently was that Mr. LeBourgeois should receive twenty cents net more than the other planters. That is, in the case supposed, where the other planters on the basis of 3 5-16c. sugar, were getting 3 12-60, or $2.61 per ton net, Mr. LeBourgeois would get $2.81 per ton net, or 20 cents a ton more than the other. And he was settled with on this basis.

"That this was a proper and just basis is corroborated by the fact that in 1895 Mr. LeBourgeois and Mr. Shepp were both paid in this manner. In 1895 they received for hauling their cane in carts twenty cents per ton more than the other planters. This shows that they regarded twenty cents a ton as a suitable compensation to them, under the circumstances, for hanling their cane. Presumably, the same compensation for hauling would be just in 1896."

We are of the opinion that the judgment appealed from is correct. It is difficult to imagine upon what ground or from what motive defendant would have departed from the terms of its advantageous written contract to give plaintiff several thousand dollars more than the contract called for for a less desirable delivery of cane. In the general contracts (similar to the written one between plaintiff and defendant) made by defendant with its customers, the latter obligated themselves to load and deliver the cane sold on cars, on switch

nearest to their respective plantations, defendant itself paying freight and produce taxes.

Plaintiff is in error in supposing that the freight rate was a mere deduction from or a charge upon an otherwise fixed price for the cane per ton. It was one of the two factors upon which the company fixed the price itself. The price itself agreed upon was what would remain after deduction of a fixed rate of freight conventionally agreed upon between the parties from the second variable, or sliding factor.

When defendant said it would pay plaintiff twenty cents per ton more than it paid to other shippers, the obvious meaning of what was said was, that plaintiff should receive for his cane twenty cents per ton more than the other sellers would actually receive for theirs—that is to say, twenty cents more than what may be called the net price fixed in the written contracts. The judgment of the District Court is hereby affirmed.

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Creditors and legatees of a succession accepted under benefit of inventory are at liberty, if the beneficiary heir does not come forward within the legal delay to claim the administration of a succession for himself, to have the succession placed under administration in other hands. C. C., Arts. 1034, 1035, 1036, 1041, 1047, 1058, 1101. The executor appointed by the will of the deceased, though not given seizin, properly takes charge of and administers the succession under such circumstances, assuming that the tutrix of a minor forced heir would have had, on a contest, a preference over him.

The powers, duties and responsibilities of testamentary executors in Louisiana under existing laws, run closely to those of curators and administrators. Parties in interest have the right to exact security at their hands for the faithful performance of their duties. C. C., Arts. 1670, 1673; McGehee vs. McGehee, 41 An. 660.

Article 1607 of the Civil Code, which declares that "when at the death of the testator there are heirs to whom a certain proportion of the property is reserved

by law, these heirs are seized of right by his death of all the effects of the succession, and the universal legatee is bound to demand of them the delivery of the effects included in the testament, "whatever be its scope or interpretation was not intended to apply to a case where a succession is accepted under benefit of inventory by a minor heir, and where its property has never been placed in the actual possession of such heir, but has, on the contrary, been legally placed under the administration of, and in the actual possession of a testamentary executor, who by the will was made the universal legatee of the deceased. Bird vs. Jones, 5 An. 548.

When the universal legatee is himself the testamentary executor appointed by the will, and on his petition and prayer the will has been probated and ordered executed, and the executor has qualified and taken possession of the property of the succession, there is no basis for the contention that the fruits and revenues of the thing or things which were "legally" bequeathed to him, belong to the heir, pending the administration.

The application by the person created universal legatee and testamentary executor by last will and testament for an order probating and executing the will, confirming him as executor and placing him in possession under the will as legatee, is a sufficient demand for the delivery of his legacy to cut off the possibility of the fruits and revenues of the things "legally" bequeathed to the universal legatee enuring thereafter to the benefit of the forced heir.

The taking possession during administration by a universal legatee of the property bequeathed to him by the will (the universal legatee being also testamentary executor), does not have the effect, *ipso facto*, of closing the succession and discharging the executor. Succession of Sterry, 38 An. 854; Succession of Francez, 49 An. 1732.

The "*legitime*" is due in Louisiana under a *status* of heirship, though forced heirs are sometimes alluded to as and assimilated to creditors. The forced heir may, by claiming as such, as an heir under benefit of inventory, escape direct personal liability for the debts and charges of the succession, but in fixing the reserve, the law has not ordered it to be established regardless of payment of the succession debts and charges out of the property of the succession, though certain charges are excluded by express provision of law, as for instance, commissions of executorship and costs of delivery. C. C., Arts. 1632, 1687.

Costs and attorney's fees incurred by the executors in defending an action brought by a forced heir to set aside the will in its entirety as a nullity are chargeable against the succession, so also are costs incurred in the general settlement of the succession, also reasonable fees for services of attorneys, necessary for that purpose. Funeral expenses and expenses of last illness, are also chargeable to the succession.

An executor who is also universal legatee, who takes possession *ex parte* of all the property of the succession, and deals with it as his own with knowledge of the existence of a minor forced heir, is chargeable with the rent of the portion of the succession which vested legally in the minor forced heir. Being charged with rent and accorded revenues, the expenses incurred in the cultivation and administration of the plantation, including overseer's wages and ordinary incidental repairing of buildings and clearing of land, are at his cost. The rights and obligations of the parties relative to permanent improvements placed upon the property by the universal legatee, having to be considered from the standpoint of the parties being undivided joint owners of the plantation, these rights and obligations should properly be determined in an action of partition not on opposition to the account.

McNeely, Tutrix, vs. McNeely, Executor, and Succession.

APPEAL from the Fourth Judicial District Court for the Parish of Grant. *Machen, J.*

W. C. Roberts and *R. E. Milling* for Executor, Appellant.

R. J. Bowman, J. G. White & Thornton and *J. P. Hadnot* for Opponent, Appellant.

Argued and submitted December 16, 1897.
Opinion handed down January 24, 1898.
Rehearing refused March 7, 1898.

STATEMENT OF THE CASE.

On November 7, 1893, Mary L. McNeely in her capacity as tutrix of her minor child, Ross B. McNeely, filed a petition in the District Court for Grant parish, in which she alleged that the said child was born on the 10th of April, 1890, being the issue of her marriage with Ludlow McNeely; that her husband died on or about the 29th of April, 1893, leaving no other descendants. That on or about the 12th of May, 1893, John H. McNeely petitioned said court to probate and order to be executed a document purporting to be the last will and testament of her said husband by which all of his property was bequeathed to said John H. McNeely. That said will was probated and ordered to be executed and the said John H. McNeely qualified as testamentary executor. That although said will did not give the said John H. McNeely the seizin of the estate of the testator, nor was there any decree giving or decreeing him to have the seizin of said estate, he had taken possession of said estate consisting of a large plantation and improvements thereon yielding a revenue annually of about twenty-five hundred dollars and also of town lots in the town of Colfax and of personal property yielding a further revenue of four or five hundred dollars. That the entire property of her husband and disposed of by the said last will was at his death and was still worth twenty thousand dollars.

That said will was in form a nuncupative will by private act and was an absolute nullity for want of form as prescribed by the Civil

Code for the validity of a nuncupative will by private act. That her husband could not dispose of his entire property to the detriment of said minor, who, even if said last will was valid, was entitled to one-third of said estate, together with *one-third of the rents and revenues from the death of his father* and during the time the said estate was administered by said McNeely as executor.

In view of the premises she prayed that the said J. H. McNeely be cited in his said capacity of executor and as legatee to answer her demand that said will be decreed to be null and void, and that in her said capacity she do recover of the said McNeely, in his capacity of executor and as legatee, the entire property left by Ludlow McNeely at his death, with the revenues since his death. That in the event that the will be maintained as valid that its disposition be reduced to the disposable portion, and that in her said capacity she recover of the said McNeely one-third of the property left by the said Ludlow McNeely, together with *one-third of its rents and revenues since his death.*

On the 4th of June, 1894, defendant appeared in both capacities to except and contingently to answer plaintiff's demand.

By way of exception he contested the right of the plaintiff to bring the action, inasmuch as he denied and contested the fact that the child of whom she claimed to be tutrix was the child of Ludlow McNeely, but the offspring of an adulterous connection between the plaintiff and some person other than her husband; that he was illegitimate and had no rights in, to or upon the property of the estate.

Answering contingently, defendant, after pleading the general issue, admitted that the last will and testament of Ludlow McNeely had been probated and himself appointed executor under it. He averred that the will probated was the last will and testament of the deceased, and that the same was written and executed according to law and was a valid will. That the probate proceedings contained a judgment confirming respondent as testamentary executor and giving him seizin and possession of the estate left by the deceased, and that he had taken possession as universal legatee under said judgment and will. That he had, since the death of Ludlow McNeely and since the probate of the will, caused valuable improvements to be placed on said property, as described in his pleadings; that he had also partially paid a mortgage resting on part of the property bequeathed, and had made repairs and clearings on the property, as

set forth in his answer. He averred that he would be entitled to recover the entire amount of said expenditures and improvements in case the minor recovered the entire property, or one-third thereof should he recover one-third of the property, he being a possessor in good faith under said will and judgment.

He prayed that plaintiff's suit be rejected and dismissed; that the minor child be decreed illegitimate and without right to inherit it from the deceased, and that he as universal legatee be quieted in the ownership and possession of said property bequeathed to him by the will; that it be decreed valid. That in case the plaintiff should recover the entire estate claimed, that defendant have judgment in reconvention for the sum of five thousand seven hundred and sixty-five dollars, or if plaintiff should recover one-third of the estate that defendant have judgment for one-third of said amount with the right of detention of the property until said amounts be paid him.

Motions were made to strike out the exceptions, as the issue therein raised could, if raised at all, be only raised in a direct action and contradictorily with a tutor *ad hoc* to represent the minor. This motion was overruled and a motion to refer the motion to the merits was sustained. The case went to trial and resulted in the District Court in a judgment in favor of the defendant in both of the capacities in which he was sued, decreeing that the minor was neither the child nor heir of Ludlow McNeely and rejecting plaintiff's demand at his costs. The plaintiff appealed to the Supreme Court, which rendered a judgment to be found reported in the 47th An. 1825 (McNeely vs. McNeely).

By that judgment it was decreed that the judgment of the lower court be avoided, annulled and reversed, that Ross B. McNeely was the legitimate child of Ludlow McNeely and his wife, M. L. McNeely, and as such entitled to the *legitime* of one-third of the property left by said deceased; that the will of the deceased in favor of his brother, J. H. McNeely, be reduced to the disposable portion, two-thirds of said property; that all questions of rents and revenues, improvements and debts paid and to be paid be reserved for further proceedings in the lower court, and that defendant pay costs.

Upon the return of the cause to the District Court plaintiff on the 6th of August, 1895, obtained an order from the court that defendant file an account as testamentary executor. In obedience thereto, the

executor presented, first, a provisional account, then a correction as to certain items, and finally, an additional or supplemental account.

To these the tutrix filed several oppositions covering a general opposition to each and all of the items of the account, followed by minutely detailed oppositions as to special items. The court sustained the account to a certain extent, but also partially sustained the oppositions, and homologated the account as so amended. Both parties appealed.

The following admissions were spread upon the record: "That the rent for the entire estate of L. McNeely, deceased, for the years 1894, 1895 and 1896 would be the sum of fifteen hundred dollars a year; that the mortgage claims and taxes paid for said years were not disputed by opponent. That proof would show that the fence erected between the estate of McNeely and the Citizens Bank property being a necessary expense of the estate, was worth two hundred and fifty dollars.

"That the sum of fifteen hundred dollars a year, as stated, was a correct rental for said years above all improvements, except the fence just mentioned, value as stated two hundred and fifty dollars. That the proof would show that the old gin house claimed by opponent to be on the estate of McNeely was removed from said property before the death of McNeely, and, therefore no rent is due on said property.

"That the proof would show that the following items on the account of 1893 are the property of J. H. McNeely: The gin house, two gin stands, one boiler and engine, one steam cotton press and fixtures and one grist mill, and, therefore, no rent is claimed on the gin and its appurtenances by opponent.

"That the proof would show that a proper rental value of the property of the estate for the year 1893 would be the sum of fifteen hundred dollars. This admission is made reserving to the executor all his rights to resist the claim for rent for said year, as set forth in his account, and does not affect the executor's right to claim a charge for other improvements placed on the property during the year 1893, as appears by his account.

"It is understood that the admissions in the record as to what the proof would show with reference to the items made in that connection does not affect the right of the executor to press his claim for court costs, attorney's fees and expenses of last illness, as appears by his account, nor the right of the opponent to oppose them.

further understood that in consequence of the admissions in
d with reference to the gin house and the property that the
insurance and taxes on said property is withdrawn.
admitted that the costs in the case of M. J. McNeely, Tutrix,
McNeely, Executor, amounting to $465.65, were paid by
ntor."

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inion of the court was delivered by

LLS, C. J. The tutrix of the minor, Ross B. McNeely,
this court that J. H. McNeely was ever put in posses-
the estate of L. McNeely. He avers that "no such judg-
s ever rendered; that the clerk probated the will, con-
he said McNeely as testamentary executor and granted
ers of executorship, and at the same time made the fol-
order: 'That J. H. McNeely be recognized and confirmed
mentary executor of his brother, Ludlow McNeely, he hav-
n the oath required by law as such with power to execute
l according to the terms and tenor thereof and that let-
amentary issue to said J. H. McNeely according to law
he be recognized as testamentary heir and universal legatee
rill, with the right of seizin and possession of the estate
g to the terms of said will according to law. That the
of the oath as executor and the letters of executorship
the pretence that the said McNeely was put in possession
x parte and contradictory order of the clerk of court, and
l fact is negatived by his still acting as executor and filing
nt as executor. That the clerk was without authority to
ny judgment putting a legatee as heir in possession, and no
gment can be rendered or could have been rendered except
District Court, in open court, and by suit in the ordinary form
on and citation, contradictorily with the heir or attorney of
eirs, and if said *ex parte* order pretends to put the said McNeely
sion it is an absolute nullity on its face, and the said McNeely
possessor as owner in good faith, but is in possession as execu-
ng C. P. 1001, Secs. 1, 2 and 3; The State vs. Judge of the
Probates, 4 Rob. 42; Succession of Lampton, 35 An. 419).
minor and forced heir was seized of right of all the effects
ccession, and he was entitled to the enjoyment of the fruits
enues thereof from the date of the death of the testator; that

said fruits and revenues do not belong to the succession, but are the property of the minor. That the forced heir is a creditor of the succession to the extent of his *legitime*, and is in no way responsible for costs and attorney's fees of the suit of McNeely, Tutrix, vs. McNeely, Executor, *et al.*, and those of the succession settlement, they being chargeable to the legatee; that the executor was without authority to cultivate and make crops upon the plantation, or put up improvements, or make repairs thereon for account of the succession; that he did not, in fact, do so, as he cultivated the plantation for his own account, and he alone is chargeable with the expenses of administration—the clearing and repairs upon the place and the improvements put up. That the executor, being also a legatee, was entitled to no commissions as such.

On the 12th of May, 1893, J. H. McNeely filed in the District Court a petition, in which he alleged the death of L. McNeely; that he had left a last will and testament, in which he was constituted universal legatee and appointed testamentary executor; that he had the right to have said will probated and himself put in possession as testamentary executor on qualifying as well as to be recognized as universal legatee and put in possession of the estate. The prayer of this petition was in consonance with its allegations. Annexed to this petition was petitioner's affidavit to the fact of the absence of the District Judge from the parish of Grant.

On the same day the clerk of the District Court probated the will according to its terms and tenor, ordered its execution, and recognized and confirmed petitioner as testamentary executor, and decreed that letters issue to him as such, according to law. It further recognized petitioner as universal legatee, with right of seizin and possession, according to the terms of the said will.

The probate of the will and the order directing its execution has never been contested, though a direct action was brought to annul the will itself, the action being directed against the testamentary executor who had confirmed under the will and its probate and against the same party individually as universal legatee. In this suit the latter was averred to be in possession of the property and fruits and revenues were demanded of him. We do not understand that the claim is made now that the clerk was without authority to probate the will itself and to confirm the executor, but that a proceeding to place heirs in possession is a proceeding which has to be

conducted and disposed of in open court contradictorily with the heirs or an attorney of absent heirs, and that the order for possession can only be signed by the District Judge.

We need not inquire whether, under the laws as they now stand, a clerk of court would be authorized to place the heirs of an intestate succession in possession upon their petition to be so placed, for that is not the case before us. The case at bar is that of an application made for the probate of a will—the granting of an order directing its execution and confirming the appointment of the testamentary executor named therein.

The authority to grant these particular orders is conferred upon clerks of court throughout the State outside of the city of New Orleans by Acts Nos. 106 of 1880 and 43 of 1882. The constitutionality of those acts has not been called in question. We are of the opinion that the will was legally probated and ordered executed and the testamentary executor legally appointed and confirmed.

Being so confirmed we think under the circumstances of this case he was legally authorized to take charge of the property of the succession and liquidate its affairs. The testator was directly authorized by law to appoint a testamentary executor. C. C. 1658, 1659. It is true that in this case he did not grant him the seizin of the estate, but the situation was such as to require that some one take charge of the administration of the estate and its property. Had Ross B. McNeely been of age and had he accepted the succession of his father purely and simply a question might have arisen as to the rights and powers of the testamentary executor appointed by the will. He was, however, not only a minor incapable of accepting the succession otherwise than under benefit of inventory, but no one on his behalf appeared to claim or take charge of the administration of the succession. There was no necessity for parties interested in the succession to call upon the tutrix to declare whether the heir accepted or not, and if he accepted, to declare whether he did so unconditionally or not—the law itself settled that fact. The situation under and through the law was precisely that which would have resulted had creditors or legatees called upon a major heir to declare his status in respect to the succession, and had he declared that he accepted under benefit of inventory. Under such conditions the appointment of a succession representative became at once called for by the law (C. C. 1058), if parties interested should demand one. This representative in the case

of an intestate succession would have been either an administrator or a curator. In the case of a testamentary succession it would have been either the testamentary executor appointed by the will, or an administrator appointed by the court, if the legal heirs under certain conditions should exact that the latter character of representative should be appointed.

We think that the creditors and legatees of a succession accepted under benefit of inventory are at liberty, if the beneficiary heir does not come forward within the legal delays to claim the administration of the succession for himself, to have the succession placed under administration in other hands (C. C., 1034, 1035, 1036, 1041, 1047, 1058, 1095, 1101).

The powers, duties and obligations of testamentary executors in Louisiana, under existing statutes, run closely toward those of curators and administrators. Parties in interest have the right to exact security at their hands for their faithful performance of their duties (C. C. 1670, 1673; Heirs of McGehee vs. McGehee, 41 An. 660).

Holding as we do that J. H. McNeely was legally appointed testamentary executor of the succession of his brother charged under the circumstances of this case with the administration of its property and its affairs we now direct our attention to the consequences of that fact upon the rights of the parties to this litigation.

Counsel of the minor cites Art. 1607 of the Civil Code, which declares that: "When at the death of the testator there are heirs to whom a certain proportion of the property is reserved by law these heirs are seized of right by his death of all the effects of the succession and the universal legatee is bound to demand of them the delivery of the effects included in the testament," as establishing beyond question that it was the duty of J. H. McNeely to have made a demand upon the tutrix for the delivery of the portion left legally to him by the will, and that he not having done so the entire property should be held in law as to have been constantly in the actual possession of the minor up to the present time in so far as a right to fruits and revenues is concerned.

The article in question, whatever may be its scope or interpretation, was clearly not intended to apply to a case where a succession is accepted under benefit of inventory, and where its property has never been placed in the actual possession of such heir, but has, on

the contrary, been legally placed under the administration and in the actual possession of a testamentary executor who is himself the universal legatee of the deceased, and this is the case at bar (Bird vs. Jones, 5 An. 643).

We are of the opinion that when the universal legatee is himself the testamentary executor appointed by the will and on his petition to the court the will has been probated and ordered executed according to its tenor and he has qualified and taken into his actual possession the property of the succession and assumed the liquidation of the estate, there is no basis whatever for the contention that the fruits and revenues of the thing or objects legally bequeathed to the universal legatee belong to the heir.

Even in the special cases to which Art. 1607 may be held to refer the next article provides that, "nevertheless, in those cases the universal legatee will have the enjoyment of the effects included in the testament from the day of the decease if the demand for the delivery has been made within a year from that period; if not, enjoyment will only commence from the day of the judicial demand or from the day on which the delivery has been agreed upon." The law did not contemplate that the universal legatee in the actual possession of the objects bequeathed to him under the will should make a demand for delivery from one not in possession. We think a judicial demand made by the universal legatee for the probate of the will for an order for its execution and the placing of himself in possession under the will is a sufficient demand for delivery of his legacy to cut off the possibility of the fruits and revenues of the thing legally bequeathed to him thereafter enuring to the benefit of the legal heir.

Article 1628 of the Civil Code declares that the testamentary executor who has the seizin of the effects of the succession and who is at the same time a legatee is not bound to demand the delivery of his legacy; that he can retain it in his possession subject to the obligation mentioned in Art. 1627 of being bound to give it up for the purpose of contributing to the payment of debts in case it be liable for any. It is true that Art. 1628 has direct reference to the case of a testamentary executor who is a particular legatee, but we think the provisions of that article fairly extend to the case of a universal legatee situated as is the universal legatee under the circumstances of this case, in their bearing upon the question of the

fruits and revenues of the thing legally bequeathed to the universal legatee.

What we have said does not refer to the question of the fruits and revenues of that portion of the thing which the universal legatee may have taken possession of which did not and could not legally belong to him or pass to him under the will, but which remained in and belonged to the heir. That presents a different question. We simply say that the fruits and revenues of that portion of the property of the succession of L. McNeely which was legally bequeathed (the will to the extent of two-thirds having been sustained) to J. H. McNeely, and which went originally into his possession as testamentary executor, belonged to the universal legatee. We think he had the right *quoad* the plaintiff to consider that portion as his own, to so deal with it, subject to such rights on the part of the heir and such liability on the part of the legatee as would result from the ownership of the heir of an undivided interest in that property under the circumstances of this case. We leave out of view in this connection any discussion as to what the situation would be were rights of creditors involved. The question before us is freed from that complication. What those rights and liabilities were in respect to the plaintiff, we will hereafter have to ascertain and declare.

We may say at once that the taking possession by the executor of the property mentioned has not had as its effect the discharge of the executor. He is still executor and his account is properly before us for examination. Succession of Sterry, 38 An. 854; Succession of Frances, 49 An. 1732. The first question with reference to that account which we will take up is that of the costs and attorney's fees in the matter of the suit of McNeeley vs. McNeeley, 47 An. 1321, and those incurred in the general settlement of the estate.

Counsel claim that a forced heir is a "creditor" to the amount of his *legitime* of one-third of the estate as it existed at the date of the death of the testator, and that this amount he is entitled to take as of that date, not reduced by succession costs and charges and attorney's fees.

Counsels claim that the minor's position is that of a creditor is inconsistent with those advanced on his behalf in other portions of their argument. It is true, that forced heirs have sometimes, in some respects, been assimilated to creditors, but it is very clear that that is not their legal *status*.

McNeely, Tutrix, vs. McNeely, Executor, and Succession.

When a person dies in Louisiana, leaving descendants, they become at the instant of his death his heirs. Of this *status* they can not be deprived by their ancestor, unless through legal disinherison for legal cause. In the absence of testamentary dispositions, the law by its own force determines the extent of their respective portions, but it allows the ancestor within limits fixed and announced by itself to modify those proportions, subjecting any modification made by him in excess of this limit to successful reduction by the heir to within those permitted. This power of the ancestor to thus alter by the exercise of his own will the extent of the rights of his descendants in his succession does not result in transforming their *status* from that of heirs to creditors. Of that *status* they can not be deprived by the act of their ancestor. It is by reason of that fact and of their forced legal right to be maintained in their claims as heirs to the portion which as such the law has reserved to them if they elect to claim the same that they are designated as forced heirs. It is only under their *status* as heirs that they can claim this proportion known as the *legitime*. The seizin which they are declared in Art. 1607 of the Civil Code to have, is not peculiarly and specially given to them as "forced heirs," but is given to them by law as "heirs" of their father. The seizin is not "granted" to them through that article. It is simply recognized therein in its bearings and consequences upon the special condition of affairs to which that article refers. The articles of the Code in describing and fixing the rights and obligations of these forced heirs evidently contemplate cases where the reserve should have been trenched upon either by the donations *inter vivos* or the testamentary dispositions of the ancestor, and where they are forced to fall back for their protection upon their legal right reserved to them by law, hence it is that they are careful to place themselves before the court exclusively as heirs occupying the position assigned them by law as such. What is that position? It is certainly not that claimed by the tutor of holding the full amount of the proportion allowed them by the law entirely regardless of the debts of the deceased and entirely regardless of legal costs and attorney's fees properly and legally chargeable as such to the entire estate for the purpose of its general settlement out of the property belonging to the succession at the date of its opening. The forced heir may, by claiming as such, as an heir under benefit of inventory, escape direct personal liability for the debts and charges

of the succession, but in fixing the reserve, the law has not ordered it to be established regardless of payment of the succession debts and charges out of the property belonging to the succession at its opening, though certain charges are excluded by express provision of law, as, for instance, the commissions of executors as declared in Art. 1687 of the Civil Code and the costs of delivery as declared in Art. 1682.

The question of costs and attorney's fees is complicated in this litigation by the particular manner in which plaintiff brought his suit and that in which it was defended. The action was primarily one to have declared null and void in its entirety the will of Ludlow McNeely, coupled with a demand as resulting from such nullity for the ownership and possession of the entire property with its fruits and revenues from the date of his death, and contingently and subsidiarily for the reduction of the legacy to the disposable portion, with a contingent demand for the ownership and possession of an undivided one-third of the property and one-third of its revenues from the same date.

The defence on the part of the executor was an insistence upon the validity of the will as written, coupled with a denial that the plaintiff was the legitimate child and heir of the deceased. This denial struck at his right either to attack the will as a whole, or to ask for a reduction of the legacy to the disposable portion.

Plaintiff's demand in so far as it attacked the entire will was not in aid of his *legitime* or reserve, but as a general legal heir seeking to be decreed to be the sole heir in the succession. He was cast in the action to the extent that he was proceeding upon that line of attack, and the executor was justified on that same line in the defence he made upon that special issue. Had the suit contained no other issue and claimed no other than that particular relief, plaintiff would unquestionably have had the costs of the suit thrown upon him, and the executor would have been entitled to costs and reasonable attorney's fees (Succession of Hasley, 27 An. 589).

Dalloz and Verge, under Art. 1016, C. N. (our Art. 1634), under the No. 10, refers to a decision, the *syllabus* of which was to the effect that: "L'article 1016 qui porte que les frais de délivrance d'un legs ne peuvent jamais être pris sur la réserve ne met par obstacle a ce que ces frais soient compris dans la condemnation aux dépens contre le réservataire par le jugement qui a repoussé son action en nullité du testament."

We have seen that plaintiff's action contained a contingent demand in which he was successful for a reduction to the disposable portion of the legacy made in the will.

With reference to that portion of the case this court held that the attack upon the legitimacy and heirship of the plaintiff was totally unwarranted by the law. That the child though born after a separation from bed and board was born in wedlock and therefore had had his *status* as a legitimate child and heir irrevocably fixed by the fact that the father had not brought before his death and within the time fixed for such an action, an action "en desaveu" of the child. The executor was aware of the fact that no such action had been brought by the father. He had knowledge of the fact of the existence of the child, and that it had been born during marriage before the bonds of matrimony had been finally broken, and he must be held in law to have known that the special defence he set up was unauthorized and unwarranted.

Had the plaintiff limited his action to a claim for a reduction of the legacy made in the will to the disposable portion, and had he been met with the defence that he was not the child and heir of the deceased, judgment would have been rendered and should have been rendered in his favor for costs. We do not think, under the circumstances of this case, opponent can be made responsible, directly or indirectly, for any portion of the costs incurred, in the attempt to make that defence good, nor for the fees of the attorneys employed for that purpose. The error of law into which the testamentary executor and universal legatee fell as to his right to set up this special defence, and his belief that any estoppel which might have struck the father on this subject did not reach to him, did not have the effect of authorizing the executor to charge up those particular costs and attorney's fees to the succession. He must sustain them himself. The evidence shows that the attorneys in the suit of McNeely, Tutrix, vs. J. H. McNeely, stipulated for a fee of two hundred and fifty dollars for contesting the legitimacy and heirship of opponent. That amount is included in the sum of twelve hundred and fifty dollars, which figures on the account as an item for attorney's fees and should be struck out. The costs incurred in the case of McNeely, tutrix, must be separated; those incurred in attempting to defeat the heirship of opponent should be changed entirely to J. H. McNeely individually; the balance is a proper general charge

against the succession. The District Court should make the separation and apportionment of these costs.

We are of the opinion that the executor is entitled to charge up, as a charge against the succession, the costs incurred in the general settlement of the succession, as also reasonable fees for services of attorneys rendered necessary for that purpose (C. C. 1682; Succession of Lizzie Dean, 33 An. 869). Funeral expenses and expenses of last illness are also chargeable to the succession (33 An. 869). The testamentary executor being also a legatee is not entitled to commissions (C. C. 1689).

The executor is entitled to charge up the amounts paid by him on the mortgage notes held against the property and for the taxes paid by him on the property.

We next consider the claim made by the plaintiffs for fruits and revenues. His right to the same must be limited to a claim for fruits and revenues upon one undivided third of the property, that being the extent of his interest in the ownership of the property under our decision in the case of McNeely, Tutrix, vs. McNeely, Executor, 47 An. 1325. He claims that they are due from the date of the death of his father. We have already stated that J. H. McNeely must be held to have had *knowledge* of the existence of the plaintiff's claim, as the legitimate child of Ludlow McNeely, to one undivided third of his estate, and of the rightfulness of that claim. The effect of that knowledge was to make him, to the extent of his taking possession of that undivided third, a possessor in bad faith. He did not, though having this knowledge, make the minor a party in any way to the proceedings for the probating and execution of the will, and the course which he subsequently took in contesting to the bitter end the legitimacy and heirship of the child makes it certain that had plaintiff, through her tutrix, made any demand *upon him at that time* for joint possession of the property, it would have been peremptorily refused by the executor.

It is admitted that the rental of the property is worth *fifteen hundred dollars* per year over and above all improvements for the year 1893, and each succeeding year included in the executor's accounts. The account should be so framed as to charge the executor for the year 1893, and each succeeding year, at that rate as for rent, but these rents should be made to enure one-third to opponent, and two-thirds to the universal legatee. The right of the opponent as to

rents for years later than the period covered by the accounts should be and is reserved and left open.

The effect of placing J. H. McNeely in the attitude of a *quasi*-tenant, chargeable as for rent, is, while entitling him to the crops, to make him responsible himself for and to relieve opponent from any responsibility for the expenses incurred in the cultivation of and administration of the property as such (including overseer's wages) during the period of his holding the property under those conditions —this does not include permanent improvements upon the property, but does include the ordinary incidental repairing of buildings and clearing of land.

In respect to the permanent improvements placed by J. H. McNeely upon the property it must be borne in mind that when placed there by him he held an interest of two undivided thirds in the property—opponent holding the other undivided third interest. The rights and obligations of parties have to be considered in view of such being the relations between them. We understand the parties to say that they have come to an agreement in respect to the gin house, the two gin stands, the boiler and engine, the steam cotton press and fixtures and the grist mill, which are borne upon the account—that they are recognized by opponent as being the individual property of J. H. McNeely, and that he has the right to remove the same from the property. The District Court should so decree and give effect to this agreement.

We think the rights of J. H. McNeely, as resulting from permanent improvements placed by him on the property other than those covered by the admission referred to should be reserved for consideration and determination in an action of partition between opponent and himself. They are not passed on by us, but are reserved. We think that the amount chargeable to the succession for attorney's fees for the general settlement of the succession up to date, instead of being two thousand dollars as charged in the account, should be reduced to and it is hereby fixed at twelve hundred dollars.

We think we have passed upon all of the disputed items of the accounts now covered by the oppositions. It is possible we may not have done so, as matters have been presented to us, in some respects, in a very unsatisfactory, desultory manner. As some of these items need re-examination for decision, and as over a year has elapsed since the accounts were presented, we think the best course to

pursue will be to reverse the judgment appealed from and to set aside the accounts filed and remand the cause for the filing of a new account under and through which the rights of parties can be finally determined and fixed.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and the accounts filed by the executor are hereby set aside, and it is now ordered, adjudged and decreed that this cause be remanded to the District Court with orders to that court to order the testamentary executor to recast his account and make it conform to the views herein expressed and decided, and to render judgment on the rights and obligations of parties according to the same. Costs of appeal to be paid by the parties in the proportion of one-third and two-thirds, two-thirds by the universal legatees, and one-third by the opponent and heir.

No. 12,751.

SUCCESSION OF MRS. HELEN C. HALEY.

In fixing the value of fees due by a succession for professional services of physicians, the court is justified in taking into consideration the value of the succession.

The claim that from the moment more than one physician is called in and attends regularly upon a case, every visit made by every physician employed takes rank as a "consultation," can not be listened to. Succession of Duclos, 11 An. 407.

Prescription pleaded against a privilege or mortgage should not be permitted to be urged against the debt which the privilege or mortgage secures. The court should not extend the plea beyond its terms. C. C. 3463.

Upon an application by a natural mother residing in New York to be appointed tutrix of her minor child living here, it is the duty of the court to look after the good of the child rather than consider the feelings of the mother. Where it is convinced that it is for the interest and good of the latter that the child and its property should not be taken from the jurisdiction of the Louisiana courts and beyond their supervision, the application should not be granted.

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

Horace E. Upton and *Farrar, Jonas, Kruttschnitt & Gurley* for Anatole A. Ker, individually, as testamentary executor and applicant for appointment as testamentary tutor, Appellant.

Succession of Haley.

Albert Voorhies, *Henry Chiapella* and *W. J. Formento* for Drs. Formento, Matas, Larue and Mioton, Opponents, Appellees.

Samuel L. Gilmore, City Attorney, and *W. A. Sommerville*, Assistant City Attorney, for City of New Orleans, Opponent, Appellee.

Argued and submitted May 21, 1898.
Opinion handed down May 30, 1898.
Rehearing refused June 13, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. Several distinct matters are included in the appeal in this court under the above title, brought up in one and the same transcript.

The executor of the estate having filed a provisional account in which Dr. Formento was placed as a privileged creditor for seven hundred and fifty dollars for medical services rendered to the deceased, and Dr. Matas for two hundred and fifty dollars, and in which Drs. Larue and Mioton were entirely left out, the parties named filed opposition thereto, Dr. Formento claiming to be a creditor for three thousand two hundred and sixty dollars, Dr. Matas for five hundred dollars and Drs. Larue and Mioton each for one hundred dollars.

The executor having failed to recognize a claim advanced against the succesion by the city of New Orleans for city taxes on personal property for the years 1884 to 1895, inclusive, with interest, and also for certain taxes on real estate, the city filed an opposition to the account. Mrs. Jeannette Prescott, as natural tutrix of her child, Charles M. Taite (universal legatee of the deceased), opposed the claim for taxes, pleading the prescription of three years, in bar of the tax lien and privilege. She prayed that the demand for taxes be rejected. The District Court sustained the opposition of Dr. Formento, according him twenty-five hundred dollars, and that of Dr. Matas, according him three hundred and seventy-five dollars It ordered Drs. Larue and Mioton to be each placed on the account for seventy-five dollars. It sustained the opposition of the cfty of New Orleans for city taxes to the amount of the several tax bills sued upon, with interest as prayed for.

A new trial having been granted, the court amended its former judgment, reducing Dr. Formento's claim as a creditor to one thousand dollars and that of Dr. Matas to three hundred dollars, and according to Drs. Larue and Mioton twenty dollars each.

It recognized the city of New Orleans as a creditor, as per tax bills sued on for city taxes on real estate for the years 1893, 1894 and 1895, but decreed all the other taxes claimed barred by the prescription pleaded.

The executor appealed.

All of the opponents asked that judgment be amended. The city prayed that it be amended by recognizing it as an ordinary creditor for the taxes on movables, as shown by the tax bills on which it declared.

The District Judge, in assigning reasons for the modification of his original judgment, stated that he had not altered his mind as to the actual value of the services rendered by the different physicians, but that the succession was much smaller in value than he had believed it would be, and that that fact was a proper element for consideration in determining the amount of the fees which should be recognized; "that the property of the succession had depreciated, rents had ceased, and there was little left."

This court is not advised of the condition of the estate. The District Court was justified in fixing the fees, in taking into consideration the value of the succession, by the following decisions: Succession of Mager, 12 Rob. 418; Succession of Virgin, 18 An. 42; Succession of Linton, 21 An. 130; Czarnowski vs. Succession of Zeyer, 35 An. 798; Breaux, Fenner & Hall vs. Francke, 30 An. 336.

We do not think that we would be warranted in declaring error in the judgment appealed from in these particular respects.

We think it not amiss, however, to say, that we fully concur with the opinion of this court expressed in the Succession of Duclose, 11 An. 406, in reference to the legality of an extra charge for the visits of a physician, based simply upon the fact that more than one physician should have been called in, and should have regularly attended the patient.

We think the amendment asked for by the city of New Orleans should be made. The plea of prescription set up in the District Court was simply as to the lien and privilege by which the taxes on personal property stood secured. The court should not have

extended the plea beyond its terms (C. C. 3463). The judgment of the District Court in favor of the city of New Orleans is therefore hereby amended so as to recognize it as an ordinary creditor of the succession of Helen C. Haley for the amount of the taxes on personal property (as shown in the tax bills for such taxes declared on), with interest thereon as prayed for, and the executor is directed to pay the same as such in due course of administration; the judgment appealed from in favor of the city of New Orleans, against the said succession, is otherwise hereby affirmed. The judgments in favor of Dr. Felix Formento, Dr. Rudolph Matas, Dr. Felix A. Larue and Dr. Eugene J. Mioton against the said succession are hereby affirmed.

The second question involved in this matter is the correctness or incorrectness of the District Court in confirming Miss Jeannette Prescott as natural tutrix of the minor, Charles M. Taite. She was once before confirmed as such tutrix by that court, but on appeal to the Supreme Court the judgment was reversed and the order of appointment was set aside, as will be seen by reference to the report of the case in the 49th An. 710.

On the return of the cause, she made a second application for appointment and confirmation as natural tutrix of said minor. After hearing evidence, the District Court granted her prayer, and she was confirmed as such.

It is established by the evidence that the applicant is the natural mother of the child; that she was brought to the city of New Orleans about the year 1887 by the deceased, Mrs. Helen C. Haley, who then, and for many years thereafter, was keeping a house of ill fame in that city; that she was then about sixteen years of age; that while an occupant of this house she gave birth to the child referred to. About the year 1889 she returned to New York, where it appears she was the kept mistress of several different persons. When she returned to New York she left the child with Mrs. Haley, who had exclusive charge of him up to the time of her death, on the 23d day of June, 1895. Mrs. Haley left a last will and testament in which she constituted the child as her universal legatee and referred to him therein as her adopted child.

In this will she appointed Anatole A. Ker her testamentary executor and tutor of the child. Ker qualified as executor, but the succession not having been yet fully administered, he failed to qualify as tutor. Matters were in this situation when, on or about the 20th

day of April, 1897, Miss Jeannette Prescott appeared, applying, as mother of the child, to be appointed its natural tutrix. It was upon this application that she was by the *ex parte* order of the District Court, which this court, on appeal, set aside, confirmed as such tutrix.

In the reasons assigned by the District Judge for his recent action he refers to the very strong claims which a mother has to have possession and control over her child, and he expresses his conviction that the mother can, as matters stand, be safely entrusted with its care. Without entering into the details of the testimony in the case, we regret that we do not feel justified in affirming his judgment. There has not been on the part of the mother the interest in its welfare manifested which would indicate any great affection toward it. Through the long interval between her departure from New Orleans to the death of Mrs. Haley, we find no evidence of her having kept in touch with the child other than is shown in a single letter written in 1892, in which she refers to him. While no act of adoption has been produced, and doubtless none was passed, the mother seems to have entirely surrendered the child to Mrs. Haley, who cared for it as her own up to her death.

When Mrs. Haley died, she was supposed to have left a very considerable estate and it was only about fifteen months after the date of the opening of her succession that the mother seems to have been aroused to any interest in her son, who, in the meantime, had been placed by the executor, at the expense of the succession, in a school presided over by "sisters" of the Catholic church. The child is now under influences which the mother herself could not but commend, and where it is, it will unquestionably receive all possible care and attention. We recognize fully the claims of a mother to have the custody of her child, but we are not satisfied in this case that it would be to the latter's interest, or for its good, that it should be taken from this jurisdiction where the courts of this State could have no supervision over its future condition.

The mother is a resident of New York, and is now in that State. Everything points to an intention on her part to have the child sent to her. She seems, at the present time, to have a position as companion of a widow living in the city of New York, but we are not advised of her having any means of support outside of what pay she can receive from this source. What would become of her, in case she should lose this position, we do not know.

Relations of that character are apt to be broken at any moment. We are afraid that matters would drift back easily to where they were before, and we are not convinced that they have ever been as fully changed as the District Judge supposes. The remark made by Miss Prescott to the Mother Superior of the school where the child is, is calculated to excite grave suspicions on that subject, while she does not seem to have entirely disconnected herself from parties with whom she had formerly associatod in New Orleans. The changed mode of life upon which the District Court relies only dates back to a period after Mrs. Haley's death in 1895, when it became a matter of interest to avoid the appearance of wrong. It is to be hoped that the appearances testified to by the lady with whom she is now living, and others, are genuine and true, but one at least of the parties whose depositions are before us is referred to by herself, in her letter to Mrs. Haley in 1892, in terms having a tendency to very much weaken the force of what he has testified to. It is our duty to look after the good of the child, rather than the wishes or feelings of the mother. We wish we could more satisfactorily than we do, see the way clear to their both running in full accord in the same direction, but as matters are, we do not feel warranted in permitting the judgment of the District Court on this subject to stand.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment of the District Court appointing and confirming Miss Jeannette Prescott as natural tutrix of the minor, Charles M. Taite, be and the same is hereby annulled, avoided and reversed, and the appointment set aside.

No. 12,850.

A. M. Stewart vs. The Cattle Company et al.

An appeal lodged in the Supreme Court should be dismissed when it has been made to appear that the appeal bond furnished by appellant was set aside in the lower court for want of sufficient security, but with the right reserved to file a new bond within a fixed delay, and such reserved right was never exercised.

APPEAL from the Fifth Judicial District Court for the Parish of Ouachita. *Potts, J.*

Stubbs & Russell for Plaintiff, Appellant.

Hudson, Potts & Burnstein for Defendants, Appellees.

Submitted on the face of the papers May 31, 1898.
Opinion handed down June 13, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. This suit was instituted by the plaintiff, asking for the settlement of the business of a partnership alleged to exist between himself, R. B. Blanks, and John P. Parker, under the name of the Cattle Company. He prayed that an accounting be had under the direction of the court, and that he have judgment against his partners for the sum ascertained to be due him on such settlement.

The District Court, as a result of the accounting, rendered judgment in favor of each of the defendant partners (John P. Parker and R. B. Blanks) against plaintiff for the sum of ninety-seven dollars and forty-eight cents, with legal interest from the date of the judgment.

On plaintiff's petition he was granted a devolutive appeal, on furnishing bond, with proper security, in the sum of two hundred and fifty dollars.

Plaintiff furnished a bond for the amount named, with securities, on the 25th of April, 1898.

On the 11th of May, 1898, on motion of the defendants, Parker and Blanks, the court ruled the plaintiff to show cause why the bond furnished should not be rejected and set aside for want of sufficient security, movers alleging that the sureties upon the bond were insolvent. Plaintiff answered the rule, averring the solvency and sufficiency of the sureties.

The court rendered judgment upon the rule, setting aside the appeal bond on account of the insolvency of the sureties, but granting plaintiff until the 25th of May, 1898, to give a solvent security on said bond, or an additional good and sufficient appeal bond.

The transcript of appeal having been lodged in the Supreme Court, the appellees, annexing to their motion the proceedings and judgment of the District Court in the matter of the rule to set aside the appeal bond furnished by the appellant, moved to dismiss the appeal on the grounds:

1. That appellant's bond for appeal had been set aside, because of the insolvency of the sureties thereon, by the lower court.

2. That appellants had failed and refused to execute a new appea bond, or furnish another and solvent surety upon said appeal bond, although accorded an opportunity to do so.

3. Because there is now no appeal bond in this cause.

For the reasons assigned in the motion to dismiss, which are sustained by the evidence, the appeal taken in this case is hereby dismissed.

No. 12,857.

STATE OF LOUISIANA VS. JUSTIN CANCIENNE.

50 847
50 1324
51 1110
51 1113
51 1118
50 847
112 284
113 727
50 847
117 872

Defendant indicted for the murder of his wife asked the following charge:

"If the jury find from the evidence that the accused discovered his wife in such a position with Delatte as to convince any reasonable man that they were in the act of adultery, and that he was so incensed and outraged by the sight that he lost all control of his reason, and acting under the overpowering influence produced by the sight of his shame and humiliation, he then and there drew his pistol and fired, and after his pistol was empty, he immediately drew a razor and inflicted a wound upon his wife, from which she died, the accused is not responsible for his acts, and the jury must acquit"

The court correctly refused this charge, which asked, under the facts stated, not a reduction of the crime from murder to manslaughter, but a "justification" of the husband's acts entitling him to an "acquittal." A husband who, detecting his wife at his own home, in the act of adultery, kills her on the spot, provoked by the wrong, though not guilty of "murder," does not stand "justified" in his act. The homicide is "manslaughter."

Where a husband, on entering his home and finding his wife in the act of adultery, shoots at the wife's paramour, or at her, or at both indiscriminately, whereupon, the wife, under the evidence, seizes and holds her husband by the arm, informing the paramour that she had done so, and calling on him to come and they would kill him, the court should permit the husband to introduce testimony as to the relative strength of his wife and himself in order to lay the foundation for a reasonable belief on his part that his life was placed in danger by her act, and for the purpose of justifying as in "self defence" his cutting her to detach her hold. The fact that the husband did not stand "justified" in his original act of shooting at the wife and her paramour, did not cut him off under the circumstances stated from invoking the doctrine of "self-defence," when in one of the after phases of the difficulty his life became endangered by the act of the wife. The doctrine of "aggressorship" in respect generally to that of "self-defence" should be relaxed in a case of this character.

When a party seeks to have a principle of law applied in a special charge to the jury, he must present such a statement of facts, as a predicate, as would make the principle of law invoked legally applicable under the evidence to the particular case.

APPEAL from the Eighteenth Judicial District Court for the Parish of Lafourche. *Caillouet, J.*

M. J. Cunningham, Attorney General, and *L. C. Moise*, District Attorney, for Plaintiff, Appellee.

Howell & Martin and *Clay Knobloch & Son* for Defendant, Appellant.

Submitted on briefs June 13, 1898.

Opinion handed down June 25, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant, indicted for the murder of his wife, was found guilty of manslaughter, and sentenced to imprisonment in the penitentiary for eighteen months.

Third Bill.—In a third bill of exceptions, defendant recites that his counsel offered to prove on cross-examination of Dora Putnam, a witness for the State, that the defendant and his wife had had a struggle begun by her, the wife, in which she, prior to any aggression or hostile demonstration made against her, had attempted to disarm defendant so as to protect Delatte, who, the evidence showed, had been caught by defendant in defendant's bedroom near defendant's wife, with his (Delatte's) pants unbuttoned and suspenders down, and that it was only after said struggle begun by the wife that he, defendant, cut her with a razor, and thereupon counsel attempted to prove by Dora Putnam that the deceased was much stronger physically than he was, but he was not permitted to make the proof under objections made by the State and sustained by the court.

The court, in reference to this matter, says that it had stated the status of the case on this point in the bill of exceptions taken to the court's refusal to admit the testimony of the witness Delatte on the same point, and the reasons therein assigned for the court's refusal it reiterated with the additional statement that the court did not refuse to allow the witness Putnam to testify as to the struggle or tussle between the defendant and his wife, but on the contrary allowed her evidence on this score to go before the jury, as counsel practically admitted in the statement of facts referred to and annexed to another bill taken on the trial in the presence of accused and his counsel; that the court did, however, refuse to permit this witness to testify to the superior strength of the wife for the reasons

stated in other bills and reiterated, viz.: That a full view of the case showed the accused to have been the aggressor in the first instance against the witness Delatte, who was in the room with his wife, or against both indiscriminately, and that whatever struggle ensued between him and deceased was but an incident of his original act of aggression, from which he had not desisted in good faith, and for the further reason that at the time of the struggle for the pistol, the firing by the deceased had stopped and the *post-mortem* examination showed that two bullets had entered the deceased's body.

Fourth Bill.—In a fourth bill of exceptions it is recited that after evidence had been offered which defendant's counsel fully believed had abundantly shown that as between defendant and his wife, the wife in the struggle between them which led to the killing was the aggressor, and when counsel were proceeding to prove that the wife was much more powerful than the husband on the State's objection that the defence had not laid the proper foundation for the introduction of proof as to the relative strength of the wife and husband.

Defendant was not permitted to make such proof by reason of the court sustaining the objections made. That thereupon counsel reserved bill of exceptions and asked the court to order that all the evidence just taken on the question as to who was the first aggressor to be taken down in writing, so as to annex said evidence to said bill of exceptions under the provisions of Act No. 113 of 1896, but that the court ruled that said act did not provide for the taking down of evidence, but simply provided for a statement of facts to be taken down, to which ruling of the court defendant reserved a bill of exceptions.

The addendum of the court to this bill states that the court caused a statement of facts upon which the ruling was made to be then and there taken by the clerk of the court in the presence of the accused and his counsel, and before proceeding any further with the trial, and that the court annexed said statement to the bill of exceptions. The court stated that the testimony given in the statement of facts was in substance that which was given by the witness, Dora Putnam, at the time at issue, and was taken down by the clerk as dictated by the judge in the presence of the jury, the accused and his counsel and the witness on the stand. That the testimony of the witness, Dora Putnam, was the only testimony which was sought to be reduced to writing, and in passing on this issue as to whether a

sufficient foundation had been laid to introduce the proof of superior strength, the court had necessarily to consider the testimony of witnesses preceding her as well as hers.

The statement of fact referred to, after having recited that counsel for defendant had elicited, on the cross-examination of Dora Putnam, a witness on the stand in behalf of the prosecution, that the accused had shot at Fernand Delatte, who was found in the room with his wife, whereupon the wife had stood between Delatte and the accused in the attitude of protecting Delatte; that she had attempted shoving defendant aside, whereupon a tussle ensued between the husband and wife; declared that counsel thereupon proposed to prove that the wife was much more powerful than the husband, when the District Attorney objected to such evidence and the court sustained the objection. That the objection was sustained for the reason that, in the opinion of the court, the evidence produced on the trial by the witness on the stand and a prior witness satisfied the court that the accused was the origiaal aggressor, and there was no evidence to show that he had desisted from the fight in gocd faith; that the accused was the original aggressor as against Fernand Delatte, who was with his wife in the room when the whole difficulty began. That the court considered the tussle between the accused and his wife was a part and incident of the whole difficulty.

Sixth Bill.—The sixth bill was taken to the refusal of the court to give the following requested special charge to the jury:

"If the jury find from the evidence that the accused had good reason to believe that his life was in danger, or that he was in great danger of serious bodily harm, he had a right to use such force as might have been necessary to protect his life or save himself from great bodily harm, even though to accomplish this it were necessary to slay his wife."

Counsel recites in the bill that the charge was asked under the following condition of the evidence:

"That there was a scuffle between the husband and the wife—that the wife had grabbed the hand in which the husband had held his pistol with which he had just fired at Delatte, the party whom he found with his wife in her bedroom with his pants unbuttoned, and that the wife while holding the pistol which accused held in his hand called out 'Come, Fernand I have got him—he can't hurt you—we will kill him.'"

The court in its statement annexed to this bill says that the evidence was not fully stated by counsel. There was evidence as stated by counsel, but that was not the whole evidence on the point.

The evidence tended to show that when the accused entered the room he surprised Delatte and his (accused's) wife in a compromising attitude (the accused testifying as a witness that he caught them in the very act of adultery)—that accused fired at Delatte (the first shot), that three of four shots were fired according to some witnesses, and one or two shots according to others—accused as a witness being unable to say how many shots were fired. That Delatte was shot through the arm and the deceased received two bullets in the breast, the accused being the only one who did the shooting.

That the shooting took place in a very small room in which the accused surprised his wife and Delatte—both being in the same room during the shooting.

That accused as a witness on the stand declared that his wife caught his arm and the pistol which he held in his hand, and that after she had so grabbed it, she called out: "Come, Fernand, I have got him—he can't hurt you; we will kill him." That he then pulled out a razor and cut the deceased, that he did not know how many times, or if he cut her more than once. The court deduced from the testimony of the husband, that the wife had caught his arm after the shots had been fired, and that the struggle between the husband and wife was for possession of the pistol.

The court says that the only witness who testified to the wife's calling out "Come, Fernand, I have got him; he can't hurt you; we will kill him," was the husband himself. The court said the testimony showed that the wife was cut three times by the razor—a gash in the abdomen, a cut on the wrist or hand, and her throat cut from ear to ear, severing the windpipe. That the witness Dora Putnam testified that the throat had been cut back of the house near a cistern, the deceased having run out of the house and having been pursued by the husband, who overtook her and cut her throat there; but that in justice to the accused, it should be stated that there was some evidence before the jury tending to impeach this witness.

That the court concluded from defendant's own version of the case that there was no element of self-defence in it, and no reason

to charge as to self-defence, even if the requested charge had been good law. That if the court correctly apprehended the law, the accused was not justified in shooting Delatte under the facts of this case; if not justified he was about to commit a felony on him and it was not an assault on the part of the deceased in trying to prevent him from perpetrating his design, which would authorize the accused to resort to it in self-defence.

That according to accused's own testimony, the deceased grabbed his arm and pistol after he had ceased firing (he could not tell or remember how many times he had fired), and at that time two of his bullets had taken effect in the body of the deceased (whether fired at her or at Delatte, making no difference), and the accused not having desisted from the fray in good faith at the time the struggle with his wife commenced, he could not claim to have been acting in self-defence.

Seventh Bill.—The seventh bill was taken to the refusal of the court to give to the jury the following requested special charge:

"If the jury find from the evidence that the accused discovered his wife in such a position with Fernand Delatte as to convince any reasonable man that they were in the act of adultery, and that he was so incensed and outraged by the sight that he lost all control of his reason, and acting under the overpowering influence produced by the sight of his shame and humiliation, he then and there drew his pistol and fired, and after his pistol was empty he immediately drew a razor and inflicted a wound upon his wife from which she died, the accused is not responsible for his acts and the jury must acquit."

Counsel recites in the bill of exceptions that the charge was request under the following condition of the evidence:

That evidence had been adduced showing that "the husband came upon his wife and one Fernand Delatte sitting on the bed together in his bedroom very close to each other, with Delatte's pants unbuttoned and Delatte playing with his wife at the time or just before the husband entered into the room "playing a play [as expressed by the witness Delatte on cross-examination] different from any he had ever played with the wife in the presence of the husband. That the room was closed at the time of the entrance of the husband, who opened and came through the back door, the wife and Delatte being alone in the room."

The court stated it refused the charge, because, in its opinion, it was not good law. That it had already charged the jury as to the law applicable to homicide upon the detection in adultery of a wife and her killing by the husband on such discovery and no exception was taken to such charge, except such as might be deemed taken inferentially by the request for the special charge, which was refused.

OPINION.

The immediate and direct cause of the death of appellant's wife was the razor cut across the throat. Whether the gunshot wounds were themselves of a character to have proved fatal does not appear. Defendant was indicted for and on trial for "murder." The last special charge (referred to in the seventh bill of exceptions) asked not for a reduction of the crime to "manslaughter," but for an absolute "acquittal."

In Price vs. The State, 18 Texas Court of Appeals, 474 (5th Criminal Law Reports, page 385), the Supreme Court of Texas, under a special statute of that State, held justified the killing by a husband of a person whom he had discovered with his wife under circumstances such as to cause him to believe upon reasonable appearances that they were either then in the actual commission of adultery, or were about to commit such act, or were still together, the act having just been committed. In the body of its opinion the court said: "We are not aware that a similar statute making such a homicide justifiable can be found in the Codes of any other State, though the principle and precedent from which ours is derived is of most ancient origin. But in most if not in all of the States as at common law a killing under such a circumstances would reduce the homicide from murder to manslaughter.

Blackstone says: "So if a man takes another in the act of adultery with his wife and kills him directly on the spot, though this was allowed by the law of Solon, as likewise by the Roman civil law (if the adulterer was found in the husband's own house), and also among the ancient Goths, yet in England it is not absolutely ranked in the class of justifiable homicide, as in a case of forcible rape, but it is manslaughter. It is, however, the lowest degree of it, and. therefore, in such a case, the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation." 4 Black. Com. (Chitty), Side P. 191.

Mr. Bishop states the rule as it now obtains thus: "If a husband finds his wife committing adultery, and, provoked by the wrong, instantly takes her life, or the adulterer's * * * the homicide is only manslaughter."

We have not in Louisiana a statute corresponding to that in Texas, and we have, therefore, to be controlled by the rules of the common law, which do not "justify" a homicide committed under the circumstances stated, but reduce it to manslaughter. The special charge, as asked for, was properly refused.

The special charge asked and refused by the court, forming the subject matter of the fifth bill, was correctly refused; it was substantially the same charge as that referred to in the seventh bill, altered a little as to phraseology. It assumed as a fact that a husband called to face such a scene as that referred to in the different bills of exception, must be so wrought up by excitement as to make him irresponsible for his acts to the full extent of justification. There is no claim that there was any testimony in the case as to "insanity." We have said that a husband would not be "justified" to the extent of an "acquittal" for killing a man whom he discovered in actual adultery with his wife; if this be so, he would not be justified in acting under a "delusion" that such act was being committed.

The complaint which forms the subject-matter of the third bill of exception, has given us much concern.

The theory of defendant's case, which there was some testimony tending to establish, and which it was for the jury to weigh, was that on his entering his bedroom at his home by a back door (the front door being bolted) he found the blinds closed and one Fernand Delatte on his bed in the act of adultery with his (defendant's) wife. That he immediately fired several pistol shots at the parties, two shots taking effect in the wife's breast and one in Delatte's arm; that the wife seized her husband's arm and attempted to wrest his pistol from his hand, calling out: "Come, Fernand, I have got him; he can't hurt you; we will kill him;" that a tussle ensued between husband and wife, in the course of which the former drew a razor and cut his wife across the wrist, across the abdomen and across the throat, killing her. Defendant's theory is that his life was endangered through the action of the wife in seizing his arm and calling on Delatte to advance upon him, and that they would have killed him.

We understand the District Court to hold that the evidence was inadmissible and irrelevant, inasmuch as a homicide committed upon the wife under such circumstances could not be "justified," but would remain "manslaughter" even though the husband had good reason to believe that his life was in danger, or that he was in great danger of serious bodily harm and although he had used only such force as might have been necessary (even to the extent of killing his wife) to protect his life or save himself from great bodily harm. We understand him to hold that the original shooting and wonnding by the husband, though not "murder," was none the less illegal and "manslaughter"—that *quoad* the shooting and fighting. Defendant was the aggressor *ab initio*, and that this original illegal *status* was sufficiently retained throughout the subsequent phases of the trouble to prevent his conduct from being held "justified;" that under the circumstances stated he was still "legally" guilty of "manslaughter." The court applied to the case the rule that the aggressor in a fight or difficulty can not plead "self-defence" in "justification" of a homicide unless and untll he had withdrawn from or attempted to withdraw from it in good faith. It did not trace the trouble as to its origin further back than the husband's firing the shots, and left the wife and the adulteress as being "aggressors in any way in the immediate difficulty entirely out of view. We think there is a difference between the case of a person who, having originally no immediate cause of provocation himself, should originate a difficulty which, in its after phases, would lead to his killing the person whom he led into it, and that of a man who entering into his own home is there brought to face a scene calculated to throw him into a condition of frenzy, under the influence of which he commits an act which, though not legally excusable, comes near the border line of justification. We think the situation was such as to justify us in referring the origin of the difficulty to the wife and her paramour as the "aggressors," sufficiently so to open the door to submisson to a jury of a plea of "self-defence" when in one of the after phases of the difficulty the husband's life had been placed in danger by one of them, and in order to save the same he had killed the party making the killing necessary.

We think the rigor of the rule which the court refers to should be relaxed in a case of this character, and that the matter of self-defence should have been submitted to the jury to be by it passed

upon under the whole evidence, and that this excluded testimony could legally have formed part of it. It is true that the jury found the accused guilty of manslaughter, but *non constat* what their verdict would have been had this testimony gone to it. We must not read the situation from a standpoint of affairs after the verdict and assume that defendant, under a verdict of manslaughter, has been accorded all the relief that the facts and the law entitled him to. We are not informed of all the facts of the case. We do not know were Delatte was or what he was doing at the time the wife of the defendant called out to him. Had Delatte advanced upon defendant while he was held by his wife, the situation might well have become critical.

It is possible that appellant had no good substantial ground for believing his life to have been in danger at that time and through his wife's conduct, but that was a matter for the jury to determine.

We think special reference to the fourth bill unnecessary. The fact is obviously conceded on both sides that accused shot at Delatte, and at his wife, before the latter made any demonstration against him. The fact being conceded, there was no necessity for testimony on that point to have been taken down by the clerk.

The question of law attempted to be raised in the sixth bill taken to the refusal of the court to give to the jury the special charge therein referred to, has been discussed in our opinion as to the correctness of the court's ruling, excluding the testimony of Dora Putnam. The charge asked was properly refused, as it did not set forth a given state of facts to serve as a predicate for the same. The principle asked to be announced by the court was clearly unsustainable as an absolnte, general, legal proposition.

For the reasons herein assigned, it is ordered, adjudged and decreed that the verdict of the jury and the judgment thereon be and the same are hereby set aside, and the cause is remanded to the District Court for further proceedings according to law.

No. 12,561.

GEORGE F. PATTON VS. THOMAS PICKLES.

50	857
104	159
104	160
50	857
107	369
107	382
50	857
110	405
50	857
118	819
118	1012

In a contract for ferriage, safe transportation is not merely an incident of the contract, but it is its very direct object. When the obligor fails to perform that obligation the obligee is entitled to damages just as the obligee is entitled to damages for inexecution of any other contract unless the obligor can offer just and legal reasons for non-execution.

He who claims the execution of an obligation must prove it. On the other hand he who contends he is exonerated must prove the fact which has produced the extinction of the obligation. The very fact itself of the non-execution of a contract carries with it the presumption of a "contractual fault" from which the obligor has thrown upon him the *onus* of freeing himself.

Where a person having paid for a ticket for ferriage has, on invitation of the employees of the ferry company, passed out upon an iron bridge leading to the ferry-boat, and while standing thereon it broke, precipitating her into the river, it is not for the passenger to prove that the breaking was due to the negligence of the company, but upon the company to establish affirmatively a state of facts which would release it from responsibility.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

O. B. Sansum for Plaintiff, Appellee.

Frank E. Rainold, Frank N. Butler and *Bernard McCloskey* for Defendants, Appellants.

Argued and submitted March 11, 1898.

Opinion handed down April 18, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant, Thomas Pickles, has held for many years, under contract with the city of New Orleans, the franchise for ferrying passengers, wagons, etc., from the foot of Canal street, on the left bank of the Mississippi river, to Algiers, on the opposite side of the same stream, and from Algiers to the city of New Orleans.

Passengers intending to cross from Algiers to Canal street pass first into a large room erected upon the river bank, from which, through a door opening toward the river, they pass upon an inclined iron bridge or gangway leading down from the ferry house to a pontoon bridge below.

This pontoon bridge rises and falls with the rise and fall of the Mississippi river. It is moored alongside of a line of piling which receives the push or shock of the ferry boat as it lands against the pontoon. The iron inclined bridge passes between some of the pilings, but its outer edge is not intended to pass beyond the outer edge of the piling. The immediate connection between the iron bridge and the pontoon is by means of an apron which is expected to slide as occasion requires. At the entrance of the ferry house on the shore side is a turning stile through which passengers pass, one by one, paying their fare as they pass through. It is furnished with a check, which being applied, prevents any one from entering the room.

Wagons and vehicles about to be crossed go through a side gate upon a wagon gangway leading down to the pontoon bridge. There is no connection between this gangway and the iron bridge. On the night of the 19th, or the morning of the 20th of October, 1895, a disastrous fire occurred in Algiers, which attracted during that day to the latter place very large crowds, the number being estimated to be between ten and fourteen thousand persons. While numbers returned to the city, a very large number remained on the Algiers side until nearly dark, when they commenced crowding to take passage back upon the ferry boat. Among the persons so returning at that time were the wife of the plaintiff and her son, a boy about ten or eleven years old. They paid their fare at the turning stile and passing through the ferry room, went out for several feet upon the iron bridge. The lower part of the bridge was then crowded with persons, while others continued to pass out upon the upper portion from behind through the ferry room. The situation was such as to make it difficult for Mrs. Patton and her child to return. They attempted to do so, but before they could pass into the ferry house, the iron bridge broke at about its middle point and precipitated her into the river.

She received painful injuries from her fall, and contracted from her wet clothing a serious attack of bronchitis. Defendant, on appeal, maintains that judgment was erroneously rendered in plaintiff's favor for damages for her injuries so received.

The *syllabus* of defendant's brief is as follows:

1. "Plaintiff proved that the bridge, belonging to defendant leading from the waiting room of the ferry house to the pontoon or

floating wharf, broke, and she was injured thereby. No negligence of any kind is proved and the court is asked to presume negligence from the mere fact of accident, and likewise to presume that the plaintiff was not guilty of contributory negligence.

2. No such presumption can arise in favor of a person except he is being passively conveyed in the vehicle of a common carrier. While the passenger is on the platform, bridge, in the station house, or any other portion of the premises of a common carrier, moving from place to place of his own volition, the carrier occupies toward him the precise relation of any other owner of real estate toward the customer who comes upon his premises. If he is injured, in order to recover damages he must prove negligence on the part of the carrier and likewise prove that he was free from contributory negligence. Thompson's Carriers of Passengers, pages 104, 209, 214.

3. The burden of proof is therefore upon the plaintiff to establish negligence, but (*ex industria*) defendant has proved that he was in no wise negligent. He proved that the bridge which collapsed was built according to plans and specifications which were approved by the City Surveyor; that he was the proper officer to approve the same, being designated as such by the contract. That said plans called for the construction of a bridge calculated to carry one hundred pounds to the square foot with a factor of safety of six, and a bridge of this character is strong enough to sustain the dead weight of all persons who could stand upon it. That it was constructed by bridge builders of national repute, and finally, when the bridge was completed, it was inspected and approved by the city surveyor as being in accordance with plans and specifications; that it was likewise proved that the bridge was only eight years old and had in no manner deteriorated in strength, the bridge being of iron. That in regard to the bridge the defendant exercised all the care and diligence that human foresight and the experience of twenty years as lessee of the public ferries could suggest; that it was proved that an extraordinary and unforeseen event caused nearly fourteen thousand people to cross the ferry on that day, three times as many as had ever crossed on a single day. That the crowd in attempting to get home from Algiers became excited and uncontrollable; that they rushed into the ferry house, some paying fares and others not; that the attempt of the superintendent to control the mob was futile; that they crowded, pushed and jammed themselves upon the bridge

in their anxiety to get home before dark, and this crowd, of which plaintiff's wife was a part, broke the bridge. That the experience of defendant for twenty years as lessee of the ferries had not led him to anticipate such a crowd and he had no reason to believe that the passengers would behave in so unreasonable a manner.

That every precaution suggested by an extended and practical experience was exercised by the superintendant upon the occasion. That the lessee was himself at the time sick in bed of the disease of which he ultimately died.

4. Ferry companies are not insurers of the absolute safety of passengers, either while coming on board the ferry boats, or while going ashore therefrom, nor are they bound to guard against probable accidents which could not reasonably be foreseen. Their duty is to furnish accommodations for the receiving and landing of passengers, which are reasonably sufficient for their purpose and for the protection of persons using the means provided in a reasonable way. (Blackman vs. London, etc., R. Co., 17 W. B. 769; Riggs vs. Manchester, etc., R. Co., 12 Jur. (N. S.) 525; Cornman vs. Eastern Counties R. Co., 4 H. & N. 781; Crafter vs. Metropolitan R. Co., L. R., 1 C. P. 300; Dougan vs. Chaplain, Tr. Co., 56 N. Y. 1; Crocheran vs. North Shore, etc., Ferry Co., *Id.* 656; reversing 1 N. Y. Sup. Ct. (T. & C.) 446; Cleveland vs. New Jersey Steamboat Company, 68 N. Y. 306.) It is not enough to make out a case of negligence to suggest that additional precautions would have prevented the accident. Loftus vs. Union Ferry Company, 22 Hun. 33, granting new trial after verdict for plainiff. Dyer vs. New York, L. E. & W. Ry. Co., 7 Atlantic Reporter, Vol. 7, p. 417; 138 N. Y. Court of Appeals, 647. Amer. and Eng. Encyclopedia of Law, Vol. 2, p. 804; Vol. 7, p. 949, par. 4."

Defendant quotes the New York Court as saying in Cleveland vs. The New Jersey Steamboat Co. that: "A carrier of passengers is not bound to foresee and provide against casualties never before known and not reasonably to be expected (56 N. Y. 1; 52 N. Y. 32, 656). Hence his duty is not to be estimated by what, after an accident, then first appears to be a proper precaution against a recurrence of it." (Bowen vs. N. Y. Central R. R. Co., 18 N. Y. 408.)

He quotes the same court in Loftus vs. Union Ferry Company of Brooklyn, 84 N. Y. 460, in which it said:

"We think this case is governed by the cases of Dougan vs. Chap-

lain Trans. Co., 56 N. Y. 1; Cochran vs. North Shore Staten Island Ferry Co., *Id.* 656; and Cleveland vs. New Jersey Ferry Co., 68 N. Y. 306. The defendant was bound "to provide suitable and safe accommodations for the landing of passengers." The rule of the strictest diligence in this respect is the only one consistent with a due regard to the value of human life and with the relation which the defendant assumed to the public. But the rule does not impose upon the defendant the duty of providing for the safety of its passengers, that they shall encounter no probable dangers and meet with no casualty in the use of the appliances provided by it. It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened."

"If defendant ought to have foreseen that such an accident might happen, or such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. The company had the experience of years certifying to the efficiency of the guard. That it was possible for a child, or even a man to get through the opening was apparent enough, but that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty. If the structure was intrinsically insecure, the fact that it had been used without injury before this would not exempt the company from responsibility when it did occur from its defective condition. We think the exemption of the defendant in this case rests upon the fact which we think clearly appears as an inference from the other facts, that the company had no reason to apprehend an accident like this, and that the arrangements made were such as experience had, up to that time, shown to be safe and suitable and sufficient to meet the requirements of its duty."

"The line which separates a pure misadventure, resulting in injury for which no one is responsible, from accident creating a responsibility by reason of negligence, is often narrow and difficult to be drawn, but we think the casualty in this case is of the former and not of the latter class."

He (defendant) further refers to the cases of Race vs. Union Ferry Co. of New York and Brooklyn, 138 N. Y. 647, and Dwyer vs. N. Y., Long Island & Western Railroad Co., in the former of which the court held that "the ferry company in the management of its busi-

ness had the right to assume that passengers would take care of themselves, and if it conducted its business with such care and skill as would make the entrance upon its boats safe for persons of ordinary prudence, it met the requirements of the law. The proof on the part of the defendant showed that all its ferries were managed in substantially the same way, and that while they carried many millions of passengers yearly no accident of this kind was ever reported or known; that the plaintiff had the burden to show that the defendant was guilty of culpable negligence and that in that particular case plaintiff had failed to sustain that burden." And in the second of which cases, it declared that "if a person on leaving a ferry-boat voluntarily joins a crowd which is so dense as to prevent him from seeing where he treads, and voluntarily proceeds with such crowd and is injured by his foot being caught between the boat and the dock, such conduct manifests, *per se*, contributory negligence and he should be non-suited."

Plaintiff on the other hand insists that Thompson on Carriers of Passengers (p. 210) correctly lays down as a general rule that where an injury happens to a passenger, in consequence of the breaking of the vehicle, roadway or other appliance owned or contracted by the carrier and used by him in making the transit, the person entitled to sue for an injury makes out a *prima facie* case for damages against the carrier by showing the contract of carriage—that the accident happened in consequence of such breaking or failure and that in consequence of this accident he sustained damages. That when these facts are made to appear it will devolve upon the carrier to excuse this *prima facie* neglect of duty to show that notwithstanding the accident happened as shown by the plaintiff's evidence, it happened in spite of the use by himself, his servants and the contractors by whom his roadway appliances and vehicles were built, of the greatest degree of diligence practicable under the circumstances. In other words, he must show in order to rebut this presumption that the accident resulted from circumstances against which human care and foresight could not guard."

Defendant contends that this rule does not apply where the occasion of the hurt of the passenger was an active, voluntary movement on his part, combined with some alleged deficiency in the carrier's means of transportation or accommodation, and the reason is that in such cases it is necessary to consider whether there may not

have been contributory negligence on the part of a passenger. That it is only in respect of those accidents which happen to the passenger while he passively trusts himself to the safety of the carrier's means of transportation, or to the skill, diligence and care of his servants, that the rule applies. That the rule imposing upon the carriers of persons the highest degree of care has this limitation, it applies only to those means and measures of safety which the passenger of necessity trust wholly to the carrier. That in general it is applicable only to the period when the carrier is, in a certain sense, the bailee of the person of the passenger. That where the passenger is injured by reason of certain defects in the buildings or grounds of the carrier's before the transit has commenced, or after it has ended, the carrier is or is not liable accordingly as he has or has not been guilty of want of ordinary care. That in this respect he occupies toward the passenger the precise relation of any other owner of real estate toward his customers who come upon his premises for the purpose of transacting business.

That though carriers are bound to keep in a safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their station grounds, reasonably near to the platforms where passengers, or those who have purchased tickets with a view to take passage ou their cars, would naturally or ordinarily be likely to go, the duty of protection to such persons does not go to the extent of a warranty of the safe condition of the premises, neither is the carrier held bound to bestow upon their condition that extraordinary degree of vigilance which the law, from motives of the soundest policy, imposes upon him in regard to the carriage of his passengers. That the passenger, while in actual progress upon his journey, is exposed to countless hazards giving himself in charge of the carrier, and in view of the circumstances of the case the law requires of the carrier the exercise of the greatest possible diligence for the benefit of the passenger and holds him responsible for the slightest negligence, but that the rule ceases with the reason for it; therefore, as a passenger's entrance to the carrier's station is characterized by none of the hazard incident to the journey itself, the rigor of the rule is justly relaxed, in that at such a time and place the carrier is bound to exercise only a reasonable degree of care for the protection of his patrons."

The parties to the present litigation occupied contractual relations to each other. Plaintiff's wife had paid for a passage across the river from Algiers, and had, after such payment, gone within the approaches to the ferry boat, and was actually making use of the appliances furnished by the defendant for making the trip. The contract between the parties was one which from time immemorial has imposed upon the obligor exceptionally severe obligations. Safe carriage is not merely an *incident of the contract*, but it is its *very direct object*. To safely transport is precisely that which the carrier undertakes for a consideration to do. When the obligor fails to perform that obligation the obligee is entitled to damages just as the obligee is entitled to damages for inexecution *of any other contract*, unless *the obligor can offer* just *and sufficient reasons for non-execution*. What the extent of the damages would be in any given case *where the non-execution could not be "fully justified"* would depend upon the circumstances of the case. Art. 2232 of the Civil Code declares that he who claims the execution of an obligation must prove it. On the other hand, *he who contends that he is exonerated must prove the payment* or the fact *which has produced the extinction of the obligation*, and Art. 1926, that "on the breach of any obligation to do or not to do, the obligee is entitled to damages." The general rule is modified by the second paragraph of Art. 1923, which declares that "when, by a fortuitous event or irresistible force, the debtor is hindered from giving or doing what he has contracted to give or do, or is from the same cause compelled to do what the contract bound him not to do, no damages can be recovered for the inexecution of the contract."

Under Art. 2219, C. C., an obligor, under a contract to give, is relieved from his obligation, if he be prevented from executing it by reason of a fortuitous accident, but the article *requires him to prove* the fortuitous accident which he alleges. The particular contract which we are considering falls properly under the rules of our Code governing contracts of carriers and watermen. Art. 2754 of the Code under that heading is to the effect that "carriers and watermen are liable for the loss or damage of the things entrusted to their care unless they can prove that such loss or damage has been occasioned by accidental or uncontrollable events."

It will be seen from this that the general rule as to where lies the burden of proof for non-execution of a contract is not departed

from in the case of a carrier's contract for transportation, but it is specially reaffirmed and emphasized.

The very fact of the non-execution of the obligations of a contract carries with it of itself the presumption of a "*contractual*" fault from which obligor has thrown upon him the *onus* of freeing himself. The French writers classify faults into "fautes contractuelles" and "fautes delictuelles." The "faute delictuelle" is one which characterizes the act resulting from it as an "offence or as a *quasi*-offence." With respect to the burden of proof when the result of a suit is dependent upon the existence of such a fault having been established the general rule (subject to exceptions) is that the person alleging it must show it either directly or by proof of facts from which its existence could and would logically and fairly be inferred. Corresponding to "fautes contractuelles" and "fautes delictuelles" are "obligations contractuelles" and "obligations delictuelles," the first resulting from contracts, the second from the law. We have on several occasions referred to the fact that obligations as of "tort" could be superadded to the "*contractual obligations*" flowing from the contracts of parties (See also 30 N. E. Rep. 1021).

It is exceedingly difficult sometimes to ascertain whether a particular action as brought for damages is one "*ex contractu*" or "*ex delicto.*" Our Code in one and the same article (Art. 1934, C. C.) deals as well with the damages resulting from "offences and *quasi*-offences" as from "contractual faults" proper, though without referring to matters of evidence in connection with them. It gives much more flexible powers to juries and to courts in fixing the quantum of damages in cases of tort than it does in matters of simple inexecution of contracts. When a suit is brought for damages for non-execution of a contract, the question of the burden o proof as to the character of the fault committed becomes important only when the character or *quantum* of damages is dependent upon that fact. In the case at bar there is proof positive of a contract for the safe transportation of plaintiff's wife from Algiers to the opposite side of the river over the ferry operated by the defendant, and equally positive proof that this contract was not executed by the defendant. We are of the opinion that the defendant has not shown that this inexecution resulted from accidental and uncontrollable events (C. C. 2754), and that compensatory damages would be due to the plaintiff under Art. 1933, C. C. for this non-execution

viewed from the standpoint of the violation of a contract, independent of any question of the defendant's having been guilty of an offence or *quasi*-offence. We have not overlooked the fact that Art. 2754 of the Civil Code, in reference to the responsibility of carriers, refers to the loss or damage to the "things" entrusted to their care and makes no mention of "persons." It is quite possible and probable that in some particular cases, and for some particular purposes the fact that the contract of transportation, for the inexecution of which damages are claimed in a suit, should be one for the transportation of a "person," instead of a "thing" would modify to some extent the responsibilities of the contracting parties, but not to the extent which defendant claims. While we may not be able to declare with certainty to what particular fact the breakihg of the bridge which caused the injuries to plaintiff's wife should be attributed, we see enough to convince us under the evidence that defendant's course and conduct did not come up to the standard required of him as a carrier of passengers, and that plaintiff's wife was guilty of no contributory negligence. In the first place, it was at all times within the power of defendant's employee in charge of the turning of the stile at which fare was received, by making use of the check attached to the stile, to have controlled the passing of persons through the ferry house on to the iron bridge, and to prevent that point at least (which was the precise one at which the plaintiff's wife was exposed) from becoming a point of danger. It is very clear to us that he did not do so, but that he continued to receive fares and to permit persons to pass through the ferry house on to the iron bridge, up to the very moment of the accident, and that the persons standing on the passenger bridge near the ferry house, became involved in the accident as the direct result of being permitted and invited to pass upon it under dangerous conditions. In the next place, it was perfectly feasible for defendant to have prevented the crowd, which made its way to the pontoon by way of the wagon gangway from doing so by closing the gate which led to it. It was this particular portion of the crowd which defendant evidently refers to in his pleadings as the "pushing, rushing crowd," which went in without paying.

More persons may have crossed over the ferry on the day of the accident than had ever passed over it before, but defendant's employees had the experience of many "Mardi Gras" crowds (as one

of the witnesses states), and they must have known and should have anticipated that as nightfall approached there would likely be a rush to cross back to the city, and proper precautions should have been taken to guard against the crowding through the wagon-way down to the pontoon, especially as the superintendent was present upon the spot. The defendant urges upon us that the bridge was built by bridge builders of national reputation, that the number of persons upon it on the day of the accident was less than the number which it was constructed to hold, standing head to head. That it was fully as strong the day it broke as it was the day it was placed in position. That it had been in position for eight years with crowds passing over it, and not a single accident had occurred during the whole time.

It is true that the bridge had been in position for a number of years without accident, but this particular argument loses much of its force from the fact that the bridge had been taken from the position which it had originally been placed in, for the purpose of renewing and repairing the wooden piling under and about it and that it was only thrown open for travel over it on the day before the accident. It is more than probable that when replaced in position, its bearings were not properly adjusted or that some of the pilings were either faulty in position, or were otherwise defective. It was certainly imprudent to put its safety to the test under the new and dangerous conditions under which (when tested) it gave way. From the evidence it would appear that when the ferry boat struck the pontoon bridge the blow forced the latter against the line of piling. That at that time the pontoon bridge was loaded with passengers, as was also the iron bridge at its lower end. That as the boat struck the pontoon, a bar which had been thrown across the lower end of the iron bridge (to prevent persons from moving out of it) was withdrawn and the crowd on the wagon gangway, that upon the pontoon, and that upon the passenger bridge, all moved forward rapidly to get upon the boat. That as the boat struck the pontoon the passenger bridge was raised by the concussion and simultaneously the forward movement of the different crowds occurred, followed at once by the breaking of the bridge in the middle.

The handling of the ferry-boat, the construction of the new piling, the replacing of the iron bridge, the crowding of persons upon the wagon-way and upon the iron bridge, particularly upon the latter,

were all matters under the direct control of the defendant. From faulty action, as well as faulty inaction of the defendant, in respect to these matters, or some of them, in concurrence, possibly, with a rush on the part of the persons upon the wagon and passenger approaches, the bridge, on which plaintiff's wife was standing, was caused to break, and defendant became responsible for the same.

It is no anwer in the case to say that defendant had no control over the conduct of the crowd, for, in the first place, they should not have been permitted to be in such numbers upon the gangway, and, in the next place, the parties who were standing on the upper portion of the iron bridge at the time of the accident (and plaintiff's wife was one of them) would not have been there had the man at the turnstile turned the check upon it as he should have done when danger became apparent to him. A simple *suggestion*, even, of danger, to a timid woman, would have caused her to desist from entering. She could not be expected to have anticipated or to have realized any sooner than she did, the possibility of danger in view of the direct invitation of defendant's employee to her "to pass in," and his receipt of her fare in so doing. Under plaintiff's prayer on appeal for an increase of the amount of damage awarded, we have examined carefully the testimony bearing on what should be the *quantum* of damages to be accorded. It is one of those cases where physical pain and suffering constitute the principal factors. While it is quite probable we would have accorded plaintiff heavier damages had we been called upon to pass on this question in the first instance, we do not feel warranted in reversing, on this point, the judgment appealed from.

It is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

MR. JUSTICE BLANCHARD: I concur in the opinion of the majority of the court that plaintiff should have judgment, but dissent as to the mere affirmance of the judgment appealed from, believing the same should be increased to one thousand dollars.

No. 12,840.

BENTON & MILLIKEN VS. G. W. SENTELL ET AL.

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f125 508

Plaintiff in a partition suit, who has cited a number of co-defendants as owning certain designated interests in the property sought to be divided, has no legal reason to complain that one of the defendants, after denying that the interest of one of her co-defendants was as large as had been stated in the petition, should, under an agreement with that co-defendant, have discontinued (under reservation of her rights) her opposition on that point, and permitted the partition to proceed on the basis alleged. Contestant could not, thereafter, attack generally the partition, on the ground that that particular party had been assigned too large an interest. The partition as made would stand, though the two parties might have to adjust rights *dehors* the partition between themselves. If plaintiffs obtain all they are entitled to, they have no legal concern as to how the other parties to the litigation may settle their relative differences.

A vendor having, by warranty deed duly recorded, undertaken to sell an undivided fifth interest in a plantation when his real interest was less, any interest therein which the vendor should thereafter acquire, up to the extent of the interest conveyed, would at once, without any act between the parties, enure to the benefit of the vendee. A declaration in the act of sale as to how he had acquired the thing sold would be merely descriptive, and not limit the extent of the thing sold or the warranty.

A quit-claim deed reaches only to interests actually owned at that time by the party executing it; it is of no effect whatever as to interests already gone.

A husband uniting with his wife in executing a quit-claim deed is estopped from attempting thereafter to acquire by seizure (as a creditor of his wife's succession) rights which she had, with his consent, voluntarily surrendered.

APPEAL from the Seventh Judicial District Court for the Parish of Carroll. *Montgomery, J.*

***C. S. Wyly* for Plaintiff, Appellant.**

***Clifton F. Davis* for Mrs. Kate Ellett, Co-defendant, Appellee.**

Argued and submitted June 4, 1898.
Opinion handed down June 13, 1898.
Rehearing refused June 29, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiffs in this case alleging themselves to be each the owner of an undivided *one-fifth* interest in a plantation in the parish of East Carroll, known as the Glen Mary planta-

tion, brought this suit for a partition of the same between all the joint owners thereof, setting up incidental demands by reason of improvements which they averred they had put upon the property.

By consent of parties all the issues raised in the lower court, under the pleadings of the different parties, but one were postponed for examination and decision to some future period. The case was taken up and tried on the single question as to the extent of the interests of the different joint owners.

Plaintiffs in their original petition named as joint owners of the plantation with themselves George W. Sentell, of New Orleans; Mrs. Kate Ellett, of Memphis, Tenn., and George M. Fletcher, of New York, declaring that *each of said parties owned an undivided one-fifth interest in the plantation*. At their instance the parties named were cited. By supplemental petition plaintiffs having alleged the death of George W. Sentell, Mrs. Susie S. Barber, a daughter and heir of the deceased who had acquired his interest in this property in partition proceedings between herself and her co-heirs, was made a defendant in lieu of her father.

All the defendants answered. After George M. Fletcher had done so, the plaintiffs bought out his interest in the property, and alleging that fact increased accordingly their claims as to the extent of their joint ownership. Mrs. Kate Ellett, in her answer (filed before this purchase of Fletcher's interest had been made), denied that the interest of the plaintiffs or Mrs. Barber or Fletcher in the property was such as plaintiffs had alleged it to be, and averred that her own interest was larger than had been declared in the petition. She alleged that the property was susceptible of division in kind, and prayed that the interest of each of the co-owners be set apart to them separately and in full ownership respectively, as follows: To *herself*, *two-fifths;* to *G. M. Fletcher*, *three-twentieths;* to *Mrs. Barber*, *three-twentieths;* to *J. S. Milliken*, *three-twentieths;* to *C. D. Benton*, *three-twentieths.*

Upon the filing of this answer of Mrs. Ellett, Mrs. Barber appeared, excepting, that Mrs. Ellett's attack was unwarranted and unjustifiable; that the effect of the same was to change her (Mrs. Ellett's) position from a co-defendant with her to that of a plaintiff adverse to her, in a petitory or possessory action; that she could not advance her claims in this collateral manner.

By agreement between these two parties, Mrs. Ellett's attack upon

the extent of Mrs. Barber's interest was (under reservation of rights) discontinued in spite of the objections made thereto on the part of the plaintiffs. These objections being overruled, plaintiffs reserved a bill of exceptions.

It is conceded on all sides that the *Glen Mary plantation* belonged, at the time of her death, to a *Mrs. Mary Coleman, widow of William Stowers.* Mrs. Stowers was a daughter of J. B. Coleman, Sr., and Mrs. Catherine Coleman. She died childless, leaving surviving her, her father and mother, two brothers (John Ballard Coleman and Frank Coleman) and three sisters (Mrs. Kate Ellett, widow of H. T. Ellett; *Mrs. Jennie Coleman*, wife of George M. Fletcher, and *Mrs. Rebecca Coleman*, wife of P. Jones Yorke).

Mrs. Rebecca Coleman (Mrs. Yorke) subsequently died, leaving as her heir *Miss Catherine Coleman Yorke*, who afterward married *H. P. Brush.*

The father, *John C. Coleman, Sr.*, died in *December, 1874.*

The mother, Mrs. Catherine Coleman, died in January, 1889.

She seems to have been *appointed tutrix of one or more of her children*, but of which ones does not appear. What the ages of the different children were, the record does not disclose.

While tutrix, she *as such leased in its entirety a certain store* on the *Glen Mary Plantation* to Benton & Co., a firm then composed of *C. D. Benton and James Andrews.*

On the 14th of May, 1879, the mother, Mrs. Catherine Coleman (then a widow), executed in Tennessee an act before H. L. Claiborne (a notary public in that State, and commissioner for the State of Louisiana), in which she declared, "that in consideration of the sum of three thousand five hundred dollars to her in hand paid *by Mrs. Kate Ellett*, she did thereby grant, bargain, sell and convey unto the said Mrs. Kate Ellett, her heirs and assigns, all her right, title and interest in and to that plantation in the parish of Carroll, State of Louisiana, fronting on Bunches Bend Lake, or Old River, *formerly belonging to William Stowers, and by him left to his widow, Mary Stowers, and by her to her father, John B. Coleman*, bounded above (giving the description of the property) to have and to hold the same unto the said Mrs. Kate Ellett, her heirs and assigns forever. But this conveyance was made as a security for the payment of the said sum of three thousand five hundred dollars, and is to be null and

void on the payment of the said sum of money, with interest in two *years from the date thereof.*"

This act was recorded in the mortgage book of the parish of Car- roll *on the twenty-second day of* May, 1879, and reinscribed on the *thirteenth day of March, 1889.*

On the 1st of April, 1880, by act before Garner, notary public, *John Ballard Coleman* sold to *C. B. Benton* under full warranty the following described property, to-wit:

"*The undivided one-fifth* (1-5) *interest in and to the following land or plantation situated, etc.* (describing the Glen Mary plantation) * * * *being the undivided one-fifth interest* inherited by the ven- dor *from his father,* John B. Coleman." * * * This *act was recorded on April 5, 1880.*

On the 21st of May, 1887, the sheriff *of East Carroll parish* exe- cuted a deed to *George W. Sentell* and *W. B. McLean* of an *undivided one-fifth interest* in the Glen Mary plantation, as being the last and highest bidders at a sheriff's sale, made in execution of a *judgment* obtained by *Mrs. Lizzie Coleman against her husband, Frank Coleman,* the said *one-fifth interest having been seized and sold as the interest of Frank Coleman in said property.*

This *act was recorded May 26, 1887. On February 14, 1894, W. B. McLean* sold the interest so acquired by him to George Sentell, by act *which was recorded* March 5, 1894.

On the *26th of February, 1896,* in a *partition between the heirs of George W. Sentell,* the property so acquired by Sentell and McLean, and by Sentell from McLean, was set over to Mrs. Susie Sentell, wife of Leonard K. Barber, one of the defendants in the case. The act *was recorded on the 15th of April, 1896.*

On the *17th of June, 1889,* John Ballard Coleman executed the fol- lowing instrument, *which was recorded* on the *10th of April, 1890:*

"Whereas, on the *14th day of May, 1879, Mrs. Catherine Coleman,* of Nashville, Tenn., executed a mortgage upon the real estate herein- after described, to secure *Mrs. Kate Ellett,* wife of H. T. Ellett, in the sum of thirty-five hundred dollars, and whereas, said Catherine Cole- man has since died, leaving said debt unpaid; and whereas the same is largely more than the value of the real estate, and it is desirable to rest the title to the same in said Kate Ellett; therefore, this indenture wit- nesseth that, in consideration of the premises and the sum of five dol- lars to us in hand paid, we, the undersigned, who besides said Kate

Ellett are the only heirs at law of the said Catherine Coleman, do remise, release and forever quit-claim unto her, the said Kate Ellett, her heirs and assigns, *all our right, title and interest and estate* in and to the real estate so mortgaged, and which is described as follows:

A plantation or tract of land in the parish of Carroll and State of Louisiana, fronting on Bunches Bend Lake, or Old River, *formerly belonging to William Stowers, and by him left to his widow, Mary Stowers, and by her to her father, John B. Coleman*, bounded above, etc. (describing the Glen Mary plantation)."

At the time this act was executed, John Ballard Coleman had already disposed of an undivided one-fifth interest in the Glen Mary plantation to C. D. Benton, and that act was then of record.

On the 8th of April, 1889, Miss Catherine Coleman Yorke (afterward Mrs. Brush) sold to C. D. Benton and James S. Milliken, under full warranty, "the following described property, to-wit: The undivided one-fifth interest in and to that tract of land or plantation situated on Bunches Bend Lake and known as Glen Mary (describing the property) * * the part, parcel, share and interest thereof herein conveyed being the one undivided fifth (1-5)." * * This act was recorded October 16, 1889.

On the fourteenth day of May, 1889, Frank H. Coleman, John B. Coleman, Mrs. Jennie C. Fletcher (wife of George M. Fletcher) and Catherine C. Brush (formerly Catherine C. Yorke) executed a quit-claim deed in favor of Mrs. Kate Ellett in words precisely similar to those used in the quit-claim deed of J. Ballard Coleman already copied. George M. Fletcher, husband of Jennie C. Coleman, and H. T. Brush, husband of Catherine C. Yorke, signed this act. The act seems to have been signed at different times after the 14th of May, 1880.

The act as signed by Frank Coleman, Mrs. Fletcher and Catherine Coleman Yorke (Mrs. Brush), was recorded on the 2d April, 1890.

It will be seen that when this act was executed by Frank Coleman his interest in Glen Mary had been already sold in the suit of his wife against herself, and that Catherine C. Yorke had already sold her interest in Glen Mary on the 8th of April, 1889, to Benton and Milliken, and the act to those parties from Miss Yorke was recorded before the quit-claim deed to Mrs. Ellett was recorded.

Mrs. Jennie Coleman Fletcher's interest in Glen Mary does not seem to have been alienated or encumbered at the time of her signing the quit-claim deed in favor of Mrs. Ellett.

On September 12, 1894, the sheriff of East Carroll parish executed a deed to George M. Fletcher of an undivided one-fifth interest in the Glen Mary plantation, as being the last and highest bidder at a public sale made in the matter of the succession of his wife, Jennie Coleman, at which sale the interest of his said wife in said Glen Mary plantation was advertised and sold as being an undivided fifth. This act was recorded November 5, 1894.

On February 19, 1898, after this suit was filed (and after Fletcher had filed an answer in the case) George M. Fletcher sold to C. D. Benton and J. S. Milliken the undivided one-fifth interest which he had purchased in the succession of his wife. The act was recorded March 11, 1898.

Mrs. Ellett's claim of an ownership of two-fifths in Glen Mary plantation is based upon the theory that at the death of Mrs. Mary Stowers, the property was not willed by her to her father, as declared in the mortgage which Mrs. Catherine Coleman gave to Mrs. Ellett, in the act from J. Ballard Coleman to C. D. Benton, and in the quit-claim deeds signed by Ballard Coleman, Frank Coleman, Mrs. Jennie Fletcher and Mrs. Catharine Yorke Brush, on which she declares—but that it descended to her legal heirs, who were her father and mother and brothers and sisters.

That the father inherited a fourth, the mother a fourth, and the brothers and sisters (five in number) each a fifth of a half, or a tenth each. That when the father died, each child inherited from him a fifth of a fourth, or one-twentieth.

That when the mother died each child inherited from her a fifth of a fourth, so that the ultimate interest of each child in the property was one-fifth of one-half, equal to one-tenth, or two-twentieths, plus one-fifth of one-fourth, equal to one-twentieth, plus one-fifth of one-fourth, equal to one-twentieth, equaling altogether four-twentieths, or one-fifth.

That subsequently all of the four children relinquished to her their one-twentieth inherited from their mother, so that, adding these four-twentieths (one-fifth) to her own prior interest, she now holds an undivided two-fifths interest in the property. She does not pretend that the parties signing the quit-claim deeds intended to convey to her anything more than their respective interests in the property that was inherited (on her theory) from their mother.

Though the parties for years all acted upon the theory and belief

that Mrs. Mary Stowers bequeathed Glen Mary plantation to her father, no evidence was introduced at all to establish that fact, or that either Mrs. Stowers' succession or that of J. B. Coleman was ever opened. If such a will was ever made, it was never produced or probated.

Whether Mrs. Ellett denies absolutely that there ever was any such will, or that having never been probated it remained without effect (C. C. 1644), we do not know.

All the other parties acknowledge, that Mrs. Ellett is entitled to an undivided fifth—that is to say, all parties, but herself, adhere still to the idea that the property passed from Mrs. Stowers to her father.

Mrs. Ellett insists, that even should she be wrong in her legal position, she is entitled to hold that assumed by her for the reason that the plaintiffs by their acts and conduct have estopped themselves from contesting its correctness. She claims that Benton was for years the intimate friend and counselor of her family and of herself—that he has always recognized and dealt with her on the basis of the situation which she is contending for, and it is too late for him to gainsay it. That Milliken was fully advised of everything done, and is he also estopped, and that Fletcher having himself signed and approved the quit-claim deed granted by his wife, is in no position to go behind it.

The District Judge rendered judgment sustaining Mrs. Ellett's' plea of estoppel and decreed Glen Mary plantation to the parties to this suit in the proportions as follows: To Benton and Milliken, nine-twentieths; to Mrs. Kate Ellett, seven-twentieths; to Mrs. S. K. Barber, four-twentieths, and that said interest be set apart in full ownership.

The District Court evidently gave effect to the quit-claim deed of Ballard Coleman—Mrs. Jennie Fletcher and Mrs. Catherine York Brush, to the extent of recognizing that each of those parties conveyed thereby to Mrs. Ellett a one-twentieth interest, which they held as being heirs of their mother and on the theory, that the property passed from Mrs. Stowers' succession as an intestate succession to her legal heirs. The interest of Mrs. Barber, for the time being, not being contested, was admitted as correct at four-twentieths or one-fifth.

Plaintiffs appealed.

They maintain that whether or not at the time Ballard Coleman conveyed to C. D. Benton the one-fifth of the Glen Mary plantation, that was in reality the extent of his interest, that fact plays no important part in the litigation, inasmuch as on Mrs. Ellett's theory of the facts of the case he none the less ultimately acquired as heir of his father and of his mother an interest sufficient to supplement the interest, which (on that theory) he had before, so as to make good his recorded warranty deed of an undivided fifth interest in the Glen Mary plantation.

That as he acquired these new interests they enured at once to Benton's benefit. In support of this position they refer to Bonin vs. Eyssaline, 12 M. 187; McGuire vs. Amelung, 12 M. 649; Woods vs. Kimbal, 5 Martin (N. S.), 247; Fenn vs. Rils, 9 La. 99; Stokes vs. Schackleford, I2 La. 170; Lee vs. Ferguson, 5 An. 532.

They say there was no intervening obstacle then existing to the operation of the doctrine announced in the decisions quoted. That when once this accretion (if it could be so styled) took place it was beyond the power of Ballard Coleman by a subsequent quit-claim deed to his sister to alter the already fixed existing condition.

They contend that when Catherine Coleman Yorke on the 8th day of April, 1889, conveyed to Benton & Milliken an interest of one undivided fifth in the property, she held that interest in it in point of fact; whether she should be considered as having inherited it directly from her grandfather alone, or whether she did so through first her mother as one of the legal heirs of Mrs. Stowers, and next as becoming subsequently a legal heir of her grandfather and then her grandmother.

That when she executed her quit-claim deed to Mrs. Ellett she had already disposed of her entire interest in Glen Mary to Benton & Milliken, and the deed to the latter was also placed of record before the quit-claim deed was recorded.

The first point to which we direct our attention is the complaint made by the plaintiffs, that the court should have permitted Mrs. Ellett to have discontinued her attack as to the extent of Mrs. Barber's interest in the property. Plaintiffs had brought Mrs. Barber as a party defendant into the case, and the effect of the discontinuance was not to throw her out. It was out of the power of either Mrs. Barber or Mrs. Ellett, or both, to disconnect the former from the suit. Once in it, she was bound to remain unless she could

herself successfully plead some exception having the effect of dismissing her. Mrs. Ellett was perfectly free as between herself and Mrs. Barber to contest or not the latter's rights, or having contested them, to discontinue the attack either absolutely or under reservation. We do not see how plaintiffs could be prejudiced in this matter. If they obtain all they are entitled to, they have no interest as to how the other parties may dispose of or settle their own relative differences. If this case goes to judgment, and the rights of parties other than those as between Mrs. Barber and Mrs. Ellett be fixed on the basis of Mrs. Barber's having an undivided one-fifth interest in the property, Mrs. Ellett could not hereafter renew her attack and have the partition rescinded or modified on the ground that her interest was different from that which is for the present conceded. The attack if made, would have to be directed against the moneys which Mrs. Barber should (if the partition was by licitation) have (as between those two parties exclusively) unduly received beyond her legal share, or exclusively against the property which should have been specially allotted to her in kind. There could be no general upsetting or rescission of the partition itself.

The District Court failed to disclose upon what facts or acts it held Benton, or Benton & Milliken, estopped from claiming the exact rights to which they are legally entitled. We can discover nothing wherein they have violated confidence or fiduciary relations, or led Mrs. Ellett into any course of conduct prejudicial to her. The act of sale from Ballard Coleman to Benton was at a time when all parties were of the opinion that Glen Mary had been bequeathed to her father, and when as a result of that fact Ballard Coleman's interest in it would have been an undivided fifth. There is no reason assigned why he could not and why he should not have undertaken to make the sale he did. If he should make any error in the extent of the interest he conveyed, he would be bound on his warranty.

If it be true, which is by no manner of means certain, that he did really sell more than he was entitled to, the other fact that he should have subsequently become the heir successively of his father and mother by their deaths, and by so becoming had fulfilled his warranty, were legal results flowing out of a condition of affairs to which he did not lead up and of which he was strictly entitled to avail himself. We can see no valid reason why plaintiffs should not have purchased the interest of Catherine Yorke, or subsequently the interest of Fletcher.

We find no ground for holding that Mrs. Ellett had been influenced by Benton to follow the particular course which was adopted, of causing the various parties interested in the Glen Mary plantation to execute quit-claim deeds to her instead of proceeding to foreclose on what is correctly said was at best a mortgage held by Mrs. Ellett. Her son says, on the contrary, that the course followed was under the advice of a commissioner for Louisiana in Tennessee, who claimed to understand Louisiana law. By what authority Mrs. Coleman had mortgaged that property to Mrs. Ellett does not appear on the face of the instrument which she signed, she had no ownership in it, for it was therein declared that it had been left by Mrs. Stowers to her father. The parties who signed the quit-claim deeds never acknowledged their direct personal liability on the loan made to their mother, nor her authority to mortgage the plantation, nor acknowledge that their mother had any ownership therein. They had the right if they thought proper, as owners of the property or interested therein, to relinquish any rights they might have therein to anybody (so long as the rights of third parties legally interested were not prejudiced), independently of any question of mortgage, or liability on their part, direct or indirect, to any person when they did so.

This was all they attempted to do, and this was all they could do. It is a mistake to assume that if Mrs. Ellett had undertaken to foreclose on what is referred to throughout as the mortgage to Mrs. Ellett, that she would have occupied to-day any better position than she has now, as it is quite probable that the parties who signed the quit-claim deeds would have resisted a proceeding of that character. Whether she would or not have occupied a better position, we do not see how plaintiffs are accountable for her not holding it. We think that plaintiffs are correct in their position, that if Ballard Coleman having by warranty deed duly, recorded, undertaken to sell to Benton an undivided fifth interest in the plantation, when his real interest was less, should thereafter acquire an interest up to the extent of the interest conveyed, the latter would at once, without any act between the parties, enure to the benefit of Benton. Coleman undertook to sell absolutely that precise interest, and the subsequent declaration in the act as to how he acquired the thing sold was merely descriptive, and did not limit the extent of the thing sold, or the extent of the warranty.

We think that a quit-claim deed reaches only to interests actually owned at that time by the party executing it; that it is of no effect whatever as to interests already gone.

In the very nature of things there is a great difference between an act of sale or donation and a quit-claim deed. It is true that through the latter, interests in property may be acquired, for the party quit-claiming is ordinarily estopped from subsequently asserting rights which had been by him relinquished. A person undertaking to sell warrants the existence of and his ownership of the thiug sold, and is bound to make the warranty good; but a party quit-claiming carries out precisely what he undertook to do in simply abstaining from disturbing or questioning the rights of those in whose favor he has renounced.

We think, however, that George M. Fletcher was estopped from purchasing or legally conveying to Benton & Milliken the full undivided one-fifth interest in Glen Mary which he attempted to sell to them. Mrs. Fletcher, with her husband's consent, quit-claimed to Mrs. Ellett "all her right, title and interest in the Glen Mary plantation." Mrs. Ellett does not pretend that that relinquishment, broad as it is, goes further than to surrender her one-twentieth of the property.

No reason has been assigned why this deed is not valid. There were then no outstanding rignts upon the property that we have been advised of. The husband claimed afterward to be a creditor of his wife, but the time for him to have objected, if objections he had to make, was prior to the signing of the act. The act having been signed by him and his wife and placed of record, he was estopped from attempting to acquire through his wife's succession the rights which she, with his consent, had voluntarily surrendered. The plaintiffs, after this suit was brought and the pleadings of all the parties had fully developed, attempted to purchase this one-twentieth interest which Mr. Fletcher had parted with. Even if nnder other circumstances they could have acquired it, they certainly could not do so under existing circumstances.

We are of the opinion that plaintiffs acquired, through Ballard Coleman, an undivided one-fifth interest in the property; from Catharine Coleman Yorke an additional one-fifth interest, and from George M. Fletcher three undivided twentieths—in all, eleven-twentieths; that Mrs. Barber owns four undivided twentieths, and that Mrs. Ellett owns five undivided twentieths.

For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment appealed from be amended by decreeing the Glen Mary plantation to belong to the parties to this suit in the proportion as follows: To Benton & Milliken, eleven-twentieths; to Mrs. Kate Ellett, five-twentieths, and to Mrs. L. K. Barber, four-twentieths.

It is further ordered, adjudged and decreed that the said judgment be further amended by ordering the costs below to be paid by the respective parties according to their respective interests, and that as so amended the judgment appealed from is affirmed. Costs of appeal to be borne by the parties according to their respective interests.

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12,538.

STATE ET REL. HENRY ORR, SR., VS. THE CITY OF NEW ORLEANS ET ALS.

Taxpayers have a standing in court to contest upon proper charges the validity of a municipal ordinance or contract executed under it, whenever its enforcement may increase the burden of taxation. Handy vs. New Orleans, 39 An. 107.

Article 51 of the Constitution, which declares that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher or teacher thereof as such, and no preference shall ever be given to, nor any discrimination against any church, sect or creed of religion, or any form of religious faith or worship, nor shall any appropriation be made for private, charitable or benevolent purposes to any person or community; *provided* this shall not apply to the State asylums for the insane and deaf, and dumb and blind, and the Charity Hospital, and public charitable institutions conducted under State authority," refers to appropriations made by the General Assembly, and to moneys taken from the State treasury, not to appropriations made by the common councils of cities, or to moneys taken from the city treasuries.

Article 56 of the Constitution prohibits the loaning, pledging or granting of any fund of the political corporations of the State to any person or persons, association or corporation, public or private. To the extent that any appropriation made by a city council in favor of a charitable association of the city exceeds in amount the precise legal equivalent rendered by the particular institution which is to receive it for the support of just such persons as the city itself would be legally chargeable with, the appropriation evidences a donation and a gift, and by reason of that fact it is beyond the power of the council to make it under Art. 56 of the Constitution. Appropriations to charitable associations granted from a general sense by the council of the laudable objects and purposes of those institution, but having no fixed, certain, established consideration for the same, are at best remunerative donations for possible anticipated future benefits, and not being based upon contract express or implied are *ultra vires*.

State ex rel. Orr, Sr., vs. City et als.

The twenty-first and twenty-fourth sections of the charter of the city of New Orleans, defining the duties of the city comptroller and treasurer, did not contemplate that an appropriation by the city council should *per se* justify the withdrawal of the amount of the same from the city treasurer. They obviously intended that each claim presented under an appropriation should be subjected to examination and auditing, and should be based upon affirmatively shown exact legal consideration.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

John C. Wickliffe and *Arthur H. Brown* for Plaintiff, Appellant.

Charles J. Théard, Charles S. Rice, Anthony Sambola, J. St. Paul, Dinkelspiel & Hart, James J. McLoughlin, Assistant City Attorney; *Sam'l L. Gilmore*, City Attorney; *J. Madison Vance* (*Frank McGloin* of Counsel) for Defendants, Appellees.

Argued and submitted December 18, 1897.
Opinion handed down March 7, 1898.
Rehearing refusing May 2, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. In a petition filed by him in the Civil District Court, on November 30, 1896, relator averred that he was a citizen and taxpayer of the city of New Orleans, and the father of two children of school age, who were dependent upon the public schools of that city for an education, and who were attending said schools. That through lack of sufficient appropriation of public money from the public treasury of said city by the City Council of New Orleans to the school fund of said city for the year 1896, the School Board of said city had declared that it would be necessary to close the said pnblic schools during the month of November, 1896. That in the budget of expenditures of the city of New Orleans for the year 1896, the City Council of the city of New Orleans appropriated and ordered taken from the public treasury of the city of New Orleans the sum of forty thousand two hundred dollars, and same paid to sundry private, charitable and benevolent institutions, to-wit: Evangelical Lutheran Orphan Asylum (Bethel); Protestant Or-

phans' Home, St. Vincent's Orphan Asylum, Wet Nurses, St. Mary's Orphan Boys' Asylum, House of Good Shepherd, German Protestant Orphan Asylum, Touro Infirmary, Faith Home for Aged Widows, Lafon's Old Folks' Home, St. Vincent's Asylum, New Orleans Female Orphan Asylum, Female Orphan Asylum of the Immaculate Conception, German Protestant Home for the Aged and Infirm, Jewish Home, Home for Incurables, Maison Hospitaliere, St. Alphonsus Asylum, St. Vincent's Half Orphan Asylum, Louisiana Asylum, St. Joseph's Boys and Girls' Asylum, Holy Family Asylum, St. Joseph's Asyium of the Little Sisters of the Poor, Protestont Episcopal Children's Home, Eye, Ear, Nose and Throat Hospital, Convalescent's Home, Louisiana Freedman's Asylum, St. Vincent de Paul's Society, Conference of St. Joseph and Immaculate Conception, St. Mary's Asylum of Little Sisters of the Poor and the Carmelite Nuns, which said sums in various amounts were ordered to be paid to private persons and communities as members and representatives of various churches, sects and denominations of religion, for an itemized statement of which reference was made to the said budget of 1896, adopted by the said City Council on the fourteenth day of January, 1896, and to the resolution of apportionment thereunder, adopted by said council or its committee on the fourth day of February, 1896, both of which were made part of the petition. That the existing City Council through its Committee on Budget and Assessment had prepared a budget of expenditures of the public moneys and of appropriations from the public treasury of the city of New Orleans fo the year 1897, which budget had been published in the newspapers of the city of New Orleans; said budget having been prepared and provisionally adopted by said committee on the third day of December, 1896, which budget was made part of the petition.

That by said budget it was proposed to appropriate and take from the treasury of the city of New Orleans a sum of money largely in excess of the sum of twenty-seven thousand dollars for private, charitable and benevolent purposes in various amounts to sundry private persons and communities as representatives of and in aid of sundry churches, sects and denominations of religion; that said proposed budget would be adopted by the council and said sums taken from the treasury for said purposes unless the said council and officers were restrained from so doing by due process and orders of

court. That none of the appropriations referred to either in the budget of 1896 or that of 1897 were for the State Asylums for the Insane, Deaf, Dumb or Blind, nor for any charity hospital nor other charitable institution or institutions conducted under State or any other public authority. That all of said appropriations and proposed appropriations were illegal, contrary to law, and beyond the power of the City Council to make or to have made.

That of the appropriation of 1896 a large portion had been paid from the treasury by the City Treasurer on the warrant of the comptroller and the amounts remaining would be so paid out unless said officers were prevented from doing so by law. That if said balance were paid out under the budget of 1896 there would not be sufficient money in the treasury to permit the public schools to remain open for the full time during the year prescribed by law and relator's children would be prevented from attending same during the time they are closed. That if the appropriations proposed in the budget of 1897 were made and the money taken from the treasury there would not be left money enough therein to keep open the public schools during the year 1897 for the full term prescribed by law and custom in said city, and relator's children would be prevented, as stated, from attending school, and thereby prevented from obtaining the education at the public schools which was the right of every American citizen and citizen of the State of Louisiana. That relator's interest in the subject matter was largely in excess of two thousand dollars. In view of the premises, relator prayed for citation upon the mayor—the treasurer and comptrolier of the city and also the common council; that relator have judgment against them decreeing all of said appropriations null and void, and prohibiting any further payment of the money appropriated by the budget of 1896 to the said private, charitable and benevolent purposes to said purposes and communities, and prohibiting the council from appropriating any money for said pnrposes out of the treasury for the year 1897 as proposed, or any subsequent year, and that the mayor be prohibited from approving, and forbidden to approve any ordinance making such appropriation or appropriations; that the comptroller be forbidden from drawing and the treasurer from paying any warrant thereunder, or any money under color of appropriation for any private, charitable or benevolent purpose whatever, to any person or community or in aid of any church, sect or denomination of religion whatever, and for

all writs and orders necessary to enforce the judgment to that effect.

Defendants, through their counsel, filed an exception of no cause of action, and prayed that the suit be dismissed. This exception was referred to the merits.

On the 9th of January, 1897, relator filed a supplemental petition, in which he alleged that since the filing of his petition, the appropriations for 1897, which had been referred to as proposed appropriations, had been, in fact, made in the budget of 1897, and had been approved by the mayor, and were made to the persons and communities named in the supplemental petition for the amounts therein stated. Relator substantially reiterated the allegations of his original petition as to the illegal character of the same and set forth *de novo* his grounds of complaint. He averred that payments made out of the appropriations for the purposes stated were illegal and without warrant of law. He prayed that they be so decreed, and that the officials participating therein be decreed liable for the same and ordered to pay the same into the city treasury. He reiterated the prayer of his original petition, adding thereto relief in consonance with the allegations of the supplemental petition.

The defendants answered under benefit of their exception. They pleaded, first, the general issue. They then admitted that the city of New Orleans had made certain appropriations for the years 1896 and 1897 to the institutions named in plaintiff's petition, but they averred that said appropriations were made strictly in accordance with law.

The Protestant Orphan Home, the Association for the Relief of Jewish Widows and Orphans, the German Evangelical Lutheran Bethlehem Orphan Association, the Touro Infirmary and the New Orleans Convalescent Home, parties in whose behalf and for whose benefit, among other, appropriations had been made in the budgets of 1896 and 1897, intervened in the suit to join the defendants and protect their interests under the appropriations. Their petitions of intervention were substantially alike. They averred that they were each an incorporated charity under the laws of the State and owners of an asylum for the care, nourishment and protection of the indigent sick and orphans; that they were possessed of no adequate means of support and depended very largely upon contributions made by charitable persons and appropriations made by the city of New

Orleans, similar to those contained in the budget of 1897. That the city made use of their institution for the care and support of their indigents and orphans. That said contributions and appropriations were absolutely necessary for the charitable uses for which the institutions were respectively founded. That the appropriations attacked in nowise contravened the charter of the city of New Orleans; were not *ultra vires*, but were lawful and proper under the Constitution and laws of the State. That relator disclosed no interest for the relief prayed for and that the court was without jurisdiction *ratione materiæ*.

The District Court after trial rendered judgment in favor of defendants and intervenors, refusing the injunction and *mandamus* prayed for, and dismissing the suit.

Plaintiff appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. In Handy *et al.* vs. The City of New Orleans *et al.*, 39 An. 107, this court held that taxpayers have a standing in court to contest, upon proper charges, the validity of a municipal ordinance and contract executed under it, whenever its enforcement may increase the burden of taxation. That a petition of taxpayers discloses a cause of action which charges that a municipal corporation has passed an ordinance in excess of its powers and in violation of prohibitory provisions in its charter. Under the authority of that decision the District Court properly overruled the exception of no cause of action filed by the defendants. The petition in this case not only contained averments of the character referred to, but specially charged that the ordinances attacked were violative of the State Constitution.

Relator's principal attack on the ordinances of the city is based upon the provisions of Art. 51 of the Constitution, which declares that "no money shall ever be taken from the public treasury directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof as such, and no preference shall ever be given to, nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship; nor shall any appropriation be made for private, charitable or benevolent purposes to any person or

community; provided this shall not apply to the State asylums for the insane and deaf, dumb and blind, and the charity hospitals and public charitable institutions conducted under State authority."

This article is found under the heading of "*Limitations upon Legislative Powers*," and is evidently directed against taking money out of the State Treasury and of prohibiting the General Assembly from itself making appropriation for private, charitable or benevolent purposes other than for those specially enumerated and permitted.

As the acts complained of are not those of the General Assembly, but of the city of New Orleans, we are called on to comment upon that particular article of the Constitution only in so far as relator bases upon it the contention that a prohibition upon the powers of the Legislature itself carries with it as a necessary and unavoidable consequence a similar prohibition upon all the subordinate or inferior political organizations in the State. He argues that all the powers of such bodies are derived from the General Assembly, and that the latter can not confer upon its creatures powers which it can not exercise itself. This argument rests upon a misconception of the original powers of the General Assembly and the effect upon them of constitutional limitations. It has been repeatedly held that unlike the Congress of the United States, which must find affirmative authority for its action, the Legislature of a State is unlimited in its powers, except in so far as the latter are restricted within certain limitations by constitutional provisions.

It has also been repeatedly held that the scope of these restrictions is not to be extended; that they are not to be enlarged by construction beyond their terms. The decision in Hughes vs. Murdock, 45 An. 935, to that effect merely announces a well recognized doctrine. Arts. 44 and 45 of the Constitution afford examples of cases where the limitations upon the powers of the General Assembly are made to extend not only to the direct actions of the Legislature itself, but to its powers of delegation of authority to others.

The position taken that there is manifest inconsistency between prohibiting the Legislature from taking action upon some particular subject and yet authorizing it either to permit subordinate corporations to do so, or authorizing it to charge them with the duty of doing so, is not logically correct. For instance: there may be certain duties, the performance of which from their character could be and should be exacted in certain localities for the public good, the

expenses of which should be made to be contributed to by the people of that special locality. While the people of the State at large might have an interest in seeing those duties performed and they should through the Legislature have supervision and control over them to some extent, it might be very unfair and improper to cast a general burden in respect to the same upon the whole people. Different localities should be made to bear exclusively the burden to the extent that they were specially and directly concerned in the subject-matter.

We would see no inconsistency in the Constitution's forbidding the Legislature from appropriating the State's money for the care of the indigent insane in the different parishes, and yet either making it obligatory upon it to charge the various parishes with the duty of properly providing for them or leaving that matter open for legislative discretionary action. The duty of providing for the indigent insane would still remain properly a matter of public concern; the Constitution would simply have shifted the burden of the duty from the State at large to the people of the particular places where those unfortunate persons should chance to be found.

Deciding, however, that the provisions of Art. 51 of the Constitution do not extend to this case leaves for examination how far the ordinances of the city are chargeable with illegality under Art. 56 of that instrument and under its own charter. It is best that no technical obstacle be thrown in the way of the solution of that question at this time. It is subject to be presented at any moment, and it should be disposed of at once, to the end that the Constitutional Convention, now in session, may take such action in the matter as to it may be deemed right and to the best interests of the people of the State.

Article 56 of the Constitution declares that "the *funds*, credit, property, or things of value of the State, or of any *political corporation thereof*, shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private; nor shall the State or any political corporation purchase or subscribe to the capital or stock of any corporation or association whatever, or for any private enterprise. Nor shall the State, nor any political corporation thereof assume the liabilities of any political, municipal, parochial, private or other corporation or association whatsoever; nor shall the State undertake to carry on the business of any such

corporation or association or become a part owner therein; provided the State, through the General Assembly, shall have power to grant the right of way through its public lands to any railroad or canal."

No mention is made in this atticle of appropriations which might be sought to be made for private, charitable or benevolent purposes, nor is the prohibition of the article aimed at grants as being "directly or indirectly in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof as such."

The prohibition against grants is as broad as words can make it, and is totally independent of the object to which the grant when made would be applied. The article is found in the Constitution (as is Art. 51), under the heading of "Limitations of Legislative Powers," but, unlike the latter, its terms extend expressly to a prohibition of the "granting of the funds of any political corporation of the State to any person or persons, association or corporation, public or private." The granting of the funds of the political corporations to private persons or corporations being itself prohibited independently of the body attempting to make the grant, or to permit the same to be made, removes from the General Assembly the power through any delegation from it to confer authority on parishes or cities in the State to make them. Grants of parishes or cities of that character based on such delegation would be null and void.

The article prohibits the loaning, pledging or granting of any funds of the political corporations of the State to any person or persons, association or corporation, public or private.

It must be conceded that the institutions in whose behalf the appropriations attacked were made are private corporations. The public authorities have no control or authority over them.

The question remains whether the ordinances attacked evidence "*grants*" of the funds of the city of New Orleans.

Webster defines the verb "*to grant*" as signifying:

1. To give over—to make conveyance of—to give the possession or title of—usually in answer to petition—to convey.

2. To confer or bestow with or without compensation, particularly in answer to prayer or request.

3. To admit as true when disputed or not satisfactorily proved, to yield belief to, to allow to yield, to concede, synonyms. To give,

confer, bestow, convey, transfer, admit, allow, concede. And the word "grant" as a noun as signifying:

1. The act of granting—a bestowing or conferring; concession, admission of something as true.

2. The thing granted or bestowed, a gift, a boon.

3. A transfer of property by deed or writing, especially an appropriation or conveyance made by the government; as a grant of land.

It is argued that the ordinances of the city of New Orleans are not grants of the funds of the city; that they are not gifts; that the city stands charged with the duty of supporting its own infirm, sick and disabled paupers; that the institutions in question have taken upon themselves that obligation; that they have discharged and will continue to discharge the same; that in so doing they have relieved the city and will continue to relieve the city from the pecuniary obgliations which but for them it would have itself to incur; that the city has received and will receive a *quid pro quo* for the amounts appropriated; that the city has the legal power to discharge its duties through agencies other than itself or by contracts with other parties.

Relator replies that though the duty of municipal corporations to support their own infirm, sick and disabled paupers is recognized in Art. 163 of the Constitution, that article is not self-executing; that it directs the General Assembly to make such duty obligatory, but that that body has as yet taken no action in that direction. We are not aware of any action taken by the General Assembly under the requirements of Art. 163 of the Constitution other than Act No. 42 of 1890, which relates only to police juries. We think that the General Assembly construed the provisions of that article as to its obligation of taking affirmative actior as applying only to parishes; that the second clause of the article itself affirmatively made it the duty of municipal corporations to support the indigent infirm, sick and disabled persons within their borders.

Whether this was its view of the matter or not, whether it was a correct view or not, we need not inquire, for we are not called upon in this case to say whether legal proceedings could be legally taken out to coerce the city to make provision for such persons, but whether when they had done so their action would be unauthorized in the absence of a statute of the State making it obligatory upon them to do so. We have no hesitation that if the only attack made

upon the action of the city would have been the absence of such a statute, it would have been utterly groundless.

There can be no question as to the duty of cities to support indigent sick, disabled and infirm persons within their borders, but the question is how and under what circumstances and conditions are they to do so. Had the city built or leased premises having this object in view, and placed employees of its own over them and made provision through ordinances for the payment of the expenses incurred in so doing, no one, we suppose, would question the validity of such ordinances by reason of a want of power in the city to pass them.

Had the city made express contracts either with individuals or with private corporations by which the latter would have come under a well defined civil, legal tie to perform such duties for the city, the officers of the city having legal power to exact performance according to the terms of the contract and to hold such parties liable for breach of the same, and had the city passed ordinances appropriating money to carry out its obligations toward the other contracting parties under such contracts, and had the validity of such appropriations been submitted to us, a very different question would have been presented from that actually before the court.

As matters stand we find a case where there exists not only no contractual relations, either express or implied, between the city and the various corporations on whose behalf the ordinances attacked have been made, but none between those institutions and the indigent sick, poor or disabled of New Orleans. Neither the city nor those indigent sick or disabled persons themselves would have a right of action to coerce any one of them into receiving or supporting them; their action in that matter would be purely and exclusively within their own control. Their boards of directors and not the city officials would decide who should be received and supported, how many should be so supported and for how long. On the other hand none of these institutions by virtue of the fact that they had received and supported indigent orphans or indigent infirm men and women, and that the city had made appropriations in their behalf, would have such a vested right in such appropriations as to prevent a repeal of the ordinances making them or to give a right of action against the city.

We do not understand that the city pretends to have any legal sup-

ervision or control over these institutions. We do not understand the amount of the appropriations to the different institutions to be graded upon any fixed established relation between such amounts and service which could be legally charged for by each as based upon a precise legal equivalent consideration received. We understand the council to exercise its own judgment as to how much each institution should be granted and to exact no accounting for the amounts received. That the appropriations are made in bulk and drawn out in bulk; no specific vouchers being given as to how the sums received had been or would be applied. Under such circumstances the appropriations, though based upon a general sense by the council of the laudable objects and purposes of the institutions have really no fixed certain established consideration for the same. There may be or there may not be a consideration for some of them, and that consideration may be or it may not be an equivalent for the moneys received. Those moneys at the best would be received by way of remunerative donations, for possible anticipated future benefits, not by reason of contract, express or implied. Whether or not any particular appropriation was in support of a real or a remunerative donation would rest in doubt, and for determination would have to be tested in each case by extrinsic evidence. To the extent, at least, that any given appropriation exceeded in amount the precise legal equivalent rendered by the particular institution receiving it for the support of just such persons as the city itself would be legally chargeable with, the ordinance would evidence a gift and a donation to it, and by reason of that fact, would be beyond the power of the council to make. Coates vs. Campbell, 37 Minn. 498. There are no fixed established conditions attached by the ordinances as conditions precedent either to the earning of or the payment of the moneys to the different institutions. There is no attempted or visible check upon either the council, the finance committee, the comptroller or the treasurer. The right of payment seems to be made to rest simply upon the fact of appropriation itself, nothing more. There seems to be nothing to guide either the comptroller, the finance committee or the treasurer in approving or auditing claims advanced under the ordinances. We do not think that ordinances of that character are sustainable, or that such ordinances were in the contemplation of the General Assembly in framing the charter of the city of New Orleans. We think the twenty-first and twenty-fourth sec-

upon the action of the city [illegible] of the comptroller and the statute, it would have be[illegible] than an appropriation by the

There can be no que[illegible] amount of the same from the gent sick, disabled ar[illegible] intended that each claim should be question is how a[illegible] auditing and should be based upon they to do so. [illegible] consideration. Institution for the object in view, [illegible] vs. John M. Henderson, State Au- provision thr[illegible] Court, November, 1882. 18 Vol. Lawyer's incurred jn[illegible] 399, 400. Coates vs. Campbell, 37 Minn. 498. of such o[illegible] questions of law we are not authorized to act them. [illegible] what should or should not be either in the Con- Hac[illegible] statutes of the State touching matters of policy or with[illegible] have to take matters as we find them fixed and un[illegible] those whose province it is under the distribution of c[illegible] State to deal with them. The trouble in this case arises not so much from the fact that estimates were made in the annual budget for the application of moneys for the support of the poor under the heading of "Public Charities" as that through the method adopted by the common council payments of the amounts specified in the ordinances are authorized to be drawn by the various institutions themselves by and through the force of the ordinances and the appropriations themselves; freed from the necessity of establishing affirmatively before the finance committee, the comptroller and the treasurer, that the amounts about to be received were based, not upon a grant, but upon a valid, legal, existing and equivalent consideration. We do not know from the record what course has been followed by those officers in the execution of the ordinances; the methods followed for payment are not attacked.

In the Cook County case (125 Illinois 540) the Supreme Court of Illinois, referring to the necessity it was under of pronouncing a judgment which was in evident opposition to its sympathies and wishes, setting aside an appropriation made in aid of parties engaged in most praiseworthy work, but under circumstances prohibited by the constitution, said:

"They are engaged in the best and holiest of all works, that of reforming and caring for the unfortunate. We agree with counsel for appellee that they do their work faithfully and well. It is so shown by the proof. It is not for us to discuss the wisdom or unwisdom of this prohibition. There it is, couched in terms so emphatic

.n not fail to challenge attention. Any scheme, even though .ved by the blessing of the church, that surges against the will of e people as crystallized into their organic law must break in pieces as breaks the foam of the sea against the rock on the shore."

Our duty, under similar circumstances, is no less imperative than that imposed upon the Supreme Court of our sister State.

For the reasons herein assigned it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the ordinances of the city of New Orleans, making appropriation in favor of any charitable or benevolent institution of the city of New Orleans, under and by the force of which appropriations themselves the institutions in whose favor they are made can draw out from the treasury of the city the funds so appropriated, are illegal and unconstitutional, and the finance committee and chairman of the finance committee are enjoined and inhibited from endorsing or approving any requisition, claim or demand for payment of said appropriation or any part thereof by force simply of the appropriations themselves, and the comptroller of the city of New Orleans is hereby enjoined and inhibited from warranting upon the treasurer for the payment of any portion of said appropriations, and the treasurer enjoined and inhibited from paying any portion of said appropriations simply by force and by reason of the appropriations themselves.

MILLER, BREAUX, J. J., dissenting in separate opinions.

No. 12,680.

E. J. PERTUIT VS. FELIX DAMARE.

50 893
51 1166

50 893
109 679

50 893
110 37

50 893
114 894

50 893
120 631

50 893
e122 171

Mortgages are not (as cutting off equities) negotiable in the sense of the law merchant.

A father who being tutor of his minor children receives into his possession as such as part of their inheritage from their grandmother, negotiable notes made by him to his own order and by himself endorsed, which notes represented the purchase price of property purchased by him, and were secured by special mortgage and vendor's privilege on the property purchased, became *ipso facto* the debtor of his children for the amount of the notes, the said debt being secured in their favor by special mortgage and vendor's privilege. The notes in the tutor's hands were the mere evidences of his debt to them.

The tutor being so indebted to his children, could not alter the situation to their prejudice by illegally tranferring these notes before maturity to a third person. The rights of the transferee *quoad* the mortgage and privilege are subordinated to those of the minors.

APPEAL from the Twentieth Judicial District Court for the Parish of St. James. *Guion, J.*

Sims & Lambremont for Plaintiff, Appellee.

Edward N. Pugh for Auguste Damaré, Under-tutor, Third Opponent and Intervenor, Appellant.

Argued and submitted December 30, 1897.
Opinion handed down February 23, 1898.
Rehearing refused May 30, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 23d of August, 1890, by act before E. D. Laiche, deputy clerk and notary public in and for the parish of St. James, Felix P. Poché sold and delivered to Felix Damaré a certain tract of land, described in said act, for and in consideration of the price of thirty-two thousand dollars, of which price three thousand four hundred and twenty dollars were paid cash, and the balance was represented by eight promissory notes executed by the purchaser to his own order and by himself endorsed for different amounts payable at different dates at the office of the clerk of court of the parish of St. James, the notes bearing interest at eight per cent. per annum from their date until paid. These notes were, by the terms of purchase, secured as to payment by special mortgage on the property sold, vendor's privilege being retained.

On December 31, 1896, the plaintiff, Pertuit, took out executory process against the property mortgaged, as being the holder and owner of three of the eight notes representing, as stated, the purchase price of the same—to-wit: one note of two thousand dollars, maturing January, 1891; one note of four thousand dollars, maturing January 23, 1892, and one note of four thousand dollars, maturing January 23, 1893. The act of sale and mortgage had been duly recorded in the record books of the parish of St. James.

Pertuit vs. Damare.

On the 5th of January, 1897, Auguste Demaré, as under-tutor of the minors Felicie, Roger, Azema, Fernand and George Damaré, issue of the marriage of Leontine Jolly, deceased, with Felix Damaré, filed a petition in the District Court for St. James, in which he alleged:

That on the 30th June, 1890, Felix Damaré was confirmed as natural tutor of the said minors, and petitioner as their under-tutor.

That on the 12th of January, 1891, Mrs. Azema Bourgeois, widow of Cesar D. Jolly, the grandmother of the minors, died, leaving said minors and Cesar Felix Damaré, their brother, her sole heirs. That at the time of said Mrs. Azema Jolly's death, she was the owner and possessor of three promissory notes, made and subscribed by Felix Damaré, the father and tutor of said minors, under date of August 23, 1893, one for the sum of two thousand dollars, payable January 23, 1891, and two, each for the sum of four thousand dollars, payable respectively on January 23, 1892, and 1893, all to the order of said Felix Damaré, and endorsed in blank, bearing interest from date, at eight per cent. per annum; said notes being identified with an act of sale and mortgage passed before Emile J. Laiche, deputy clerk of court, and secured by special mortgage and vendor's privilege on the property of said Damaré, fully described and set forth in the said act of sale. That being the sole heirs of their said grandmother, Mrs. Jolly, and she being the owner of said notes at her death, the said notes became the property of said minors and of their brother. That their said property in said notes had never been divested, and that said minors and their brothers were still the owners of said notes. That Felix Damaré, their father and tutor, had never been authorized by any order of court, or by the advice of any family meeting, to dispose, in any manner, shape or form, either directly or indirectly, of said three notes, the property of said minors and of their brother. and that they were still vested with full ownership of said notes. That in his said capacity of under-tutor of said minors, he represented and showed that on the 31st of December, 1896, one Elphege J. Pertuit, claiming to be the holder of said three notes (the property of said minors and their brother) instituted, *via executiva* against Felix Damaré, the maker of said notes, and the tutor of said minors, in the suit entitled, Elphege J. Pertuit, vs. Felix Damaré, No. 1960 of the docket of said court. That he was advised and averred that said notes, on the

death of their grandmother (the said minors and their brother being her sole heirs) went into the charge and control of Felix Damaré, their tutor, by reason of their said heredity—Mrs. Jolly's succession never being opened and the said notes being her only property. That said Damaré, tutor, was absolutely without power or authority to part with said notes or in any way to dispose of the same; that he was absolutely without power to confer on any one the title to said notes, the property of said minors; that any one taking said notes from said Damaré, the maker of the same, was charged with notice and acted "*en pleine connaissance*" of the fact that said Damaré was without authority and power to destroy or impair, in the least, the ttile and ownership of said minors to said notes. That he distinctly charged and averred that said Pertuit acquired said notes long after maturity and with full knowledge of the title and ownership of said minors, in and to said notes, and that said Pertuit has no title or claim whatever to said notes or any part thereof. That the interest of said Damaré, tutor, and that of the minors were in conflict, and it was his duty as their tutor to intervene in said suit and protect the interest of the minors.

Should the court, however, hold that said minors were not the owners of said notes by reason of the fact that the notes made by and due by their tutor, as tutor, had the effect of extinguishing said notes and as creating a cash indebtedness by the tutor to said minors, then, and in that event, and under the reservation, he said and averred that said notes should be decreed to be extinguished and the lien and mortgage securing the same, cancelcd and erased.

That under no conceivable circumstances had Pertuit, the plaintiff in said suit, any title or claim in and to said notes, or any lien or mortgage bearing on said property. That the further proceeding of said Pertuit in said suit would cause minors irreparable injury and damage, and the same should be arrested and stopped until the decision of the present suit. That petitioner should be allowed and permitted to intervene in said suit, and said Pertuit should be enjoined from taking any further steps in said suit until further orders of the court.

In view of the premises, he prayed to be allowed to intervene in his said capacity in behalf of said minors; that Pertuit, the plaintiff, and Damaré, the defendant (the latter individually and as tutor), be cited; that judgment be rendered in favor of the minors and against

said defendants, decreeing, recognizing and adjudging that said minors are the owners in the proportion of one undivided sixth each of the said notes as heirs of their grandmother, Mrs. Jolly; that said notes be delivered and turned over to said minors, and said Pertuit be decreed to be absolutely without right or interest in and to said notes. Should the court, however, hold that said minors are not the owners of the notes, then, and in that event and under reservation, petitioner prayed that said notes and all the accessories thereto are extinguished and wiped out, and their tutor is indebted unto them for the amount of said notes as so much cash received by him (tutor) for account of said minors, and that said lien, and the lien and mortgage securing the same, be canceled and erased; that a writ of injunction issue against the plaintiff, Pertuit, enjoining and restraining him from taking any further steps or doing anything whatever in said suit until the further orders of the court; that after due proceedings said injunction be maintained and perpetuated, with costs.

An injunction was ordered to issue as prayed for, and was served upon the parties.

The plaintiff, Pertuit, answered, pleading, first, the general issue. Further answering, he averred that he acquired and held said notes through and from Paul D. Pertuit, a resident of the parish, well known therein, in good faith and for a valuable consideration; and that said Paul D. Pertuit acquired said notes in good faith and in the ordinary course of business, long before maturity, for a valuable consideration. That neither the said Paul Pertuit nor himself had ever had, at any time, notice of any of the matters set up in the petition of intervention and opposition. He, therefore, said that the intervention and opposition were not well founded in fact, law or equity. He prayed that they be rejected and dismissed with costs, reserving to him his action in a separate suit for the damages inflicted by the wrongful injunction sued out.

The District Court rendered judgment, decreeing the minors, Felicie, Roger, Azema, Fernand and George Damaré, to be the owners of five undivided sixths of the note of two thousand dollars sued on, together with five-sixths of the interest accrued and to accrue thereon, and recognizing the same to be secured by special mortgage and vendor's privilege upon the property described in the petition, taking effect from the 23d of August, 1890, and that to that extent E. J. Pertuit be decreed to have no right, title nor interest

therein; decreeing further Elphege J. Pertuit to be the owner of the other two notes of four thousand dollars each sued on, together with all interest accrued and to accrue thereon, and the said notes, in principal, interest and attorney's fees, to be secured by special mortgage and vendor's privilege, dating and taking effect from the 23d of August, 1893, upon all of the property described in the petition for executory process; decreeing further, that the demand of the third opponents, the minor children of Felix Damaré, to be recognized as the owners of said two notes be rejected and dismissed; that the injunction sued out by them be dissolved and set aside to that extent, and that in all other respects it be sustained and perpetuated; decreeing further that Elphege J. Pertuit be authorized to proceed with the seizure and sale of the property described, according to law, to pay and satisfy the amount of said two notes, in principal, interest, attorney's fees and costs of seizure and sale; that the costs incurred by the demand of the third opponents, since the filing of the petition of third opposition and injunction, be paid by the seizing creditor, Pertuit.

Third opponents appealed.

After the appeal was taken, Felix Damaré, the father and tutor of the minors, died, and one of the latter (Miss Felicie Damaré) became of age. On motion, Miss Felicie Damaré and Felix Damaré, Jr., who had been appointed tutor to the remaining minors, were made parties to the appeal, Felix Damaré, Jr., being made party as tutor. Appellee asked in the Supreme Court that the judgment be amended by rejecting the claim of the minors to the ownership of the two thousand dollar note; he also pleaded in aid of his own ownership of the notes the prescription *acquirendi causa* of three and five years; also as against any claim which Felix Damaré, Jr., might set up, the prescription *liberandi causa* of four years.

On the 23d of August, 1890, Judge Felix Poché sold to Felix Damaré, a certain plantation in the parish of St. James, which he had himself, upon the same day, purchased at a sale made in the succession of Cesar Désiré Jolly. The price of the property was thirty-two thousand dollars, of which three thousand four hundred and twenty dollars were paid cash and the balance of twenty-eight thousand five hundred and etghty dollars were represented by eight promissory notes of Damaré's, payable to his own order and by himself endorsed in blank for different amounts, and maturing at differ-

ent dates, bearing interest at eight per cent. per annum from their date until paid. Among these notes was one for six hundred and fifty dollars, and three for five thousand dollars each, these notes being secured by preference by special mortgage and vendor's privilege on an undivided half of the property; one note for two thousand nine hundred and thirty dollars, one note for two thousand dollars and two notes of four thousand dollars each.

These four notes were secured by special mortgage and vendor's privilege on the whole plantation—the note for two thousand nine hundred and thirty dollars being granted a preference of mortgage and payment over the second undivided half of the property. The note for two thousand dollars was payable on the 23d of January, 1891, and the two notes of two thousand dollors were payable on the 21st of January, 1892, and one on the 23d of January, 1893.

At the time of the sale made in the matter of the succession of Cesar D. Jolly, his wife, Mrs. Azema Bourgeois, held a mortgage claim against her husband on the property sold for ten thousand dollars.

The terms of the sale at which Judge Poché bought were cash, but we think it evident that while he got credit for the price, yet the price was settled by creditors of the succession of Jolly accepting Damaré's notes made in representation of the price of the sale from Poché to Damaré as so much cash. The widow of Jolly received in lieu of her mortgage claim the three notes of Damaré which matured on the 23d of January of the years 1891, 1892 and 1893, the first being, as stated, for two thousand dollars, and the two others for four thousand dollars each. Felix Damaré had married Leontine Jolly, the daughter of Cesar Jolly, and his wife, Azema Bourgeois. Mrs. Felix Damaré died in 1888, leaving as issue of her marriage six minor children. The father was confirmed as their tutor on the thirtieth day of June, 1890. The abstract of inventory which the law required to be recorded in order to secure by mortgage in favor of these children the faithful performance of the administration of their property by their tutor was recorded the same day. Cesar D. Jolly died in 1889. His widow, Azema Bourgeois, died on the 11th of February, 1891. At the time of her death she was living at the house of her son-in-law, Felix Damaré. She had then in her possession (in her armoir) the three notes of Damaré, which she had received from Judge Poché. The only heirs of Mrs. Jolly were her

grandchildren, the children of Damaré. After the death of their grandmother, Damaré, who was then tutor of his children, took possession of those notes belonging to them as heirs of their grandmother, of which he was the maker.

On or about the 20th of February, 1891, after the maturity of the first note, he called upon Evariste Poché, a brother of Judge Poché, who was a practising attorney in the parish of St. James, who frequently made investments of the money of other parties for them, and having money of his own, made also, frequently, investments on his account, to ascertain whether he "would let him have money on these notes," and having received an affirmative reply, he several days later returned to Poché's office, where the latter gave him ten thousand dollars (seven thousand dollars in currency and three thousand dollars in a check), and Damaré delivered to him the notes. The giving of the notes and the payment of the money were simultaneous—being one single transaction. Interest on these notes was paid by Damaré each year up to 1894, and endorsements to that effect were placed on the back of the notes. All these payments were made to Evariste Poché. Damaré dealt exclusively with him, not knowing until long afterward that the Pertuits had any connertion with or interest in the notes. In the latter part of February, 1891, Paul Pertuit, one of the parttes for whom Poché was in the habit of making invsstments, called at the office of the latter and was shown these three notes by him. They had endorsed upon each of them at that time the fact that Interest had been paid thereon up to January 23, 1891; the endorsement on the two thousand dollar note which had matured on that date, stating additionally that payment of the note was extended to January 23, 1892. Seeing that the notes were declared by their paraph to be secured by special mortgage and vendor's privilege, he bought them from Evariste Poché for ten thousand dollars, which he paid him in currency, taking possession of the notes and holding them until September, 189 , when under a business arrangement with his cousin (the plaintiff in executory proceedings), he transferred them to him. Poché received the interest for Paul Pertuit as his agent. Pertuit testified that at the time he acquired the notes from Poché he had no information in regard te any fact which led him to believe that Poché had no right to sell the notes. Damaré, the tutor, was never authorized by a family meeting or by order of court to sell the notes. Evariste Poché knew all

about the manner of the settlement of the succession of Désiré Jolly. Damaré, at the time of the transfer of the notes to him, told him that they were Mrs. Jolly's notes.

It is, under this condition of affairs, as shown by the evidence, that this case comes before us for decision as to the conflicting rights of the minors, claiming the ownership of the notes as not having had their title divested, either directly or indirectly by any act of theirs or of any one authorized therete on their behalf and those of Paul Pertuit (substantially represented by the plaintiff in executory proceedings), claiming to be holder and owner of the notes, mortgage and privilege, as having purchased them in good faith for a valuable consideration and in due course of trade, and also as having purchased them (with the exception of the note for two thousand dollars) prior to their respective maturities.

It is contended by the under-tutor, on behalf of the minors, that by express law the sale of property belonging to a third person is null. C. C. 2452. That a person can not be deprived of his property without his consent, expressed or implied; that minors, in view of their incapacity and helpless condition, are specially under the protection of the law; that in a case where they are shown to have been despoiled of their property, without shadow or pretence of right or authority, they have a superior equity over one claiming ownership to the same, even in good faith, but under acts of conversion and wrong. That the tutor of minors is prohibited from disposing of the property of his wards without the advice of a family meeting or orders of court. That these minors have been guilty of no laches, imprudence or negligence of which (to their loss) others could take advantage. That no act of estoppel is chargeable to them. That plaintiff's whole claim of right rests upon invoking in his favor the provisions of the commercial law; that that law has never been formally adopted in Louisiana, and its provisions have never been permitted to stand when in opposition to positive and direct statute law of the State. That the rules of the commercial law touching the transfer of notes and the cutting off of equities do not extend to the assignment of the mortgages and privileges by which notes are secured. That plaintiff acquired at one and the same time these three notes of the same series, all of the same date, and all identified by paraph with the same notarial act. That at the date of this acquisition one of the notes was past due; that that fact not only

opened the equities as to that particular note, but as to the others which plaintiff purchased at that time. That even if plaintiff could successfully hold the ownership of the notes as against the minors he could take nothing adversely to them *under the mortgage* and privilege securing the notes, it not being negotiable. That if plaintiff were permitted to do so, and to gain the full benefit of the special mortgage and vendor's privilege securing the notes adversely to them, the effect would be to permit their tutor by a sale of really his own debt to them, to give to his vendee a right which would prime their own, as they would be forced to fall back upon a general mortgage, dating from June, 1890, while plaintiff would claim upon a vendor's privilege upon the special property, which was the only property owned by their father; that the law did not contemplate and should not permit so iniquitous a result to the ruin of minors.

Plaintiff, on the other hand, invokes (as the under-tutor supposed he would invoke) in his own behalf the rules of the commercial law, which he maintains extends to and covers the rights of mortgage and privilege by which the notes were secured. He relies also upon the state of the public record, which he avers gave every reason to believe that the notes were legally owned and held by Evariste Poché, and legally secured in his hands as such holder by vendor's privilege and special mortgage. He asserts his absolute good faith in the premises and his utter ignorance of the fact that Damaré had any other connection with the notes than as maker of the same.

He contends that the purchase of the notes carried with it, as accessories thereto, the mortgage and privilege securing it (C. C. 2615), and that these accessories can not be separated from the principal obligation.

In the case at bar Felix Damaré, the maker of the notes and the transferee of the same to Evariste Poché, has no defence to make and could urge none, either to the notes or the mortgage or privilege. The notes are unquestionably due by him, and unquestionably secured by special mortgage and vendor's privilege; Damaré himself is, by his conduct and contract, estopped from contending to the contrary. The equities which are advanced in this suit are not those between the holder of the notes and mortgage and the maker, which is the ordinary form in which they are presented, but between different parties contesting, as between themselves, their respective titles to the notes and the right to the benefit of their accessory mortguge and privilege.

We are of the opinion that Damaré was without right and authority to transfer the notes, as he did, to Evariste Poché without order of court or legal proceedings. At the time he made the transfer not only was Poché advised of the condition of affairs and the ownership of the notes, but one of the three notes, then simultaneously transfered to him, was past due.

The Supreme Court of Michigan in Able vs. McGuigan, 78 Mich. 415 (44 N. W. 393) and Shultz vs. Shultz (71 N. W. 858) was of the opinion that a transfer of notes under such circumstances throw open the equities as to all the notes matured and unmatured.

Damaré's action in the premises was a conversion or species of theft of the property of his minor children, of whom he was then the tutor. Independently of this, had *Evariste Poché* examined the record he would have found that these notes, subscribed by Damaré to his own order and by himself endorsed, had been by him, at the time of the sale, delivered to his brother, Judge Poché, and the subsequent possession of the same by Damaré, the maker, called for examination and explanation.

There is no doubt that were Evariste Poche himself the plaintiff in this suit, his claim would be repelled by bad faith and knowledge on his part.

There is some doubt as to whether Poché in acquiring the notes did so for his own account, or whether he did so as agent for Pertuit as an undisclosed principal for whom he was in the habit of making investments. We accept that as an actual fact, Paul Pertuit *himself* was not aware at the time he received the notes from Poché that they had been the property of Mrs. Jolly, or the minors, or that they had ever returned into the possession of Felix Damaré, the maker.

The District Court was of the opinion that under the circumstances of the case, the ownership of the note for two thousand with its accessory mortgage and privilege had never passed out of the minors, and so decreed, but it held that the ownership of the other two notes, with their accompanying mortgage and vendor's privilege were transferred to Pertuit and would hold good even as against the minors under the rules of the commercial law, and the jurisprudence of the State based upon a consideration of rights of parties taken on the faith of the condition of the public records.

We have repeatedly enforced the rules of the commercial law in their bearing upon equities as between the maker of negotiable notes

and holders and owners who acquired the same before maturity in due course of trade and for a valuable consideration. The matter has passed beyond the domain of discussion, and makers of notes execute the same in Louisiana with direct reference to their rights and obligations being determined and fixed by the principles of the commercial law and the usages of commerce. C. C. 1954, 1964. Though the commercial law has not been directly and formally adopted in this State as a whole, the existence of its influence and control over certain subjects has not only been recognized by our courts, but has also been directly referred to in the law itself, as, for instance, in Art. 1914 of the Civil Code.

We have on a number of occasions permitted the holders and owners of negotiable notes who had acquired the same under circumstances such as to cut off the equities between themselves and the maker, to also enforce for their benefit and advantage the mortgage by which the makers had secured payment of their note, although there were really defences to the notes, and although we hold to the opinion that mortgages were not negotiable in the sense of cutting off the equities in relation to the enforcement of mortgages. An examination of these cases will, we think, show in each of them there was an element of estoppel as against those seeking to go behind the mortgages to attack their validity and to question the right to their enforcement. It is true that in those cases we referred in connection with their special facts to the condition of the public records, but we have nowhere announced that the simple fact alone that the public record when examined would show the proper registry of a special mortgage as having been granted by one authorized to grant it without any indication on the face of the record going to show reasons why it was not legally enforceable, would carry with it *as a necessary unavoidable consequence against all parties in interest* that the mortgage would be permitted to be enforced acrording to its terms and tenor to their prejudice regardless of reasons which could be legally assigned *by particular parties* why this result should not be permitted to be reached.

To have made such an announcement would have been to have declared that we accepted the doctrine of the negotiability of mortgages to its fullest extent.

We have always taken care in the cases we have referred to, to disclaim holding the opinion that mortgages were negotiable in the

sense that word is used in the commercial law and to place our decisions therein upon the special circumstances of the particular cases.

In the consideration of those cases we have to keep in mind precisely who the parties to the litigation were and what were the relations they bore to the subject matter before the court.

In dealing with the rights of the minors we have to consider them strictly as third parties to the sale made by their father and tutor of their notes with their mortgage and privilege. They have no connection with that sale. Their father was confirmed as their tutor on the thirtieth day of June, 1890, and the faithful administration by the tutor of their property stands secured in their favor to the extent their claim was registered by the general mortgage given them by the law. In point of date and of registry that mortgage was first in order. *In addition to this their father was indebted to them in the full amount of the three notes with interest accrued and to accrue; this indebtedness being secured in their favor by special mortgage and vendor's privilege.*

Will the transfer by the tutor of these privilege-bearing notes (belonging to them) under the circumstances in which the transfer was made, be permitted to confer upon the holder of the notes a right superior in rank and effect to those held by the minors?

We have been called upon several times to examine into and determine the relative rights of a party holding an existing undisputed mortgage on certain property, and those of a party claiming to hold a mortgage superior to the same by reason of being the third holder of a negotiable promissory note which he had acquired before maturity, in good faith, for a valuable consideration, and which note was secured by a special mortgage originally ranking that held by the other party, and standing uncanceled on the public records when the note was acquired, when in point of fact the mortgage had been extinguished by reason of an anticipated payment made by the maker prior to the maturity of the note. In such case we have constantly held that although the third holder was entitled under the commercial law to a judgment on the notes against the maker, notwithstanding it had really been paid, yet he could not enforce the *mortgage to the detriment of third parties.* That the mortgage being merely an accessory obligation, fell, when in point of fact the note was paid and the subsequent reissuing of the note,

whether by the maker or by a person, who, having got possession of it, had, without right, reissued it, could not revive the mortgage to the prejudice of third parties.

See on this subject Hill vs. Hall, 4 Rob. 416; Schmidt vs. Frey, 8 Rob. 435; Bowman vs. McKelvoy & Bradford, 14 An. 587; Schinkel vs. Hanewinkel, 19 An. 260; Brou vs. Becnel, 20 An. 256; Doll vs. Rizotti, 20 An. 265, 266; Hoyle vs. Cazabat, 25 An. 440; Hall, Rod & Putnam vs. Chancere, 25 Au. 493; Morris & Co. vs. White, 28 An. 855; Jennings vs. Vickers *et al.*, 31 An. 684; Butler vs. Slocomb, 33 An. 173; Taylor vs. Rous (Manning's Unreported Cases, page 331); Layman vs. Vicknair, 47 An. 684; Securities Co. vs. Talbert, 49 An. 1404. A mortgage would have to be granted *de novo*.

The principle lying behind these decisions is that the rights of holders of notes which they acquired before maturity, in good faith for a valuable consideration in due course of trade, are different as to the mortgages and privileges securing the note than they are as to the notes themselves; that mortgages and privileges are not negotiable in the sense in which that word is used in the commercial law, as necessarily and generally cutting off equities touching the rights of parties in relation to the mortgages.

The circumstances of a particular case and the relations of parties which would go to justify the barring out of actual equities must be exceptional.

In Bank vs. Flaithers, 45 An. 78, and in Layman vs. Vicknair, 47 An. 684, we expressly declared that these exceptional cases, when they were recognized, could not be made to rest upon the doctrine of the negotiability of mortgages under the law merchant.

In Butler vs. Slocomb, 33 An. 173, we said: "We must not be understood, however, as saying that in such cases (those referred to by the court) when the note passes from the mortgagee the mortgage does not pass with it, for such is not our opinion, inasmuch as the mortgage does follow the note. What we would say is that the mortgage when it does pass is acquired in the same condition that it was in before the mortgagee parted with his rights in, under or to the same. We assert and affirm the proposition that a mortgage when assignable and assigned can not be transferred to a third person so as to give him any greater right than the mortgagee himself possessed. In so doing we are supported by justice, by law and by jurisprudence."

In Securities Co. vs. Talbert, 49 An. 1404, we said: "We are next to inquire whether the plaintiff has by purchase of the notes acquired any greater right of protection than Norman F. Thompson had in the premises. Mrs. Talbert does not question the fact that plaintiff has a valid debt and a valid mortgage against her husband's property; what she denies is, that plaintiff's mortgage ranks her own. The original holder of the notes, as we have said, accepted his mortgage, not on the strength of the condition of the public record as claimed, but on reliance upon an incorrect statement and admission of fact made by the wife. The plaintiff had no dealings whatever with Talbert or his wife; he holds the mortgage as a mere assignee, and takes no greater rights in the premises as to the mortgage than his assignor had. The mortgage is not negotiable in the same sense as negotiable notes are negotiable, and the rules governing the equities in matters of negotiable notes have no bearing. We do not think that our decisions granting protection to third parties, dealing on the faith of the condition of the public record reach this case."

In Bank vs. Flathers, 45 An. 78, we said: "This court has very deliberately held that a *bona fide* holder of a negotiable note acquired before maturity, secured by a mortgage duly recorded, which has been executed by one having lawful authority to make it, and bearing on its face nothing to impeach its validity, can not be defeated in his mortgage rights by secret equities between the original parties existing before, or arising after its execution of which neither the act nor the public records afforded any notice, and of which he had no actual notice, *at least when such equities are opposed by the original mortgagor or on his right.*

We then proceeded to say that our opinion rested upon no assertion of the negotiability of mortgages, but upon other principles of law and equity, which forbid a man who, as a security for negotiable notes, had executed a mortgage, which he had full right and capacity to make on property belonging to himself by an act suggesting on its face no defect duly recorded and importing confession of judgment in favor not only of the mortgagee, but of any future holder of the note to impair its binding force and effect by pleading secret equities *created by his own fault, negligence or imprudence* and of which the subsequent holder of the notes had no notice and no means of information. When *cases arise in which the above elements, or some of*

them, are missing, we will determine them according to their particular facts."

We do not stop to inquire here whether the proposition announced was not too broadly stated. The extract from the decision which we have copied is inserted in this opinion for the purpose of showing that our ruling was based not on the negotiability of mortgages, but upon the doctrine of estoppel, and to call attention to the paragraph which we have italicized in regard to the *parties* setting up the equities in which the general terms of the statement were qualified by the expression that the rule announced was correct, "*at least when such equities were opposed by the original mortgagor or in his rights.*"

No equities are opposed in the case at bar by the mortgagor or in his right, but by third parties.

We have examined the question of the effect of the transfer of a negotiable note before maturity in good faith and for a valuable consideration in due course of trade upon the mortgages and privileges securing the same for the purpose of ascertaining what plaintiff's position would be *quoad* the minors and what legal injury would result to them from accepting as true the proposition contended for by plaintiff in executory process, that he became the legal holder of the three notes sued on by his purchase from Evariste Poché, and also became, by said purchase, the owner of the mortgages and privilege securing the same. We should give to the plaintiff the benefit of that purchase as regards Damaré, and the property in question to the extent that this can be legally done without injury to the minors.

The minors have no greater interest in this matter than the securing of their original rights free from impairment. That being accomplished it is immaterial to them what may be the situation of the other parties as between themselves.

There can be no question, as we have said, that Felix Damaré, having received from Evariste Poché ten thousand dollars as the consideration of these *transfers of these three promissory notes* secured by mortgage would be estopped from denying his indebtedness to Pertuit upon the notes or contesting the mortgages. As between himself, Evariste Poché and Pertuit, he should be held to that position even though as between the minors and Poché and Pertuit the transfer were open to attack. It frequently happens that contracts are held good as between the con-

tracting parties while held null and void, in so far as the rights of third parties would be involved. We have an instance of that kind in matters calling for the exercise of the revocatory action (C. C. 1974) where the contract attacked is set aside in so far as it prejudices the attacking creditor, but is allowed, except to that extent, to stand; and again, in the matter of the sale of movable effects the property may have shifted by the sale and the rights of the pnrchaser as owner be protected as between himself and his vendor, and yet be ignored until actual change of possession as between himself and seizing creditors of that vendor. C. C. 1922. We conceive it to be our duty to solve the issues presented to us in manner such as shall protect the rights of all parties as fully as the situation will legally permit to be done in the exercise of our equity powers.

We recognize the justice and equity of permitting Pertuit as against Damaré to hold the notes with their accessories, and to enforce the same, and the difficulty and hardship as against him of separating the accessory from the principal obligations.

The difficulty in the way of accomplishing this equitable result in favor of Pertuit, and yet enabling the minors to avail themselves of the privilege in their behalf, which secured to them this indebtedness of their father, seems to rest upon the supposed necessity of being forced to detach this vendor's privilege from the notes, and to connect it with the general indebtedness to the minors by their father, resulting from the tutorship when the notes themselves, which evidenced the particular indebtedness which the privilege was intended to secure had been transferred to other parties.

We are of the opinion that Damaré, the tutor, was without power by an illegal transfer to Evariste Poché of the notes belonging to his wards, which he then held in his possession as tutor and *which represented in his hands an indebtedness by him to them of ten thousand dollars, secured by special mortgage and vendor's privilege, to transfer to him or any one holding under him as accessory obligations securing those notes any security which would prime the security by which payment by him of the amount of the notes was secured in favor of his minor children.* He might by such transfer have created obligations against himself which he would be estopped to deny or repudiate, but he was powerless to transfer to third parties his own existing debt to his children. A person can transfer his property but not his own debt. Debts are not property.

Had the tutor on the morning of the day upon which he transferred the notes to Evariste Poché borrowed ten thousand dollars from him and given him in representation of his debt his negotiable notes, of even date secured by special mortgage of that day, it would have been out of his power to have secured those notes by vendor's privilege, or to have given to that mortgage a date anterior to the date on which it was granted, or cause it to have the effect of priming anterior mortgages. The property being encumbered or charged with mortgages in favor of other parties, his capacity to mortgage would be held in check by the rights of the parties holding those mortgages. C. C. 490, 492. He could convey by mortgage to his mortgagee of that date no greater right in the thing mortgaged than he had himself. What he could not accomplish by a direct mortgage granted by him on the day of the transfer of the notes, he could not accomplish to the prejudice of third parties by disposing of notes not belonging to him, secured by a vendor's privilege and by a mortgage of anterior date.

His holding possession of them did not extend his power of mortgaging the property with such prejudicial retroactive effect. No transfer of the notes could give to the transferee any greater rights under the mortgage securing them than the transferrer could have legally vested in them by direct mortgage on that day. Besides this, while it is true that neither the tutor nor his transferees could insist upon holding that the effect of Damaré, being the tutor of his children, and of his being also their debtor upon the promissory notes of which he was the maker, would be to operate a presumptive fictitious payment of the notes, altering the character of the indebtedness, from a debt evidenced by note and secured by special mortgage and vendor's privilege into a general indebtedness through the tutorship, secured by the tutorship mortgage (Zeigler vs. His Creditors, 49 An. 175; Dodds vs. Lanaux, 45 An. 296; Schneider vs. Burns, 45 An. 882; Duranton, Vol. 20, p. 11; Pont, p. 481) we think the *minors would have the option* (if their rights would be otherwise prejudiced) to elect to hold their father's indebtedness to be of that character and to occupy any vantage ground and protection which that position might afford them as against acts of conversion of their property by their father. If the transfer of these notes by their father, made under the circumstances stated, could and should be held to have transferred them to Poché and his

assignee with their mortgages, then we think the minors could validly claim, if necessary, that prior to this transfer they had been fictitiously paid to them by their father, and that the legal situation would be that which would result from a reissue of notes by the maker after an anticipated payment, but *after an extinguishment of the mortgage and privilege securing them.* The existing mortgage having fallen, an act *de novo* would have been required to create a new mortgage.

If the effect of that situation would, under the decisions, be to permit the transferee of the notes to hold them as owners with their mortgages, their rights under the mortgage and privilege would be subordinated to the existing rights and equities of anterior creditors, among whom, under the circumstances of the supposed election, would be the minors appearing in this case, holding under their general mortgage. But unless this theory of a fictitious payment should be strictly limited in its effects to the parties to this litigation, neither would be benefited by its application, but on the contrary, it would operate to their prejudice. It would enure to the benefit of third parties *having no grouud or reason to invoke the doctrine, as payment has not, in point of fact, been made.* There are on the property, privilege claims held by other persons concurrent with that of the minors, and these parties being bound by no equities, would, by reason of the privileges they hold, prime the general mortgage by which the rights of the minors would be secured, as well as prime those of Pertuit.

The minors can not be forced to fall back upon their general mortgage, or as upon a matter of general indebtedness, unless it should be to their interest so to do. As we have said when they became the owners of the three privilege notes involved in this litigation, *their father became their debtor to the amount of those notes with accrued and accruing interest secured by special mortgage and vendor's privilege. As between them the negotiability or non-negotiability of the notes was a matter of no moment. They merely were the evidence of their father's indebtedness. Of this special indebtedness so secured, their father could, by no wrongful act of his own, deprive them.* McCall vs. Mercier, 1 La. 347; Zeigler vs. His Creditors, 49 An. 175. If they were all of age to-day, and he were unwilling or unable to actually place those notes in their possession, they would none the less have the legal right as against him to institute proceedings upon the notes,

explaining the cause of their not producing them, and to obtain judgment against him for the amount thereof with recognition in their favor of the vendor's privilege and special mortgage securing the same. Brown vs. Saddler, 13 An. 205. Damaré himself would be powerless to complain of the non-production of the notes or to urge that they had been by him transferred to third parties with their mortgage and privilege, and that he would be called upon to make a double payment. He would be estopped from raising such a defence as against his wards, and were he in fact to be called upon to make a double payment he would occupy precisely the legal and just position which would be called for by his conduct—he would be justly estopped as well to his children as to Pertuit. A special feature of this particular case is, that the transferrer of the note to Poché (under whom Pertuit holds) was himself the very debtor at that time to third parties for a valuable consideration upon those notes, and that he would justly himself incur a double liability on accout of his illegal conduct. It would be no defence to the suit brought against him by his children that third parties had acquired rights in, to, or upon the notes, with their accessories and the property. Two parallel actions based upon the notes with their mortgage and privilege could very consistently and legally coexist against Damaré; one brought by Damaré's children against him, the other by Damaré against him. Pertuit certainly would have no legal ground of complaint that the children should institute such an action or obtain judgment against their father with recognition of their vendor's privilege. The relative legal rights of parties as resulting from the mortgages and vendor's privilege could be and would be open to be tested upon a sale of the property mortgaged. Pertuit might obtain judgment against Damaré for the amount of the notes in his possession with recognition in his favor of the vendor's privilege and mortgage, and the children also obtain judgment for the same amount with similar recognition of privilege and mortgage.

There would be two debts owed by Damaré. It is a mistake to suppose that the *acquisition by third parties of rights in respect* to the notes and privilege and mortgage had the *effect of destroying and extinguishing the minors' ownership of the debt evidenced by these notes and mortgages*, where the act on which these adverse rights rested were unauthorized acts and acts of conversion and spoliation. True it may be that for some pur-

poses and to some extent they might have to acknowledge the rights of others so acquired, but they would none the less still *retain their own rights of ownership*, for the act of sale was as to them null. C. C. 2452. Suppose that Damaré, at the maturity of the respective notes had paid Pertuit the amount thereof, would the notes have returned as extinguished notes with extinguished mortgage and privilege into his possession? Unquestionably not. Why not? Simply because though the transfer of the notes as between Damaré and Pertuit might be operative giving the latter rights of imperfect or qualified ownership therein, the minors' ownership of the notes and their right in the mortgage remained in force.

The return simply unfettered the notes and mortgages from the rights which had been temporarily impressed upon them to the extent that such rights had been legally impressed. From this it would appear that a double set of rights could legally coexist in respect to these notes.

Property held in trust by a trustee can always be followed when converted so long as the property can be followed and identified. Third parties may have acquired rights, but the owners have lost none of their own without their consent express or implied or without their fault. This case presents simply the question as to the *extent to which third parties have acquired* rights to the detriment of the minors, for the minors' rights are intact. Pertuit, as holder of the notes, could obtain judgment thereon, record the judgment in his own favor, a judicial mortgage—execute the judgment by writ of *fi. fa.* and obtain a privilege by seizure which would enure to his individual benefit, but *so far as the property mortgaged is concerned* he could *never under the mortgage obtain* a preference of payment out of the proceeds thereof which would prime the rights of the actual owners of the notes with their privilege and mortgage. He can take nothing under the mortgage and privilege to the prejudice of those parties. So long as the notes with their privilege and mortgage stand with actual existing rights of the minors therein they bar the way to any claim of preference advanced by him.

Damaré, the father and tutor of the minors, is now dead. The rights of the minors have become fixed. A new tutor has been appointed to them, authorized to enforce those rights in all respects. In view of all the facts and circumstances of this particular case, we think the course to be pursued in order to guard the interests of all

parties and to prejudice the legal rights of none is to give effect as between the plaintiff and Felix Damaré, Sr., to the transfer of the notes declared on in the executory proceedings in this case and to the transfer of the accessory obligations securing the payment of those notes, and to authorize the enforcement of payment of said notes by the plaintiff, but to subordinate the rights of the plaintiff in executory process to payment out of the proceeds of the sale of the property mortgaged to the prior payment out of those proceeds of the minors, represented therein by their under-tutor, and Miss Felicie Damaré to the full amount of the notes declared on with the interest thereon accrued to and to accrue with the right to plaintiff, E. J. Pertuit, to plead and to prove as far as the facts may justify any actual payment or extinguishment of the amount due by Damaré to his children, parties to this suit.

For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment of the District Court be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the injunction taken out by Auguste Damaré as under-tutor of the minors named in the pleadings, be, and the same is set aside, and the plaintiff, E. J. Pertuit, as holder of the notes declared on by him, be and he is hereby authorized and permitted to proceed to the sale of the property mortgaged to secure the payment of said notes, but that his right as such of payment out of the proceeds of the sale of the said property be subordinated to a preference of payment out of the same to the minors on whose behalf the said under-tutor intervened herein to the full amount of the said notes with interest accrued and to accrue thereon, with the right reserved to plaintiff, E. J. Pertuit, to plead and to prove, as far as the facts may justify, any reduction upon the same by payment or extinguishment actually made thereof.

MR. JUSTICE BREAUX concurs in the decree.

MILLER, J., dissenting, filed a dissenting opinion in this case.

BLANCHARD, J., concurs with Miller.

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No. 12,740.

STATE OF LOUISIANA VS. PIERRE PRADE.

When the statement of facts recited in a bill of exception by counsel differs from that asserted by the court, that of the court is controlling.

State vs. Prade.

Where a District Judge after a full trial is satisfied that the testimony sought to be made the basis of a new trial would not alter the result at a second trial, even if admitted, either because the testimony was otherwise so strong against the accused as would make such particular testimony clearly unavailing, or because he knew the witnesses who were proposed to be put upon the stand, and was convinced they would not be believed, or because of similar reasons his opportunities for acting advisedly, justly and properly are so superior to those of the Supreme Court that it would not be warranted in substituting its udgment for his in the premises, except in very clear cases.

APPEAL from the Nineteenth Judicial District Court for the Parish of St. Martin. *Voorhies, J.*

M. J. Cunningham, Attorney General, and *James Simon*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

Edward Simon for Defendant, Appellant.

Argued and submitted April 9, 1898.
Opinion handed down May 2, 1898.
Rehearing refused May 30, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant was convicted of an assault with intent to commit rape, and sentenced to three years' hard labor in the penitentiary.

The complaints urged by him on appeal are those reserved in a bill of exception to the action of the District Court in overruling a motion for a new trial.

The first ground assigned for a new trial was that when his cause was called for trial the attorney whom he had employed to defend him announced in open court that he withdrew from the case, but immediately accepted, at the request of the court, the position of an assigned counsel, but "that said attorney expressly limited with the consent of the court his assistance to attending to the evidence on the trial and jury matters," in consequence of which limitation the defence contemplated by Art. 8 of the Constitution was not carried out, and defendant not defended, said attorney not arguing the matters involved on the merits. That said attorney forthwith

went to trial without asking time to prepare the defence indispensable in the matter, particularly on a charge of felony like this. That defendant, a youth of humble station in life, was unable to see to his own defence and to know the sort of evidence necessary in his defence.

2. Because since the trial of the case defendant had discovered evidence of a witness unknown to him until after said trial, who would make proof under oath (this witness being one Alcide Malvaux)—that said witness met the prosecutrix on the day said pretended crime was alleged to have been committed, on the evening of said day, she being on foot on the road at a distance of a few acres from the town of St. Martinsville, she being in company with a white man also on foot and a black man, and talking together—that said prosecutrix told said witness Malvaux to take her to town (which he did in his buggy) to her house, and on the way she told him that defendant, Pierre Prade, had given her three dollars to have carnal intercourse with her, and she showed him the money, and at that time she said she had Prade's hat—that she said to witness that she did not want to have intercourse with him at that time—that she said to said witness to go in his buggy and to bring Pierre to her, as she wanted to give him his hat, and said witness went and took Prade to her, and she and Prade went into her room and after the expiration of about ten minutes they both came out, and she gave Pierre his hat and thanked witness; that she told Pierre she would have carnal intercourse with him at another time—that said witness would also prove that the prosecutrix was an infamous low prostitute of the town of St. Martinsville.

3. Because defendant could prove by several witnesses found since the trial (naming them) who could not be found before with reasonable diligence (material witneesses not corroborative) that the character of the prosecutrix was that of a low prostitute of the town unworthy of credit upon oath.

That the testimony of Malvaux had been discovered since the trial; that it could not be had before or at the time of trial; that it was material in its effect and to establish his innocence; that it was not merely cumulative, corroborative and collateral, and was such as to produce an opposite result; that it was such as reasonable diligence of defendant could not have found at first trial.

Accompanying the application was an affidavit of Malvaux in which

he swore that the facts related in the motion for new trial as being within his knowledge, and as having been told to him by the prosecutrix and figuring under ground No. 1 of said motion were true and correct.

The court, in overruling the motion, said:

The facts stated by mover under ground No. 1 are incorrect. Honorable James E. Mouton was employed by him as counsel when he was arrested in June, 1897, and bailed, and remained his counsel to the day of the trial. Mover's witnesses were summoned by him and on the day of the trial were all present in court. When the case was called for trial by reason of some disagreement betwen Mover and his counsel (the latter) mentioning the fact to the court desired to withdraw from the case.

The court then asked mover whether he had an attorney to represent him, and he answered to the court that James E. Mouton was his counsel. Thereupon at the request of the court Judge Mouton consented to represent the accused by appointment of the court. He stated that he was ready to go to trial and the trial was proceeded with. When counsel in his petition says that Prade had had a half and incomplete trial, he did gross injustice to the court and to the jurors who tried the cause and misrepresented the counsel who had defended the accused with so much zeal and talent to the knowledge of all who assisted at the trial. The case was argued neither by the State nor by the defence, and submitted by both on the charge of the judge. The counsel of accused, Judge Mouton, was well cognizant of all the facts of the case, having been employed three or four months.

The second ground is without merit.

1. Because if Malvaux testifies, as it is alleged that he can, his testimony would be the reverse of that given by the accused himself when on the stand.

Newly discovered evidence, the effect of which would be to impeach the testimony of the accused himself is not a ground for new trial.

2. Malvaux in his affidavit takes particular care not to swear to the truth of the facts detailed in the second ground for new trial, but merely swears to the facts as being within his knowledge and as having been told him by the prosecutrix and figuring under ground No. 1 of the motion for a new trial.

3. Because admitting that Malvaux' affidavit is correct, it is evident by mover's very allegations that he knew that he was a witness to the facts stated (so material as he alleged to his defence), and yet he showed no diligence to have the witness, though accused was out of jail up to conviction (State vs. Washington, 36 An. 341).

To warrant a new trial, the newly discovered evidence must not be for the purpose of contradicting State witnesses. It must be such as could not have been secured by reasonable diligence, and it must not only be shown that due diligence was used, but that it was *used to discover* the evidence (State vs. Charlot, 8 Rob. 529; State vs. Morris, 27 An. 480; State vs. Woodworth and McCauley, 28 An. 89).

During the three months that intervened between his arrest and his trial, accused took no steps to secure his presence as a witness, though he resided within two miles of the court house.

The fact of the prosecutrix having received three dollars was brought to the notice of the jury, who disbelieved it, and it is not likely Malvaux' testimony would produce a different result, the more so as the witness of the accused who saw the prosecutrix immediately after the outrage, with the face bruised and clothes *torn* to pieces, all (with the exception of one) denied that prosecutrix had any money then. The fact that the prosecutrix was a woman *of* ill repute, was shown at the trial.

OPINION.

If the recitals of the bill of exceptions had come to us uncontroverted, we would have been called on to decide whether an assignment of counsel by the court to an accused person, who had no counsel, would be proper when the counsel assigned attaches to his acceptance of the trust conditions and limitations as to the extent and character of the services he should render to the accused. We would be also called on to declare whether if not proper the error would be of such a character as to carry with it the setting aside of the verdict of the jury, and the judgment rendered upon it. In the case at bar, in overruling defendant's motion for a new trial, the court declared that "the facts stated therein were incorrect." Counsel insists that this general statement was followed by a recital of particular facts connected with the assignment, and a defence of the manner in which the counsel who had been assigned performed his duty; but that the court nowhere referred to or denied the special

circumstance which constituted the very basis of his complaint, which was, that the counsel who had been assigned, accepted the trust under conditions and limitations affixed by himself and consented to by the court. He insists that such was the fact and that the court had passed that particular fact by. We would be slow to believe that a judge in affixing to a bill of exceptions a statement of facts would so express himself as to convey to us the idea that he was certifying that all the recitals of the bill were untrue, when in fact he was leaving some of the recitals uncovered and uncontradicted. We have on several occasions urged upon district judges the importance of carefully examining the allegations made in bills of exceptions so as to cut off the possibility of any discussion as to precisely which facts were admitted, and which were denied by the court. We referred particularly to this matter in State vs. Wright, 48 An. 1488, und the condition of the present case necessitates our again calling special attention to the subject. We have repeatedly said that where the court and counsel differ as to facts the statement of the court is controlling.

We must dispose of this case under that rule.

The conclusions of the District Court in respect to alleged newly discovered evidence as a basis for a new trial are reached by him with thorough knowledge of the condition of the entire evidence in the case, and with the advantage of having seen and heard all the witnesses. This court knows nothing of the facts of the case, otherwise than as it comes to a limited knowledge of them through the bills of exceptions. If a District Judge, after a full trial, be satisfied that the testimouy sought to be made the basis of a new trial should not and would not alter the result of the second trial, even if admitted, either because the testimouy otherwise was so strong against the accused as would make such particular testimony clearly unavailing, or because he knew the witnesses who were proposed to be put upon the stand and was convinced that they would not be believed, or because of other similar reasons, his opportunities for acting advisedly, justly and properly are so superior to our own that we would not be warranted in substituting our judgment for his in the premises, except in very clear cases. On the statement of the judge we have no reason to believe that a jury with Malvaux' testimony before it, would be in any way different from what it was before.

District judges know that the State asks for the conviction of no

man as to whose guilt there is reasonable doubt; they should act on that theory, and we must assume they do.

For the reasons herein assigned:

It is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

No. 12,759.

A. L. JOHNSON VS. CITY OF NEW ORLEANS.

A judgment of non-suit does not support a plea of *res judicata*. Allinet vs. Creditors, 15 An. 130.

Holders of claims against the city of New Orleans, by the laws and ordinances under which the claims were created, entitled to payment only from and out of the funds appropriated to payment of such claims, are not entitled to an absolute judgment against the city. Johnson vs. The City of New Orleans, 46 An. 714.

Assuming that the funds applicable to the payment of claims of particular years out of the taxes of those years should have been illegally diverted and misapplied to the payment of the claims of later years, the effect thereof would not be to transform the mass of these qualified creditors into general creditors with the right to obtain absolute, general judgments against the city—nor authorize any particular one of these creditors to obtain such a judgment giving him superior rights to which he would not be entitled.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Chas. Louque for Plaintiff, Appellant.

James J. McLoughlin, Assistant City Attorney, and *Saml. L. Gilmore*, City Attorney, for Defendant, Appellee.

Argued and submitted April 28, 1898.

Opinion handed down May 16, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff avers, that he is the owner of claims due to him by the city of New Orleans, to the amount of thirty-two thousand five hundred and twenty-five dollars and ninety-eight cents.

That said claims have been recognized as due to him by said city (but no judgment has been rendered thereon) in the suit entitled A. L. Johnson vs. The City of New Orleans, No. 37,596 of the docket of the Civil District Court.

That said claims were incurred by the city of New Orleans during the years 1879, 1880, 1881, 1882, 1884, 1886 and 1887.

That he is entitled to recover an absolute judgment against the city for the reason, that said city has diverted the funds out of which petitioner was to be paid in many ways, some of which petitioner is able to mention, to-wit: paying the running expenses of the city of New Orleans during the years 1888 to 1894 with the funds of the above named years 1880 to 1886 and 1887, out of the taxes of 1880 three thousand two hundred and forty-one dollars and ninety-nine cents ($3241.99), of

1881	$2,206 81
1882	3,947 48
1884	6,662 96
1886	3,109 50
1887	5,900 00
	$24,068 74

That in addition the said city has remitted a large amount of interest for said years contrary to law and the Constitution of the State for years.

1880	$20,003 00
1881	13,458 33
1882	80,280 00
1884	24,036 66
1886	30,783 00
1887	30,037 00
	$148,587 99

That in addition to the above diversion of funds the said City Council made contracts with W. J. Comeford as collector for the above back taxes and allowed the sum of twenty per cent. on the amount collected; that said contract was *ultra vires*, because it allowed to said contractor, who was by virtue of his employment an officer of said city, a salary greatly in excess of $3500 per annum, and if said contractor was not a city officer he could be delegated no power to collect the taxes, the powers under the Constitution having been delegated to the treasurer of said city.

That a similar contract was made with J. W. Gurley, who was appointed and elected Assistant City Attorney, and in less than one year his fees amounted to more than fifty thousand dollars, all of

which sums were illegally and unlawfully taken from money which should have been used for the purpose of paying petitioner's claim.

That if all the taxes collected, and which should have been collected, had been honestly and legally applied to the indebtedness of the year, his claims would have been paid long ago. In view of the premises he prayed that there be judgment in his favor and against the city of New Orleans for the sum of thirty-two thousand five hundred and twenty-five dollars with legal interest from January, 1888, and costs. Defendant excepted that plaintiff's petition disclosed no cause of action. It also pleaded *lis pendens* and *res judicata* and prayed that the suit be dismissed.

The District Court, "considering the decision of the Supreme Court in the case of A. L. Johnson vs. The City of New Orleans (No. 11,401), 46 An. 714," maintained the exception of no cause of action and *res judicata.*

Plaintiff appealed.

In the first suit of Johnson & Co. vs. The City of New Orleans, the plaintiff averred himself to be the holder and owner of the same claims on which he has based his present action. He alleged that the city of New Orleans had failed to pay said claims when due, but had ordinanced for same to be paid whenever there was money in the treasury of the city, not otherwise appropriated. His prayer was for judgment against the city for the amount of the claims with legal interest from judicial demand. The District Court rendered judgment in favor of the plaintiff to the extent that it recognized him as the owner of the claims against the city of New Orleans which were annexed to his petition, and sued for, but in other respects his suit was dismissed as in *case of non-suit.* Plaintiff appealed, and on appeal the judgment appealed from was affirmed. The exception of *lis pendens* and of *res judicata* were not well founded, and should have been overruled. The particular action then brought was ended by the judgments rendered. The only matter which was fully closed by the judgment was the fact that plaintiff was the owner of the claims declared upon. What plaintiff's rights as resulting from ownership were, or would be, was not determined. A judgment of non-suit does not support a plea of *res judicata.* Allinet vs. His Creditors, 15 An. 130.

The only difference between the petition in the present, and that in the former case, consists in plaintiff's having assigned as a reason

justifying his obtaining an absolute judgment against the city as a general creditor, that his claims were payable out of the taxes of certain years; that those taxes after having been collected by the city had been diverted and misapplied by illegal payments to other parties in manner and amount set out. We have examined the various ordinances adopted by the City Council recognizing and covering the claims held by plaintiff. They are substantially to the same effect. One of these will serve as a sample of them all.

No. 82, Counsel Series, reads as follows: "*An ordinance for the payment of the several accounts therein named.*

"*Be it ordained*, that the following appropriations be and they are hereby made for the month of December, 1892 (out of special supply fund), and that the comptroller warrant on the treasurer in payment of the same whenever there shall be money in the city treasury to the credit of the appropriate fund for such account and not otherwise appropriated."

(Below this follows a list of claims specifically described as to amounts and consideration for the same and as to the parties then holding them.)

In the opinion rendered by us in the former case, we said that "in no sense was the holder of such claims a general creditor of the city. He is a creditor with the payment confined to a particular fund when collected. Every ordinance produced in the case to fortify plaintiff's demand announces that the appropriations to pay the claims on which he sues are not payable until there is money in the city treasury derived from the collection of the public revenues to the credit of the appropriate fund—*i. e.*, that from which the creditor is entitled to be paid. Whatever the character of the obligation, whether warrant certificate or claim, original or transferred, has impressed upon it this specific and limited right of payment and, subject to that limitation, the plaintiff acquired the claim on which he sues. What occurred, and perhaps is the case now, is that there is a large amount of unpaid claims against the city, payable out of appropriations of past years. This is due to shortages in the collection of taxes and perhaps to other causes. The plaintiff doubtless is the sufferer with others from the absence of funds in the treasury to pay him. Hence his appeal to the court to change the character of his debt and give him an absolute judgment against the city with interest. It is manifest he is entitled to no such relief."

Though these remarks did not lead up to a decree which the city can invoke as *res judicata*, they are none the less an authoritative expression of the court's opinion as to the status of the plaintiff as a creditor of the city. Had the corporation refused originally to recognize the existence and validity of these claims, and had the plaintiff sued the city to have the same to be decreed to be just and legal, it is obvious that a judgment to that effect would necessarily have had to contain at the same time a limitation upon a right of general payment. The judgment would have had to restrict plaintiff's right to enforcement within the limits of the contract and of the law governing the case. The plaintiff would have been unable to enforce the judgment against the city by general seizure under a writ of *fi. fa.* We are not advised of any circumstances having arisen since our judgment in the case which has had the effect of changing plaintiff's position from a qualified creditor to a general creditor. If it be true that the funds of the city applicable to the payment of claims of particular years out of the taxes of those years have been illegally diverted and misapplied to the payment of claims of later years, there may exist some remedy by which that wrong could be rectified, but the remedy would certainly not be to transform all of these qualified creditors into general creditors, with a right to obtain absolute general judgments against the city. If this result could not be brought about in favor of the mass of the holders of such claims, still less could it be successfully sought in favor of particular creditors, thus giving them superior rights to which they would not be entitled. If plaintiff be entitled to relief, we do not see that it would be at all necessary that he should be armed with a judgment in order that it should be made to serve as a basis for obtaining it.

For the reasons assigned:

It is hereby ordered, adjudged and decreed that the judgment appealed from, in so far as it sustains the plea of *res adjudicata*, be and the same is hereby annulled, avoided and reversed, and the judgment appealed from sustaining the exception of no cause of action be affirmed in so far as plaintiff seeks to obtain an absolute judgment upon his claim against the defendant. Costs of appeal to be borne by the appellee.

No. 12,787.

THE STATE OF LOUISIANA VS. MOSES ROLLINS.

Though the law has not imposed upon courts the duty of informing accused parties, that they are entitled to counsel, and asking them whether they desire that counsel should be assigned to them—it has become almost universally the practice for them to do so *ex proprio motu*.

While the fact that a prisoner does not ask the court to assign counsel to him, and he chooses to appear by himself, and he is convicted, does not entitle him to a new trial because of his *want* of counsel (State vs. Kelly, 25 An. 382), it is none the less a fact to be considered in connection with others for the purpose of ascertaining whether in any particular case he has been accorded the full opportunities for defence which it is the duty of the State to extend to its people, even those who may be ultimately and deservedly found guilty of crime.

The right to move for a new trial is guaranteed to the defendant in the smallest civil cases. In criminal cases, the same right exists, as also the additional right of moving in arrest of judgment for defects apparent on the face of the record. These rights may be waived by the parties, but they can not be denied by the courts. The law contemplates the giving of reasonable opportunity for preparation and examination. To refuse a reasonable time for the exercise of a right is tantamount to a denial of the right itself. State vs. Gardner, 10 An. 25.

APPEAL from the Twenty-second Judicial District Court for the Parish of St. Bernard. *Hingle, J.*

M. J. Cunningham, Attorney General, and *Albert Estopinal, Jr.* (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

A. E. & O. S. Livaudais for Defendant, Appellant.

Argued and submitted April 23, 1898.
Opinion handed down May 16, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 1st of March, 1897, two informations were filed against the defendant. The first charge that he had, on September 30, 1896, wilfully and maliciously and with a dangerous weapon, to-wit: a pistol, inflicted a wound less than mayhem upon one Wash Williams, with the intent him the said Wash Williams to kill. The second charge that he had on the 30th of September,

1896, carried concealed about his person a concealed weapon, to-wit: a loaded pistol.

The minutes of the court of date March the 7th, 1897, show that the accused was on that day brought to the bar in the custody of the sheriff; that being arraigned on each of the charges he pleaded "Not Guilty." Whereupon, on motion of the District Attorney, the case was fixed for trial for March the 6th, 1897, and the accused was released on bond. For some reason unexplained the cases were not tried on that day.

On the seventh of March of the next year, 1898, the accused having failed to answer to his name when called, a bench warrant issued for his arrest returnable March 8, 1898. On that day the cases were fixed for trial for the tenth of the month. The minutes do not show that the accused was present when they were so fixed. The minutes of the tenth recite that "these cases regularly fixed came on their day for trial. Present: A. Estopinal, Jr., District Attorney, for State. The accused present in court and represented in *propria persona*. The accused being ready for trial the following persons (naming them) were duly called, presented, accepted and sworn as the jury to try these cases.

"The evidence being completed these cases were submitted.

"The court charged the jury in relation to each of the charges of wounding with intent to kill and carrying concealed weapons, ordered them to retire to their room to deliberate on their verdict and to appoint their own foreman.

"After a short absence the jury returned into court and through their foreman, Francis Bourg, returned a verdict of guilty as charged on each information; whereupon the court ordered the verdicts recorded and the jury discharged from further consideration of the cases."

Defendant, through counsel, moved for a new trial, on the ground:

1. Because the verdict of the jury was contrary to the law and the evidence.

2. Because the defendant had had no sufficient notice of the assignment of his cases for trial.

3. Because the accused, who was unprepared for trial and had no counsel to represent, him was tried and convicted solely upon the testimony of the witnesses for the prosecution and in the absence of his witnesses whose names he had furnished to the proper officer and

which said witnesses could easily have been procured; they all being residents of the parish.

4. Because the accused, who is illiterate and had no means to employ counsel, had every reason to believe that his witnesses would have been summoned (he having furnished their names to the committing magistrate, who had marked their names on the back of the the affidavit) until the time when during the trial he caused the first of his witnesses to be called when he discovered for the first time that none of his witnesses had been summoned.

5. Because since the trial of the cause his friends had procured him the assistance of counsel and he then invoked the right to be permitted to establish his defence by lawful evidence and to obtain the process of the court to procure the attendance of his witnesses. The motion for a new trial was overruled.

The accused was brought to the bar and sentenced. The minutes recite that "the court on the verdict of guilty of wounding with intent to kill, considering Sec. 794 of the Revised Statutes, sentenced Moses Rollins to imprisonment in the State penitentiary at hard labor for a period of eight months and to pay a fine of one dollar, and on the verdict of guilty of carrying concealed weapons, the court, considering Sec. —— of the Revised Statutes, sentenced Moses Rollins to pay a fine of fifteen dollars and costs, and in default thereof to suffer imprisonment in the parish jail for a period of twenty-five days."

Defendant filed a bill of exceptions to the action of the court in refusing a new trial.

This bill recites that immediateiy after the verdict was rendered in the case, counsel for the accused applied for a new trial or for time to prepare application for new trial. Whereupon the court declared that this was the last day he intended to hold court in the parish for the present term, and requested counsel to state the grounds upon which would be based his said intended application, and said counsel having done so in the manner above, and as well as the short time allowed, and his knowledge of the case permitted, and the judge overruling said motion, proceeded forthwith to sentence the accused under said verdict and Sec. 794, R. S., to pay a fine of one dollar and suffer imprisonment at hard labor for eight months. Whereupon counsel for accused reserved a bill of exception to the ruling of the court.

The District Judge made the following statement upon the bill:

"The trial took place on Thursday, March 10, 1898, it being the last day of the present term of the court. The accused was indicted for the offence at a prior term of this court, and his case continued to the present term, he being released on bond for his appearance thereto. On Monday, March 7, 1898, the prisoner having failed to appear for trial, on motion of the District Attorney a bench warrant issued for his arrest, and on Tuesday, March the 8th, the following day, being brought into court, his case was fixed for trial for Thursday, March 10, 1898.

"On the day of his trial, the defendant was asked the following question by the Court: 'Do you wish to be tried by the judge or by the jury?' He answered: 'By a jury.' The sheriff was then ordered to call the names of the witnesses summoned by the State and by the defendant, which he did in the presence of the accused, and the trial was then proceeded with without objection on the part of the defendant."

"1. The verdict rendered was in accordance with the law and the evidence.

"2. The defendant had sufficient notice of the assignment of his case for trial.

"3. The prisoner did not ask the Court to assign an attorney to defend him and chose to appear by himself, nor did he ask for a continuance on any ground whatsoever.

"4 The names of the witnesses furnished to the sheriff by him were summoned with the exception of one who could not be found.

"These witnesses were present at the trial of the cause and their testimony was given on behalf of the defendant. The services of counsel were secured only after verdict and at the very moment that the defendant was to receive sentence. It was then their motion for a new trial was made.

"5. The defendant or his friends had ample time prior to the trial to procure the assistance of counsel."

No assignment of error was made in the Supreme Court, nor was any brief filed on behalf of appellant. His counsel argued the case orally.

The accused in this case went to trial without the assistance of counsel. There is no pretence that the Court informed him that he was entitled to counsel or asked him whether he desired that counsel

should be assigned to him. Though the giving of this information and the asking of this question have not been imposed upon courts by law, it has become almost universally the practice for them to do so *ex proprio motu*. While it has been held that if a prisoner does not ask the court to assign an attorney to defend him and chooses to appear by himself and he is convicted, the want of counsel is no good reason for a new trial (State vs. Kelly, 25 An. 382) it is none the less a fact to be considered in connection with others for the purpose of ascertaining whether in any particular case he has been accorded the full opportunities for defense, which it is the duty of the State to extend to its people, even those who may be ultimately and deservedly found guilty of crime.

The minutes do not show that the appellant was present when the case was assigned for trial. *Per se*, standing alone, that fact might not be good grounnd for a new trial, but this also is a circumstance to be considered. The District Judge, in his reasons for refusing a new trial, states that appellant was present at that time, but that is not the proper place where such fact should appear. Defective minutes are not to be eked out by statements so made by the judge. The case was tried two days after the assignment. The clerk in his minutes recites as a fact that the accused was ready for trial when the case was called, but the minutes do not declare that he was asked whether he was ready, and answered that he was. As matters stand, the statement is a mere conclusion of the clerk. If the court's statement be taken as showing the facts of the case at that time, he was not asked that question at all, but simply "whether he would be tried by the court or the jury," and having answered "by the jury," the jury was at once called, empaneled and sworn and the case at once disposed of. The court says the services of counsel were secured only after verdict and at the very moment that the defendant was to receive sentence. "That it was then that motion for new trial was made." That is true, but the record shows that the verdict in the case, the motion for a new trial, the sentence of the accused and the adjournment of court, all followed in rapid succession on the same day. The motion for a new trial comes before us in a very irregular manner. It is unsworn to and reaches us as part of the minutes of the court. The reason for this appears to have arisen from the fact that the court declined to grant counsel of accused time to write out his motion and insisted that he should

state his grounds for the same at once. The reasons seem to have been assigned verbally and to have been taken down by the clerk. We see no reason for this haste. Counsel for accused could not have acted any more promptly than they did.

The judge states all this happened upon the day that he intended to adjourn the court, but this intention to adjourn should have given way at once before the reasonable demand made for time to prepare the legal motions which the law allows to be made between verdict and sentence. There is no reason assigned by the court why this hasty adjournment should have been made on that day and we see none.

In State vs. Gardner, 10 An. 25, this court said: "The right to move for a new trial is guaranteed to the defendant in the smallest civil cases. In criminal cases the same right exists, as also the additional right of moving in arrest of judgment for defects apparent *on* the face of the record.

"These rights may be waived by the parties, but they can not *be* denied by the courts. To refuse a reasonable time for the exercise of a right is tantamount to a denial of the right itself. This is exemplified in the present case. According to Hawkins the rule in the King's Bench in cases of misdemeanors was that four days *should* elapse between the conviction and the judgment if there were so many days remaining in the term. It is said by Chitty that the *court* if they granted a rule *nisi* will at the instance of the party applying make it a part of the rule that the defendant should have a certain time, *e. g.*, three days, to move in arrest of judgment after they shall have given their opinion upon the motion for a new trial, or the defendant may obtain a rule in the alternative, though as the motion in arrest may be made at any time before judgment is pronounced, it would seem that such a special rule is not necessary.

"The analogy between criminal and civil proceedings in the English court in regard to these matters of practice is very striking. Our Code of Practice relates to civil proceedings alone, but by analogy it may occasionally afford a safe guide to criminal proceedings. We are not called on to determine what a reasonable time for the preparation of the motion in question would be; we only say that the judge erred in refusing to grant any time whatever." Those views are thoroughly correct.

It will not do to say that the motion for a new trial was, in fact,

made and overruled. The law contemplates a motion made with reasonable opportunities for preparation and in this case for examination. It may be that the accused was properly found guilty and that he should be punished. If that be true and he be not punished now, it will demonstrate that harsh proceedings in the District Court are not the surest and best methods of securing the ends of justice.

We are of the opinion that the sentence appealed from should be as prematurely rendered, set aside and the cause remanded to the District Court and there reinstated on the docket with leave to the defendant to make formal motions for a new trial and in arrest of judgment and for further proceedings according to law, and it is hereby so ordered and decreed.

No. 12,483.

AMERICAN FURNITURE COMPANY VS. GRANT-JUNG FURNITURE COMPANY, LIMITED.

50 931
52 26
50 931
113 903
50 931
115 230

The writ of sequestration is intended as a protective and preventive, not a compulsory, remedy. Parties using it for coercive purposes to effect payment of claims due them, by threats of injury and annoyance, must be prepared if they do so, to be in the exact position necessary to enable them to claim the benefit of the legal proposition, that a person is not liable for damages if he merely exercises a legal right, even though his motives may be bad.

Where the question before the court is, whether on the face of the papers the District Court was justified on the pleadings and affidavit in directing a writ of sequestration to issue—the appellate court will give full weight to the affidavit and take its averments to be true; but, where the question comes up on a motion to dissolve the sequestration on a direct charge that the allegations of the petition and affidavit were false, plaintiff will be required to do more than rest upon the pleadings and affidavit. On the trial of the sequestration as to issues of fact, plaintiff must show and sustain the grounds and facts upon which his alleged fear was made to rest.

Where a person engaged in selling goods, wares and merchandise, to parties in a retail business, sells them on credit, there is an implied consent on his part that the latter should dispose of the goods purchased in the usual and regular course of business. If the price be not paid at maturity, the vendor may withdraw this consent and resort to legal proceedings (if called for) to enforce this withdrawal. Should he resort to writs of sequestration for that purpose he must be careful not to convey to the general public in his pleadings and affidavit (unless warranted by the facts) that he had reason to believe that defendants had concealed or were about concealing the goods. That allegation carries with it the idea of dishonesty or want of fairness, and is calculated to alarm all parties dealing with the vendees.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

Edwin T. Merrick and *B. R. Forman* for Plaintiff, Appellant.

W. S. Parkerson for Defendant, Appellee.

Argued and submitted January 28, 1898.
Opinion handed down March 21, 1898.
Rehearing refused April 18, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 29th of December, 1894, plaintiff instituted a suit in the Civil District Court for the parish of Orleans against defendant, asking judgment for nine hundred and forty-three dollars with vendor's privilege on certain property which it alleged it had sold to defendant. With this reference to these sales, plaintiff alleged that it had on the 5th and 20th of July, and 5th of October, 1894, contracted, sold and delivered to the defendant, goods, wares and merchandise consisting of bedroom sets, bookcases desks, sideboards, china cases, etc., as would appear by a statement annexed to its petition. That the sales of certain bookcases, china closets, bedroom sets and sideboards, of goods sold which petitioner could point out, were made in New Orleans through its secretary and gave rise to a vendor's privilege to secure payment of the price. Plaintiff's demand was accompanied by a prayer for a sequestration based upon an allegation that defendant would conceal part with or dispose of the said movables in his position during the pendency of the suit. A writ of sequestration having issued under order of court granted on plaintiff's petition, the sheriff, on the 29th of January, 1895, sequestered and took into his possesion a small lot of furniture. Defendant bonded the property sequestered on the 31st of January, 1895.

On that day defendant ruled plaintiff to show case why the sequestration should not be set aside on the grounds:

1. That the allegation contained in plaintiff's petition, that it feared that defendant would conceal, part with or dispose of the

movable property in its possession during the pendency of the suit, was false and untrue.

2. That the allegation that the sale of certain bookcases, china closets, bedroom sets and sideboards was made through an agent in New Orleans was false and untrue; said goods having been sold in the city of Cincinnati, in the State of Ohio.

On the trial of this rule the sequestration was dissolved. Plaintiff appealed from the decision to the Court of Appeals, which court affirmed the judgment of the District Court.

On the 9th of January, 1895, defendant filed an answer pleading first a general denial. Further answering, it averred that at the institution of the suit the goods had not been delivered or completed; that the defendant did not intend to conceal or part with the goods, as was well known to plaintiff, to whom the goods were tendered by defendants; that the plaintiff did not have a vendor's privilege on the goods, the same having been sold in the State of Ohio.

Assuming the position of plaintiffs in reconvention, defendants alleged that the American Furnishing Company, in accordance with the requirements of law, had, in taking out the sequestration, furnished bond in the sum of one thousand dollars, upon which E. T. Merrick, Jr., became the surety, and he was liable *in solido* with that company up to the amount of said bond.

That by reason of said wrongful, illegal and malicious sequestration, plaintiffs in reconvention were compelled to employ an attorney for the purpose of dissolving the same, and that for such services they owe their attorney the sum of two hundred and fifty dollars; that they were injured in their credit and business, many of their creditors sending their claims to attorneys for collection and demanding an immediate settlement; that they were greatly harassed and embarrassed thereby and had been injured in the sum of ten thousand dollars; that Peter Jung, vice president of the Grant-Jung Company, was compelled to go North to see their creditors as a result of said illegal, wrongful and malicious sequestration, and that the said trip forced upon them an expenditure of some three hundred dollars.

In view of the premises, defendant prayed that the sequestration be dissolved and plaintiff's suit dismissed, and that there be judgment in reconvention in their own favor for the sum of ten thousand five hundred and fifty dollars and costs.

The District Court rendered judmgent on the main demand against defendant, in favor of plaintiff, for the sum of nine hundred and forty-three dollars, with legal interest from judicial demand and costs thereof, and on the reconventional demand against plaintiffs, in favor of defendants for fifteen hundred and fifty dollars and costs of said demand.

Plaintiffs appealed. Defendants moved to amend, praying that the judgment appealed from be increased so as to grant them damages for the full amount asked in their reconventional demand. After this amendment was asked for the Grant-Jung Company was dissolved and went into liquidation under liquidators, who, on motion, were made parties to the appeal.

Counsel of the Grant-Jung Company contend in their brief and argument and the members of that company declare in their testimony, that the sequestration taken out by plaintiff was utterly unjustified; that the articles sequestered were not sold in New Orleans, and the price thereof was not secured by privilege; that they formed part of orders given for goods which were not completed and the articles in hand were not in a condition to be resold by them; that until the orders were fully filled, the price of the articles were not due and exigible and the sequestration prematurely issued; that it was not only issued illegally, but maliciously. That plaintiff's secretary, Hildebrand, who represented them in New Orleans in the matter of the sequestration, stated before it was issued that unless plaintiff's bill was paid he would cause it to be issued; that it would bring about "big trouble," and threatened them with the injury and annoyance it would cause them. That the immediate effect of the sequestration was to produce great alarm in the minds of the parties from whom defendants were in the habit of purchasing goods, as well as those who had been in the habit of purchasing from them. That the former, in a number of instances, refused or neglected to honor orders which had been sent them and stopped extra-judicially goods which had already been forwarded to them; that various commercial credit agencies withdrew their credit from their reports; that after the sequestration they were unable to purchase goods, except for cash or on shipments with bills of lading attached, or on personal guarantee of payment by Mr. Jung. That several suits were filed against the company immediately after the sequestration which would not have been filed but for it; that their

creditors generally were about to follow suit and would have done so but for Mr. Jung having been sent North and East to explain to them the exact situation having induced them to forego action; that the credit of the company was good at the time of the sequestration and it was making money, though not much; that its stock was greatly reduced below its necessities in the interval between the sequestration and the July following; that during that period it lost about eleven thousand dollars, which loss it attributed to the sequestration. That numbers of persons who were in the habit of making purchases on advance deposits of one-fourth to one-tenth of the orders, withdrew the deposits they had made, also their orders. That shortly before the sequestration defendants paid plaintiffs every dollar which was then due them and offered to return the articles which they then had on hand which they had purchased from them; that plaintiffs after accepting the offer refused to carry it out and brought suit; that defendants had done nothing to warrant their allegation, "that they had reason to fear that defendants would part with, dispose of or conceal the property sequestered during the pendency of the suit."

Plaintiffs on the other hand insist that the articles sequestered, were sold in New Orleans, and payment of the price of the same was secured by privilege; that the price was due and exigible; that defendants gave many evasive and unfounded reasons and excuses for delaying payment, and after having themselves offered to return to plaintiffs the articles in their stock, which they then had, and which remained unpaid for, declined to carry out their offer when called upon to do so, imposing upon plaintiffs as a condition for doing so the payment of a bill for freight, insurance, drayage, storage, etc., upon the goods not mentioned when they made the offer which bill was almost equal to the value of the goods to be returned and entirely unwarranted in being asked for as to amount or as to fact. Hildebrand substantially denies threatening the defendant with a sequestration. He declared that he simply referred to the consequences of a sequestration as likely to give them trouble and annoyance and declared that if he was forced to take action for the prosecution of plaintiffs' legal rights he could not help the consequences. He said that defendant after having broken off their arrangement to plaintiffs to return the articles in stock which they had purchased from plaintifft told him—that he might crack his whip

—that they had employed an attorney and could keep them out of their money for eight or nine months.

For the purposes of discussion of the rights and obligation of parties we have to accept two facts as having been conclusively established by the judgments of the District Court and the Court of Appeals: first, that the sequestration was illegally taken out; and second, that defendant was justly and truly indebted to plaintiff at the time of the judgment to the amount declared upon in their petition.

While we have to accept this first point as established, we are not advised as to the precise ground upon which the result was reached. There is evidence in the record to which the court may have given full credit to the effect that the articles in stock which were sequestered were none of them in the condition which defendant had the right to exact they should be in before being called on to make payment for the same, nor in the condition to be resold. There is conflict in the evidence as to whether all or any of the articles sequestered were purchased under a Louisiana contract. There is no evidence in the record that the defendants had concealed or were about to conceal any of the articles purchased from the plaintiffs and none that defendants were at the time of the sequestration in an embarrassed or insolvent condition.

The dissolution of the sequestration by the District Court and Court of Appeal carries with it as an unavoidable consequence a liability on the part of the plaintiffs to damages to some extent; the extent of the damages being dependent upon the facts surrounding and connected with its issuance. If the sequestration was dissolved simply bp reason of some error or mere slip of the proceedings or the pleadings, the plaintiffs would be liable for compensatory damages only; that is, to the damages resulting from it as its natural and proximate cause, but if it was issued maliciously with the motive and intention of injuring the defendants, they would be liable as for a tort just as any other person would be liable for torts resulting from acts unconnected with judicial proceedings. The writ of sequestration is intended by law to be a protective and preventive, not a compulsory remedy—parties using it for coercive purposes to effect payment of claims due them by threats of injury and annoyance must be prepared if they do so to be in the exact position to claim the benefit of the legal proposition that a person is not liable for damages if he merely exercises a legal right, even though his motives may be bad.

We are not prepared to say that a part of the articles sequestered were not purchased in Louisiana at some date later than August, 1894. It is exceedingly difficult to fix the the identity of articles of furniture sold and delivered under different orders and we can not trace some, of the articles to any order given in August, or prior thereto, but neither are we prepared to say that any portion of the articles sequestered were complete or in salable condition.

A large part of the arguments and briefs of counsel of both sides was taken up in discussing whether certain china closets sequestered were sold in Louisiana or in Cincinnati. A very close analysis of the testimony disclosed that the apparently irreconcilable statements of the witnesses of the plaintiffs on the one side and those of the defendant on the other sprang from a difference of opinion as to whether a certain conversation between J. G. Grant and Hildebrand evidenced a sale or not. It appears that the plaintiff company not only sells, but it manufactures articles of furniture. Grant testified that among the articles which his company was in the habid of purchasing from plaintiffs were bookcases of a particular pattern, known as " No. 27 bookcases." That in January, 1894, he suggested in New Orleans to Hildebrand that by a certain alteration in the pattern a very salable and popular china closet might be made, several of their customers having so expressed themselves; that Hildebrand asked him about how many persons had done so, and he replied about a dozen; that Hildebrand thought the idea a good one, and Hildebrand said his company could meet the demand; that he would communicate with his company. Up to this point both parties agree as to the conversation, but beyond that, they separate. Hildebrand says that he, at that time, fixed the prices for these new china closets, and Grant then and there purchased a dozen and ordered them forwarded. Grant says that Hildebrand did not know what the alteration would cost and was not in a position to fix prices, nor to come under any obligation to make such china closets or make sales. That he (Grant) merely made a suggestion to Hildebrand and Hildebrand merely communicated it as such to his company; that true it was that the latter adopted it and manufactured them, but that the defendant company never came under any obligation to buy until August of 1894, when he and Hildebrand met in Cincinnati, when an order was, for the first time, given for them.

Plaintiffs produced and filed a letter written to them by defendant

dated New Orleans, 3-21-1894, in which, after referring to othe matters, they say: "Do not ship the china closets you made for us until we give you further notice, as we hope soon to move into larger quarters and do not want to put any more in our warehouse."

Defendants say this letter referred to china closets other than those of this particular pattern, as their order of January, 1894 would show that the parties had dealings with reference to other kinds, but there is no evidence before us that any closets other than these particular ones were ever "made to order." We are inclined to think that there must have been some understanding between these parties in respect to them of a more definite character than defendants believe.

There may be a difference between the rights and obligations of parties as resulting from a contract of *absolute sale* and those resulting from a *contract to "manufacture"* or an order "to *manufacture*" under a promise of purchase, but we need not go into any discussion of the question inasmuch as the testimony shows that these particular articles were not in a complete condition when sequestered and not in a condition for resale, and plaintiffs were not in position to demand the price thereof.

Each party claims that the burden of proof was upon the other in respect to damages and the extent of the same. Plaintiffs contend that the affidavit taken by them verifying the allegations of their petition must be taken for true and protects them against damages, and particularly punitive damages, until rebutted. They assert that they had sworn that "they had reason to fear that defendant would part with, dispose of or conceal the goods;" that this was all that the law exacted on their part, and having complied with it they could rest secure from any charge of malice so long as defendants failed to prove the non-existence of their fear and of their good faith.

If the question before the court was simply whether, on the face of the papers, the District Court was justified on the pleadings and affidavit in directing the writ of sequestration to issue, if the regularity of the proceedings were simply at issue we would give full weight to the affidavit, but where the question comes up on a motion to dissolve the sequestration on a direct charge that the allegations of the petition and affidavit were false, we think plaintiff would be required to do more than rest upon his pleadings and affidavit. The law contemplated that on the trial of the sequestration as to issues of fact that the plaintiff should be able to show the grounds and

facts upon which his alleged fear was made to rest. The only facts disclosed in this record are the fact itself of indebtedness (which is controverted as to its being exigible though due)—its non-payment and the refusal of defendants after they had proposed to return to plaintiffs the articles which they had purchased from them and which they then held in stock to make the delivery, unless coupled with new and unreasonable demands. We find no evidence of concealment or attempted concealment of those goods on the part of defendant and no evidence of insolvency or embarrassment on their part. The conduct of the defendants in refusing to carry out their agreement with plaintiffs unless they complied with new and unreasonable conditions attached was certainly calculated to irritate them and to do away with any indulgence which they might have otherwise intended to extend to defendants, but it did not do away with the necessity when they did act of keeping within precise legal limits.

When a company engaged in such business as the plaintiffs are in, sells goods on credit to parties engaged in business, such as the defendants are in, it must be necessarily in the contemplation of both parties that the goods sold should be "disposed of and parted with." The consent of the seller to such disposition is necessarily implied. The lessor, under our law, has not only a right of privilege, but of pledge for the payment of the price of the lease, but Marcadé, under Art. 2102, referring to the fruits of the farm, says that they can unquestionably be sold by the lessor, notwithstanding the express terms of the law, for the reason that from the very nature of the subject-matter, the lessor had given an implied anticipated consent to the sale. The mere fact of selling or disposing of the goods by the defendants showed no bad faith on their part; that fact had to be one of other facts to make the selling a just cause for sequestration. It is true that if the price of a sale becomes exigible, and it be not paid according to promise, the vendor may have the right to withdraw this anticipated consent and insist that thereafter the objects upon which his privilege rests may be placed in a position such as that they be not sold and the privilege upon them lost. This right may be independent of any bad faith on the part of the vendee, and when a vendor avails himself of his right so to do, he should be careful not to convey to the general public by his pleadings or affidavit that he had reason to believe that the vendee was about "concealing" the articles sold. That particular declara-

tion conveys and carries with it the idea of dishonesty or want of fairness, and if made by responsible parties would be calculated to alarm all parties dealing with the vendee. If not true it should be left out of the affidavit; it is not harmless but very injurious surplusage.

We do not think plaintiffs were justified in making this charge against the defendants, particularly when there was nothing to indicate that defendants were in failing circumstances.

The District Court rendered a judgment for fifteen hundred and fifty dollars, without any attempt to show on what particular items of damage it was grounded. The testimony of Grant, Jung and Metaye (the secretary of the defendant company) undoubtedly show just and probable elements for damages, but their statements are of the most general character and they do not descend to particulars. Why the court fixed upon that particular sum we do not know. While we do not feel warranted in setting aside the judgment, we certainly would not be warranted in increasing the amount of damages as appellant suggests.

The judgment is affirmed.

No. 12,625.

EDWARD TALLE ET ALS. VS. MRS. WIDOW N. ANTONIO DE MONASTERIO ET ALS.

Plaintiff in a petitory action asserting his own title, attacked defendant's title as being based upon an absolutely null tax sale, and prayed for rent and also for damages. Defendant answered, averring that being a creditor of the plaintiff, the latter had suggested to him that the property be permitted to be sold for taxes, and that defendant should purchase it, and that plaintiff's indebtedness to defendant be then canceled; that this was accordingly done, and plaintiff was estopped from attacking the tax sale. He set up no demands in reconvention or compensation. The District Court set aside the tax sale, rejected plaintiff's demand for damages, and was silent as to the demand for rent. Plaintiff appealed. Defendant made no demand for an amendment.

The Supreme Court decreed that the judgment of the District Court in so far only as it dismissed and rejected plaintiff's demand for fruits and revenues be annulled; that in so far as it decreed plaintiff the ownership of the property and dismissed defendant's reconventional demand, it be left in full force; that the right be reserved to plaintiff to claim the fruits and revenues of said property, and the cause be remanded to the lower court for further proceedings according to law. On the return of the cause to the District Court, defendant filed a supplemental answer setting up, by way of defence through compensation, a number of claims against the plaintiffs. Plaintiff resisted proof of these claims

on a plea of *res judicata* under the decree of the Supreme Court. The plea was overruled, the District Court stating it understood the decree of the Supreme Court to have remanded the cause to enable plaintiff to claim fruits and revenues, the fruits and revenues of the property. That this included, also, the right of defendant to plead *de novo* whatever she might have compensation. *Held:* That the District Court in holding that the judgment of the Supreme Court did not cut off defendant's right of resisting demands, though a plea of "compensation" was correct. The purpose and intention of the judgment was to force defendants, by reason of their having acquiesced in the judgment of the District Court, to occupy on the return of the cause a purely defensive position, cutting them off from setting up reconventional demands, but not pleas in compensation.

When by the consent of the owner of property, the legal title thereto has been placed in the name of one of his creditors, under an agreement, that he should hold the same until the amount due him should be paid, the owner has no right to ignore the latter's right of detention until a balancing of accounts had been had, and by and through a petitory action recover both the property and the rents, leaving her own debts unpaid.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Theo. Cotonio for Plaintiffs, Appellants.

Horace E. Upton and *Anatole A. Ker* for Defendants, Appellees.

Argued and submitted February 26, 1898.
Opinion handed down April 4, 1898.
Rehearing refused May 16, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. This case was, by judgment of this court, rendered in 1896, and found reported in 48 An., p. 1232, remanded to the District Court for further proceedings.

The plaintiffs in the suit claimed to be the owners of certain property described in their petition which they alleged was in illegal possession of the defendants under an unwarranted and unjustifiable claim of ownership based upon a tax sale to N. Antonio de Monasterio on the 25th of February, 1876. They averred that notwithstanding the illegal adjudication of the property at tax sale, they, within six months of the same, made a legal tender to the purchaser of the price paid by him with fifty per cent, and all costs added, but

that he refused the tender and declined retransferring the property for any amount less than two thousand dollars. That De Monasterio had died, that he and his wife and his heirs had held the property in bad faith ever since February, 1876; that Monasterio had in the month of February, 1876, illegally and forcibly and maliciously ejected and dispossessed them of the possession of the property, and by reason of said acts had come under a liability to plaintiffs for rental, and also for actual and exemplary damages—the damages being fixed at over eight thousand dollars and the rental at the rate of fifteen dollars per month, from the date of taking possession, February 25, 1876. They prayed judgment for the ownership and possession of the property with rents and damages as declared upon in the petition. Defendants answered that at the date of the purchase at the tax sale, Edward Talle and the community between him and his wife, Teresa Loren (the said wife being then living), were indebted to Monasterio for groceries sold him in the sum of five hundred dollars; that he also owed him about two hundred dollars for city and State taxes paid by him at his request; that he had also acquired from one Dr. Lott, a note of Talle's for four hundred dollars; that the whole of this indebtedness amounting to eleven hundred dollars was recognized by Talle as being due by him to Monasterio at the time of the sale. That just before and at the time of said tax sale, Talle asked him to purchase said property, giving as a reason that he was heavily in debt, and was unable to pay the taxes, and he, Monasterio, was his creditor and he desired him to become the purchaser.

That in consequence of said special request he purchased the property, and as a consideration therefor canceled Talle's indebtedness to him of eleven hundred dollars.

That after he had so purchased the property Talle entered into a contract of lease with him and for a period of about eighteen months actually paid him rent for the property. That thereafter he failed to pay the monthly rent, and Monasterio sued and recovered judgment against him therefor. That failing to pay the judgment Monasterio brought suit to recover the possession of the property and obtained a judgment against him under which he was legally ejected and evicted from the premises.

That Talle set up no right or claim to said property in any of said judicial proceedings, but as in duty bound acquiesced therein, and

he was estopped from setting up any title to the property. That since the sale Monasterio had paid taxes on the property to an amount of about twelve hundred dollars.

The prayer of the answer was that plaintiff's demand be rejected with costs; that the property referred to be decreed to belong legally to the succession of Monasterio; that plaintiffs be decreed estopped from setting up the nullity and invalidity of the title for the reasons stated. Defendants, reserving the right to answer (further) if need be, prayed that the title to the property be decreed good and valid and for general relief.

On the 25th of March, 1895, the District Court rendered judgment in favor of the plaintiffs, setting aside the tax sale under which the defendants claimed the ownership of the property and decreeing plaintiffs to be the owners of the same. It also rendered judgment dismissing plaintiffs' demand for damages and decreed that defendants pay the costs.

Plaintiffs appealed from this judgment.

Defendants did not appeal, nor did they on appeal pray for any amendment or modification of the same.

On appeal the Supreme Court reversed the judgment of the District Court, setting aside the tax sale and decreed that plaintiffs' demands be rejected at their costs.

In the body of its opinion this court, referring to the judgment of the District Court appealed from, said that it annulled the sale and "decreed the plaintiffs to be the owners of the property—rejecting their demand for damages—that it made no disposition of defendants' pleas of prescription—*the claims for revenues being compensated doubtless by taxes paid*," *etc.*

On application for a rehearing appellants called to the attention of the court that defendants had not appealed from the judgment, nor prayed any amendment or modification of the same, and insisted that in view of that fact the only matters before the court for review was plaintiffs' demand for damages, which had been rejected, and for revenues, as to which the judgment appealed from was silent. That the correctness of the judgment as to the legality of the tax sale and the ownership of the property was not, under the circumstances, before the court.

This court, considering this contention to be well founded, set aside the judgment it had first rendered, substituting in its place (Talle vs.

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Court and its judgment had the force of *res judicata;* that if defendants had had any additional claim it should have been urged when the original claim was urged and it was now too late to do so.

The court overruled the objections. It stated it considered that it had the right to permit the amended answer under its discretionary powers; that it did not place the same interpretation upon the decision of the Supreme Court which counsel did.

To this ruling plaintiffs excepted.

Upon the trial of the case plaintiffs objected to any evidence going to support defendants' claim in compensation on the ground that that issue was not before the court, the claim of the defendants having been dismissed by the District Court and affirmed by the Supreme Court on appeal. The court overruled the objection. The testimony was admitted and plaintiffs excepted.

The District Court rendered judgment in which it declared that "on the second trial the court finds the amount of rents and revenues to be sixteen hundred and sixty-one dollars; that defendant is entitled to plead in compensation the following amounts paid by them:

Note due by plaintiffs to defendants	$400 00
Groceries, etc	500 00
Repairs of property	300 00
Insurance	144 00
States taxes	252 88
City taxes	723 53
Total	$2,319 53

That "defendants' supplemental answer and plea in compensation is therefore maintained and plaintiffs' suit for the fruits and revenues is dismissed, plaintiff to pay all costs."

In its reasons for judgment it said: "The court understands that this case has been remanded by the Supreme Court to claim the fruits and revenues of the property decreed by this and the Supreme Court to belong to the plaintiff. This included also the right of defendant to plead *de novo* whatever claim she may have in reconvention or set-off.

The court understands the Supreme Court to have affirmed the judgment of this court in so far as the real estate and plaintiffs' claim for damages are concerned, the only questions before them on appeal."

The plaintiffs appealed.

The first question we are called on to consider is the correctness

Monasterio *et als.*, 48 An. 1232) the following judgment: "It is ordered, adjudged and decreed that the judgment of this court previously rendered in this case be set aside and annulled. It is further ordered, adjudged and decreed that the judgment of the lower court, in so far only as it dismisses and rejects plaintiffs' demands for fruits and revenues, be annulled; said judgment, in so far as it decrees plaintiffs the ownership of the property, and dismisses defendants' reconventional demand, being left in full force and untouched by this decree, and it is further ordered and decreed that as to fruits and revenues of said property, the right to claim which is reserved to plaintiffs, that this case be remanded to the lower court for further proceedings and another trial, and that defendant pay costs."

Upon the return of the case to the District Court the defendants filed an amended or supplemental answer, in which they alleged that in addition to the indebtedness of plaintiffs to defendants as set forth in their original answer and as further offsetting any claim which plaintiffs might have for rents and revenue-, they had, since their purchase at tax sale of the property, paid for the preservation of the same at least one hundred and forty-four dollars insurance premiums, two hundred dollars for repairs, and two hundred dollars or thereabout for taxes due at the date of purchase, this being an indebtedness due by plaintiffs in addition to the eleven hundred dollars detailed in their original answer. That the city and State taxes paid by them since their purchase, with legal interest thereon, aggregate fully six hundred and fifty dollars, which they were also entitled to plead as an additional offset against any claim which plaintiffs might have for rents and revenues, respondents having been possessors in good faith. They prayed that plaintiffs' suit be dismissed and their plea of compensation of two thousand three hundred and eighty-nine dollars be maintained against any claim which plaintiffs might establish as due them for fruits and revenues.

Plaintiffs objected to the filing of this answer, on the ground first, that it came too late, that no supplemental or amended answer could be filed at that stage of the proceedings, because the cause had been remanded by the Supreme Court on a particular issue and on the papers and pleadings on file; that it set up a counter claim or set-off in addition to the one in the original answer; that this claim for taxes, insurance and repairs was disallowed by the Supreme

Court and its judgment had the force of *res judicata;* that if defendants had had any additional claim it should have been urged when the original claim was urged and it was now too late to do so.

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The first question we are called on to consider is the correctness

or incorrectness of the action of the District Court in permitting defendants over plaintiffs' objection to support their plea in compensation by testimony.

Plaintiffs' objections were that the District Court, in its original judgment, had dismissed all claims which defendants had set up, and that the Supreme Court, on plaintiffs' appeal, had affirmed the judgment of the lower court to that effect. In this proposition, plaintiffs are in error. Plaintiffs, in their petition, claimed to be the owners of the property, contending that their ownership had never been divested through a certain tax sale, under which they averred defendants were in possession and under which they claimed title; that defendants obtained possession of the property in bad faith and through force and their possession had continued such; that plaintiffs were entitled not only to the property and its possession, but to damages for the forcible taking possession of the property and for fruits and revenues ever since it was taken possession of.

Defendants met the attack by the general issue. They then contended that Talle, being heavily indebted to Monasterio (the defendant) and to other parties and unable to meet his obligations, suggested to Monasterio that as he could not meet his obligations nor pay the taxes on the property, that it be sent to sale, and that he buy it and cancel the indebtedness which plaintiff was under to him; that Monasterio agreed to this and bought the property at tax sale. That he canceled Talle's debt, as he had agreed to do, and that after his purchase he had paid the taxes on the property and made various outlays upon the same which he detailed. That after his purchase, Talle agreed to hold possession as lessee and pay rent and did so for for some time, but failing finally to pay rent, he was evicted from the premises and defendants took and had held actual possession ever since. Defendants, in their answer, claimed the ownership of the property, and contended that under the circumstances stated plaintiffs were estopped from raising any question as to the legality of the tax sale, which, *quoad* the plaintiffs, was a sale proposed by and acquiesced by themselves.

On the trial of the cause defendants do not appear to have made out to the satisfaction of the court the circumstances of the tax sale to have been such as to estop the plaintiffs from contesting its legality. Applying legal tests to that sale, the court was of opinion it could not stand, and, therefore, set it aside and decreed plaintiffs

be still the owners of the property. It rejected plaintiffs' demand for damages, and was silent as to plaintiffs' demand for fruits and revenues, and also silent as to any right of possession.

It will be seen that defendants filed no plea either in reconvention or in compensation, but relied upon being declared to be the owners of the property under the peculiar circumstances under which they took possession of the property.

It was only after the court had determined to set aside and had set aside the tax sale itself, and by so doing had deprived defendants of the ownership claimed, that the question of the attitude of the plaintiffs and the defendants relatively to each other by reason of the claim for fruits and revenues on the one hand and the indebtedness of the plaintiffs to the defendants and the fact of the disbursements made by defendants on the property, on the other hand, came to be considered and disposed of by the court *not under any plea of reconvention or compensation made*, but evidently under defendants' prayer for general relief, and as equitable conditions attached by the court to the granting of plaintiffs' demand for ownership. This court was clearly right in the view taken by it in its first opinion, that the failure of the District Court to give plaintiffs judgment for fruits and revenues was obviously, because whatever claims plaintiffs might have had to the same were met and compensated by just claims for offsets.

Defendants were evidently satisfied with the judgment of the District Court and the disposition made by it of the question of revenues as well as that of ownership, for they did not appeal, nor did they pray on plaintiffs' appeal for an amendment of judgment.

When this court, in its original judgment on appeal, overlooking the latter fact, examined the question of the legality of the tax sale and declared the sale legal—as a matter of course no mention was made of revenues, as the conclusion reached caused that question to disappear.

When on rehearing it was brought to our attention that defendants had substantially acquiesced in the judgment, we were forced by reason of that fact, and that fact alone, to set aside our judgment and leave matters on the question of ownership, as the judgment of the District Court left them. That result necessitated a consideration by us of the demands of the plaintiffs for damages and fruits and revenues to which it had not been necessary before to discuss or ex-

amine. We came to the conclusion from this examination that the judgment of the District Court, rejecting plaintiffs' claim for damages, was correct, but not being satisfied as to the state of the evidence on the subject of fruits and revenues, *we reversed the judgment of the District Court, which, on that issue, was substantially and practically one adverse to plaintiffs*, and remanded the case for further proceedings, but in view of the fact that defendant had acquiesced in the judgment, it was our intention to send the case back under circumstances such as not to permit defendant on the second trial to take or to gain any position which would be inconsistent with such acquiescence on their part. It was our purpose and intention to force defendants on the return of the *cause to occupy a purely defensive position* and cut them off from pleading any *reconventional demand*, by and through which a judgment over against plaintiffs could be obtained. We said nothing by which defendants' right of resistance, offset or compensation to plaintiffs' clsims for fruits and revenues, was to be cut off. It was only in so far as claims held by defendants might be sought to be made the basis for affirmative relief by defendants that we interposed a bar. Defendants and the District Court understood that matter correctly, for defendants did not attempt, on the second trial, to advance upon the plaintiffs, but simply resisted attack. This they were clearly entitled to do. The very question of ascertaining whether plaintiffs had a right to fruits and revenues involved an examination of any good reason which might exist for the non-existence of such right.

When the case went to trial after the tax sale had been finally disposed of, and the ownership of the property could no longer be reopened, the plaintiff Talle admitted as a witness on the stand that this tax sale which he had successfully attacked as being illegal had really been made use of by an arrangement between himself and De Monasterio to relieve the plaintiff from pecuniary embarrassments which threatened him with a loss of the property from other parties. That De Monasterio bought the property at the tax sale under this arrangement and with his consent, though he denied that De Monasterio himself was his creditor at that time.

Seymour, a witness who seems to have been a friend of both parties and to have been well advised of the relations between them, testified that it was he himself who suggested to them that a tax sale be utilized for the protection of the plaintiff. He said that

at the time of the sale Talle was indebted to De Monasterio, and he suggested that the latter buy the property and hold it until the debt due to him should be paid off. On this particular point he differs from the claim made by defendant, which is not that the property should be held in order to "work out" the debt or as security, but that the purchase was absolute and not with a power of redemption. De Monasterio being dead the exact facts of the case are left in some doubt, but we are satisfied that Talle was indebted to De Monasterio at the time of the sale and acquired the legal title by reason of that fact with Talle's approbation and consent. We are satisfied also that it was expected that De Monasterio should restore the property to Talle at some future time, but under what precise circumstances we do not know. Whether the return was conditional upon payment to be made within a given time, or whether De Monasterio was himself to "work out" the debt through his possession under the legal title acquired, does not clearly appear. A notice was given by Monasterio to Talle after the sale, on the 26th of April, 1876, informing him that the six months given by law for redemption of the property having elapsed and his title having become fixed, he would exact rent from him thereafter at the rate of fifteen dollars per month, commencing on the 1st of May, 1876; that if he did not wish to pay said rent he should consider the notice as a landlord's notice to vacate the premises by the first of June next following.

Talle remained for some time after the tax sale in possession of the property.

On the 6th of June, 1876, De Monasterio brought suit in the Fifth Justice Court for possession of the property. On tne 9th of the same month the case was indefinitely continued at plaintiff's request, costs of court being paid.

In January, 1878, De Monasterio brought a second suit in the same court for possession of the property and judgment was rendered in plaintiff's favor against defeudant on the 14th of January, 1878, and a writ of possession issued on the 23d of January, 1878, and plaintiff in that suit was placed in possession under the judgment; that judgment has never been reversed or annulled or sought to be annulled or reversed.

Seymour explains the continuance of the first of these suits by saying that the parties had come to an arrangement by which Talle was

amount of Talle's indebtedness to him and all amount which he was called on to pay by reason of his holding the legal title which enured to Talle's benefit as amounts which he would have been forced to pay had he himself held the title should be tendered to him, or should have been acquitted. That Talle had no right to ignore defendants' right of detention until a balancing of accounts had been had and to recover both the property and its fruits, leaving his debts unpaid. The District Court, both in its original judgment and in the judgment now appealed from, was of the opinion that any claims which plaintiffs might have had for rents was met and balanced by offsets and claims legally advanced by the defendants; in fact, it recognized claims as due by plaintiffs to defendants which were cut off only by reason of defendants' pleadings and the judgment of this court holding defendant to a purely defensive position. We see no reason for decreeing that there was error in the judgment appealed from, and it is hereby affirmed.

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No. 12,630.

THE STATE VS. ALBERT FABER.

The appellate jurisdiction of the Supreme Court in cases in which the constitutionality or legality of the fine, forfeiture or penalty imposed by a municipality was in contestation, is limited to a determination of the constitutionality of the fine, forfeiture or penalty and to an examination of the particular facts necessary to be considered, in order to reach a conclusion on that subject.

Proceedings directed against parties for violations of city ordinances should be in the name of the city, not that of the State.

APPEAL from the Fifth Recorder's Court of the City of New Orleans. *Harper, J.*

James J. McLoughlin, Assistant City Attorney, and *Sam'l L. Gilmore*, City Attorney, for Plaintiff, Appellee.

John C. Wickliffe for Defendant, Appellant.

Argued and submitted April 18, 1898.
Opinion handed down May, 2, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. An affidavit to the following effect was made before the fifth recorder of New Orleans:

"On information received and belief, deponent charges that one Albert Faber, on Monday, September 13, 1897, between 12 and 12:30 o'clock, on Tuesday, September 21, 1897, between 9 and 9:15 o'clock A. M., and Monday, September 27, 1897, between 8 and 8:30 o'clock P. M., at corner of Cherokee and Mississippi streets, and within the jurisdiction of this Honorable Court, then and there did wilfully and unlawfully sell liquors by the glass, etc., in violation of City Ordinance No. 7012, C. S., amended by City Ordinance No. 7199, C. S., contrary to the form of the statute in such case made and provided, and all against the peace and dignity of the State. Wherefore deponent charges accused with V. C. O. No. 7012, C. S., amended by City Ordinance No. 7199, C. S., and prays that he be arrested and dealt with according to law.

The record shows that after trial "the court, after considering the law and the evidence, fined accused twenty-five dollars or thirty days parish prison on each offence of the thirteenth, twenty-first and twenty-seventh days of September, 1897, or in total seventy-five dollars or ninety days parish prison in default of said fine."

Defendant appealed.

Article 7012, *Council Series*, is as follows:

Resolved, That it shall hereafter not be lawful for any one to set up or establish any drinking house, coffee house, beer house or place where liquors of any kind are sold at retail by the glass to be there consumed, without having first petitioned the Mayor and City Council; said petition to be published for ten days in the official journal at the expense of the petitioner.

"Be it further resolved, That after the expiration of the said ten days' publication, there being no protest uttered against the petition, same shall be granted. Provided, however, that if any person or persons protesting against the opening of a saloon or drinking house, etc., they shall be heard before the Committee on Public Order of the City Council, and if there be any valid objections in the judgment of said committee, said petition will not be granted.

"Be it further resolved, That any violation of the foregoing ordinance will be punished by a fine of not more than twenty-five dollars or not more than thirty days' imprisonment."

On February 7, 1893, the City Council passed Ordinance No. 7199, which reads as follows:

"Be it ordained that Ordinance No. 7012, C. S., be and the same is hereby amended so as to read after the word published in line seven: Three times in ten days in such form as the Committee on Public Order may designate. In line eleven, after the word 'said,' strike out the words 'ten days.'

"Be it further ordained that all ordinances or parts of ordinances, conflicting with the provisions of this ordinance be and the same are hereby repealed."

Defendant appeared and demurred to the affidavit, alleging that same was not sufficient in law and set forth no offence against any law of the State of Louisiana, or any ordinance of the city of New Orleans. That the acts therein set up do not constitute a violation of the ordinances Nos. 7912 and 7199, Council Series, as therein set forth.

For further demurrer he alleged that Ordinance No. 7012, Council Series, and Ordinance No. 7199, Council Series, and all ordinances amendatory adopted prior to July 7, 1896, have been and are repealed by Act No. 45 of the General Assembly of Louisiana, approved July 7, 1896, being the act providing a charter for the city of New Orleans, and specially by Sec. 21 of said act.

Wherefore he prayed that the affidavit be quashed and the prosecution dismissed.

The demurrer was overruled and defendant ordered to plead. To which action he reserved a bill of exception.

Defendant, under reservation, pleaded "Not guilty"—further pleading, he averred that neither the State of Louisiana nor the city of New Orleans could or should prosecute the charge made for the reason that on the *twenty-second day of June, 1897*, he was arrested, prosecuted, tried and convicted for the same offence in the affidavit set forth, to-wit: setting up and establishing a drinking house, coffee house, beer house or place where liquors are sold by retail by the glass to be there consumed at Mississippi and Cherokee streets, without a permission granted therefor by the Mayor and City Council of the city of New Orleans, said arrest, trial, prosecution and conviction being in the cause styled State of Louisiana vs. Albert Faber, No. 4863 on the docket of the Fifth Recorder's Court. Wherefore, he pleaded "*autrefois convict.*"

The defences set up in the lower court were:

1. That the ordinances for the violation of which defendant was on trial had been repealed.

2. That the complaint against him was insufficient in law and set forth no offence against any ordinance of the city.

3. That the acts set up therein did not constitute a violation of the ordinance.

4. That he had already been convicted and sentenced for the same offence.

The case is before us on appeal. Our appellate jurisdiction in matters of this character is, as we have repeatedly had occasion to say, exceedingly limited. In State vs. Zurich, 49 An. 456, we stated that in order that a case should be properly before us we should be able to declare, and should in fact declare, that the ordinance whose violation was sought to be punished was or was not legal and constitutional. It is the constitutionality or legality of the imposition by the Common Council, not the legality or constitutionality of the imposition by the Recorder, of a fine or penality, that we are called to pass on. Applying these tests to this case, it will be at once seen that we have no jurisdiction in the case. Appellant urges upon us not the *illegality or unconstitutionality* of the *ordinances* which he is charged with having violated, but their *non-existence*. That is not a matter of which we can take cognizance under the special remedy sought. If the ordinances have been repealed as claimed, the Recorder was acting without authority of any law; he was without power or jurisdiction in the premises, and his action should be attacked by *certiorari* and prohibition. The same thing could be said if the Recorder sought to apply the ordinances to a state of facts to which they were not applicable. If it be true as alleged that the complaint filed against defendant was so radically defective as to be violative of constitutional or legal rights as to be an absolute nullity, or if the proceedings taken under the ordinances, or the fine or penalty imposed by the Recorder, were, as alleged, radically wrong and in excess of his jurisdiction, the wrong can not be righted by appeal, unless the wrong is traceable to, and resting upon, the illegality or unconstitutionality of the ordinance itself, which the Recorder is seeking to enforce. If, for instance, a common council being without power to declare the doing of a particular act to be a misdemeanor, triable by criminal proceedings,

should undertake so to do, declaring that any person "*convicted*" of a violation of the ordinance should be punished by imprisonment, a case would be presented where the council would have enacted as part of the ordinance an illegal method of procedure, which could not be detached from it. The ordinance defining and fixing the mode of procedure and making the infliction of punishments dependent upon "conviction" a Recorder called on to enforce such an ordinance would be forced to conform to its terms and to proceed against any party violating it through criminal proceedings. In such a case a party "convicted" and sentenced to be punished, could complain of a method of procedure which would cut off an examination of the facts of the case by an appellate tribunal, and he would be entitled to an *appeal* from a conviction under such a proceeding, *if in* the lower court he had contested the legality of the proceedings, urging the illegality of the ordinance in attempting to impose and in imposing such a method of procedure. The illegality of the proceedings in such a case would go *back to the illegality of the ordinance authorizing* it, and not merely rest upon the illegality of the proceedings themselves as taken by the Recorder.

We take occasion to say that the acts complained of are not violative of the *statutes of the State*, as declared and should not have been so charged, and that proceedings of this character should be in the name of the City of New Orleans, and not of the State of Louisiana. They are not prosecutions of the kind referred to in Art. 86 of the Constitution.

The appeal must be and it is hereby dismissed.

MR. JUSTICE MILLER—I concur in the decree.

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No. 12,712.

CHARLES GENELLA VS. P. L. MARTIN VINCENT.

A perfectly correct assessment by no means carries with it as a necessary result the validity of subsequent proceedings made in the enforcement of the tax assessed in the name of the party assessed. Hood vs. City of New Orleans, 49 An. 1461; Hodding vs. City, 48 An. 982; Hoyle vs. Southern Athletic Club, 48 An. 879.

Notice of assessments as having been made is something other than notice of delinquency, and of an intention of selling the property assessed on failure to pay the taxes within a specified time. They are distinct matters touching different steps in the enforcement of taxes.

Genella vs. Vincent.

Article 210 of the Constitution requiring that notice should be given to the taxpayer contemplated that reasonably diligent steps should be taken to make the notice effectual.

Notice of delinquency and notices of a proposed intention to sell the assessed property should the taxes be not paid within a specified time placed in a letter mailed at New Orleans, the place of assessment, and directed to the party assessed as living at New Orleans is insufficient, where the party assessed had been living in Europe and had died there many years before the assessment—when her succession had also been opened in the District Court for Orleans, and her heir had been recognized and ordered to be placed in possession, and when the property had all the time been in possession of a tenant who could have given information of the facts of the case.

Where a defendant in a petitory action is evicted from land which he has purchased at a tax sale he should recover from the owner evicting him, the taxes which he has paid on the land. Walsh vs. Harang, 48 An. 984.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

W. S. Benedict and *Robert G. Dugué* for Plaintiff, Appellee.

W. E. Murphy and *J. Zach Spearing* for Defendant, Appellant.

Argued and submitted March 26, 1898.
Opinion handed down May 2, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. *In October, 1889*, the plaintiff in this suit obtained from the Civil District Court a writ directing the sheriff of the parish of Orleans to place him in possession of certain property described in his petition, alleging that he had become the owner of said property from the State of Louisiana; the State itself having acquired the same at a tax sale made in enforcement of delinquent taxes. Before the writ was executed, one Frank Grunow obtained an injunction restraining its execution. In his petition for injunction he attacked the title upon which plaintiff declared. The prayer of his petition was that the sheriff be restrained from proceeding under the writ and from interfering with him in the legal occupancy of the property; that after due proceedings the injunction be perpetuated, and that he be decreed to be the legal occupant and possessor of said property, free from interference on the part of Genella.

The District Court, on the trial, perpetuated the injunction, recognizing and decreeing Grunow to be the legal occupant and possessor of the property free from all interference on the part of the plaintiff. He appealed to the Supreme Court.

The evidence in the cause disclosed the fact that Grunow was in possession of the property as the tenant of one Joseph Jacquier. This court held that the issue between the parties before the court was not the right of ownership but the right of possession of the property; that the value of that right as alleged under the pleadings was not sufficient to give the court appellate jurisdidiction, and it dismissed the appeal.

Plaintiff subsequently brought the present petitory action for the property.

In his petition he averred that he was the owner for having purchased it for two hundred and eighteen dollars cash from the State of Louisiana through C. Harrison Parker, Tax Collector of the First District of New Orleans, by an authentic act duly registered, passed before Posey, notary, on October 25, 1889, in confirmation of a previous adjudication made to him by said tax collector on the eighteenth of the same month in proceedings had under Act No. 80 of 1886. That the property had been previously adjudicated to the State under the provisions of Act No. 96 of 1882 on the 18th of May, 1888, and deeded to it by an authentic act on July 13, duly registered on July 18, 1888. That both of said sales were made to enforce the payment of State taxes which were due on the property for the year 1887 under an assessment in the name of Catherine Neidergang, the former owner, who had purchased it in 1855.

That shortly after she purchased it she married one Joseph M. Jacquier in Switzerland, where she remained continually thereafter until she died in 1874, but that the persons charged with the duty of listing and assessing property for taxation in said city not having been notified and having never heard of said marriage continued thereafter to assess the property in the same name as before, with the knowledge and consent of both the husband and the wife, who paid taxes on the subsequent assessments without demur or compialnt, thus approving them and ratifying them, and after the death of his wife the assessments was continued in the same name, no notice of her death having been given to the assessors.

That Mrs. Jacquier left no ascendants or descendants or collateral

kindred, and the property at her death descended by inheritance to her husband, who assumed and retained full charge and control over it, collected the rents and revenues and paid taxes on the said assessments, thus again approving and ratifying them, but he failed to pay the taxes of 1887 for which the property was sold to the State and to petitioner as stated during the life of said Jacquier and while he was the sole owner thereof. That all of the proceedings leading up to the sale to the State and to petitioner, including the assessment, the adjudication and the sale were regular, legal and proper and conferred a valid title upon the State and upon petitioner. That Jacquier had since died, leaving as his universal legatee one P. L. Martin Vincent, who had caused himself to be recognized by the court and claimed to have been put in possession and to be the owner of the property as such, but that he is not the owner, petitioner having acquired it as above stated before the death of Jacquier, who could not transmit by inheritance or otherwise what he did not have. That in addition to the price which petitioner paid to the State for the property on October 18, 1889, two hundred and eighteen dollars, and to Posey, notary, for the act of sale, copy, etc., sixteen dollars and fifty cents, he had paid taxes upon the property up to and including March, 1895, to an amount of three hundred and twenty-three dollars and eighty cents.

That since the date of his purchase one Grunow, now claiming to be a tenant of Jacquier, under a lease of the property at five dollars per month, remained in possession of it against the will and consent of petitioner, until recently, when the said Martin obtained possession under color of the *ex parte* order of the court recognizing him as universal legatee of Jacquier and had obtained judgment in the Civil District Court against Grunow for six years' rent, say three hundred and sixty dollars, and interest, which petitioner alleged he believed had not yet been paid; that if it had been, Martin owed this rent to petitioner, and if not the judgment against Grunow for the rent should be decreed to belong to petitioner; that Martin resided in Switzerland and was represented in Louisiana by one Francis Louis Fontenot as his agent, duly authorized to stand in judgment for him. He prayed for citation for the ownership and possession of the property and rent at the rate of twenty-five dollars per month from 18th October, 1889, until possession be delivered. Should, however, the court not

recognize him as owner, then and in that contingency he prayed that Martin be condemned to pay him three hundred and twenty-three dollars and eighty cents, with eight per cent. interest per annum on each item thereof from the date of each payment, with twenty per cent. additional, and such further sum as petitioner might pay for taxes with interest before the suit was finally decided, and for general relief.

Defendant, through counsel, excepted that the petition contained inconsistent and contrary demands—plaintiff claiming to be the owner of certain real estate and claiming the purchase price paid for the same and taxes paid by him; that plaintiff could not cumulate in the same suit a real motion for the ownership of real estate and a personal action for the payment of a debt.

He pleaded *res judicata* to the claim for the ownership of the property, urging that that issue had been decided adversely to him in the case entitled *In re* Genella praying for a writ of possession (No. 28,259 of the docket of the Civil District Court), the judgment in which suit had become final.

The District Court overruled the exceptions. Defendant answered, pleading first the general issue. Further answering, he averred that he was the owner of the property, having inherited the same from Joseph M. Jacquier. That the succession of said Jacquier was opened in the Civil District Court, and respondent recognized as heir and put in possession of the same under the mortuary proceedings taken in the matter of said succession. That said order was recorded in the books of conveyance. That the plaintiff had no standing in court or right to question respondent's ownership, it having been decreed in the suit entitled *In re* Genella, claiming possession, that he was not the owner of the property. That he was in no way responsible for any sum which plaintiff may have paid, as he alleged, for the purchase of said property or for the taxes he had paid on the same, the said sale and the assessment of the taxes on the same having been declared to be null and void in the judgment rendered against plaintiff in the said proceeding (No. 28,259 of the Civil District Court), now final.

Defendant filed a supplemental answer in which, after again pleading the general issue, he averred that he was the owner and possessor of certain property which he minutely described.

He denied that the plaintiff had ever purchased said property at

tax sale, or in any other manner; he denied that it was ever assessed for the year for the taxes of which plaintiff claimed it was adjudicated to the State, and, in turn, sold to him, or ever adjudicated to the State. He averred that the property which was advertised and adjudicated to the plaintiff was lot No. 26 in said square, and plaintiff fraudulently had the description in the deed made to him to declare the property to be "*Lot B*," although "Lot B" had never been adjudicated to the State, nor advertised, nor sold to plaintiff.

In the event of the court's holding that the tax proceedings were directed against the lot of ground owned by respondent, then and in that contingency he averred that all of said proceedings were absolutely null and void, and the said property was never adjudicated to the State—that it had no title itself and could convey none to plaintiff for the reason among others that there was no assessment of said property sufficient to identify or describe it—that if there was any assessment of the same it was not in the name of the then owner, but in the name of Catherine Neidergang, who had been dead for many years previous to the assessment, whose succession had been opened in the Second District Court for the parish of Orleans, whose name, even if she had been living, was not correctly given, she having married Joseph M. Jacquier many years previous to said assessment. That no notice of said assessment or of the pretended delinquency of said tax or of the contemplated sale was given to the owner of said property. He denied that he was responsible for the alleged expenditures pretended to have been made by plaintiff for the reason that they are based upon absolutely illegal, null and void assessments, nor is he liable for the amount claimed to have been paid by plaintiff for the purchase price of said property for the reason that said amount is far in excess of the price of the pretended adjudication to the State which formed the basis of plaintiff's alleged title, and the same did not enure to the benefit of plaintiff or of his author.

The District Court rendered judgment, decreeing plaintiff to have become the owner of the property in controversy on the 18th of October, 1889, and ordering him to be placed in possession of the same. It reserved to plaintiff the right to sue defendant for rents from the 18th of October, 1889, until the property should be delivered to him.

Defendant appealed.

possession" involved was less than that
ırt jurisdiction. The case is reported in 45th
877 (*In re* Charles Genella praying to be

d the present petitory action against defend-
of the property as heir of Joseph M. Jac-
ıuier had inherited the same from his wife,

h our attention is directed is the exception
the defendant based upon the decision of the
ing the injunction which issued on the peti-
ıction of the lower court in overruling this
The appeal from the judgment on the
ıd by us precisely upon the ground that
ıthout capacity to stand in judgment upon an
ır as plaintiff or defendant.
'ect forms the law of this case. Its effect
nt appealed from determinative simply of
ɔession and to drive Genella under the cir-
on now before us—a petitory action against
ɜd by the defendant that the property in
er sold at tax sale; that it was not assessed
ıhat it should have been described as "*Lot*
ad of Lot No. 26 of square No. 156, bounded
reets; that the reference to Pilié's plan and
in the deed to Genella was unauthorized
ɔn if properly described it was improperly
Catherine Neidergang, as she had married
had besides been dead for many years before
n had been opened in 1875, and her hus-
ɔn recognized as her usufructuary heir and
ordered to be placed in possession of the
ıer succession described in the inventory
notary, on the 14th January, 1875.
petition in the present suit in giving the
rty claimed *left out this reference to "Pilié"*
as "A lot of ground with the buildings and
in the First District of this city in square
amp, Gaiennie and Erato streets, designated

intiff declares "that one of these notices
was duly and legally mailed to the *delinquent*
)d."

thereinafter named" was "Catherine Nei-
was made of Jacquier or any one else as
ion or as being her heir, and no declaration
to which the notice was addressed. The
extracted from the general *proces verbal* of
to no particulars and intended to take in by
otice which had issued from his office, "that
id legally mailed to the delinquent taxpayer
es not carry with it the force and effect
; it to be presumed in each and every indi-
cts of the particular case are needed to be
pursued by the tax collector, in respect to
that which the law would have required to
lity to his acts. His announcement that the
gally mailed is simply a general legal conclu-
validity of his action, and it does not take the
which might be needed in some particular
urse thereon conform to what the occasion

) the tax deed that the only notice attempted
in respect to a sale to be made of the prop-
eral notice given through publication in a
a letter mailed at New Orleans, addressed to
New Orleans, La."

e general notice the deed declared that the
hed once a week for two weeks in a news-
New Orleans a notice of an intended sale
ll known and unknown owners of immovable
r upper district of the city "in which he
) in the said tax rolls."

adication of the property to the State it was
as a tenant of Jacquier. It is admitted that
ife of Joseph M. Jacquier, died in Switzerland
sion was opened in the Second District Court
July, 1874; that an inventory was made in
showed that the inventory owned no other

property here other than "Lot B," which is in controversy in this case, and which was appraised at twenty-five hundred dollars; that in January, 1875, judgment was rendered in the matter of the succession on the petition of Joseph M. Jacquier, recognizing him as the usufructuary heir and universal legatee of his said wife and ordering him to be put in possession of all the immovable property belonging to the succession of his deceased wife as described in the inventory of her succession taken by Pitot, notary, on the 14th of January, 1875, to be by him enjoyed during his lifetime, and also to be by him administered upon in accordance with the terms contained in the last will of his wife.

It was admitted on the argument that Jacquier, the husband, became the heir of his wife under Art. 917 of the Civil Code.

It is under this condition of facts that we are called on to declare whether the tax adjudication to the State divested Jacquier of his ownership of the property.

The first inquiry to be made is whether prior to the sale notice was given to the tax delinquent as required by Act No. 96 of 1882, and Art. 210 of the Constitution, for if it was not, now it becomes unnecessary to discuss other questions, as such prior notice is essential to a valid tax adjudication. A perfectly correct assessment by no means carries with it as a necessary result the vaiidity of the subsequent proceedings made in enforcement of the tax assessed (see Hood vs. The City of New Orleans, 49 An. 1461; Hodding vs. The City, 48 An. 982; Hoyle vs. Southern Athletic Club, 48 An. 879).

Notice of assessments as having been made is something other than notice of delinquency and of an intention of selling the property assessed on failure to pay the taxes within a specified fixed period. They are distinct matters touching different steps in the enforcement of taxes, the latter notice being of much greater importance than the former.

In Hoyle vs. Southern Athletic Club, 48 An. 879, we held that "where property was assessed in the name of 'Estate of J. M. Hoyle,' a notice addressed by the tax collector to the 'Estate of J. M. Hoye,' placed and prepaid in the postoffice is not a compliance by the tax collector with the requirements of law."

That Art. 210 of the Constitution, in requiring that notice should be given to the taxpayer, evidently contemplated that reasonably diligent steps should be taken to make the notice effectual.

The same views were expressed in the Succession of Lacroix vs. Lumber Company, Limited, 49 An. 1445, and Hodding vs. The City, 48 An. 982, and *Walsh vs. Harang, 48 An. 989.*

The facts of this case do not bring it within the exceptional one of Webre vs. Lutcher & Moore, 45 An. 574 (referred to in Russell vs. Lang, 50 An.). The property in this case has been in possession of a tenant from whom the tax collector could have easily obtained the information needed to enable him to perform properly his duty. The succession of Catherine Neidergang had been opened in New Orleans and her husband, Jacquier, had been recognized as her heir and ordered to be put in possession.

We are of the opinion that the adjudication to the State of the property in litigation was fatally defective for want of proper notice to the owners of said property.

The defendant has failed for many years to pay taxes upon it, and has stood by and permitted the plaintiff (as holding title under the adjudication to the State and to himself) to incur all the burdens and responsibilities of ownership which it was properly his own duty to assume and bear. He can not enrich himself at the expense of the plaintiff. We are of the opinion that plaintiff's prayer made to meet the contingency of the court's not recognizing his title to the property set up herein for payments and disbursements made by him, is well founded. Walsh vs. Harang, 48 An. 989.

For the reasons assigned: It is hereby ordered, adjudged and decreed that the judgment of the District Court appealed from be and the same is hereby annulled, avoided and reversed and it is now ordered, adjudged and decreed that the adjudication made of the property in litigation herein to plaintiff and the tax deed held by him under said adjudication and the adjudication of the said property to the State of Louisiana and the tax deed held by the State under said adjudication to it which plaintiff sets up as the basis of his title to said property be and the same are hereby annulled and the evidence of the same be erased from the books of the Conveyance Office of the parish of Orleans.

It is further ordered, adjudged and decreed that plaintiff, Charles Genella, do have judgment against the defendant, P. L. Martin Vincent, for the sum of four hundred and twenty-nine dollars, with legal interest from the date of payment of each item of the account filed by him in evidence and for such other amount for taxes which he

may have paid since the filing of this suit. For the purpose of fixing the date of the respective payments made and the ascertainment of what further sums, if any, may be due to plaintiff for taxes paid by him since the institution of this suit the cause is remanded to the lower court for further proceedings according to law.

BLANCHARD, J., dissenting in separate opinion.

No. 12,813.

ELLA SIMS, WIFE OF WILLIAM H. JACKSON, TUTRIX, VS. ANNA BILLINGTON, WIFE OF CHARLES L. YOUNGER.

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There are cases where the court is justified in inferring that improvements put up by a husband on his separate estate, during marriage, and paid for during marriage, and individual or separate debts paid for during marriage were paid through funds belonging to his separate estate, but the facts of cases of that character must be exceptional. Succession of McClelland, 14 An. 763; Succession of Boyer, 36 An. 509; Succession of Webre, 49 An. 1496.

Buildings and improvements placed by a husband on his separate property during marriage and paid for with community funds, do not become the property of the community—they belong to the husband, but payments so made *give* rise to a charge against his separate estate in favor of the community. The separate estate can not be charged with the cost of such improvements, but only with the amount that such improvements enhance the value of the property. Succession of Boyer, 36 An. 509.

The fees of attorney and all costs of the settlement of the succession of the husband, and consequent settlement of the community, are due by the succession and the community in proportion to the interest of each. Costs for the special benefit of one or the other are chargeable to that one. Succession of Webre, 49 An. 1491.

A tutor is entitled to ten per cent. commissions on the amount of the revenues of the minor, not upon the amount of the property, or the property and the revenues.

The expenses of the minor for board, clothing, tuition, etc., should not exceed her net revenues, unless under special authority given by a family meeting, that an additional amount should be taken from his capital. C. C. 350. Services rendered to the tutor and to his family by the minor should be taken into consideration in fixing a claim for board against her.

A tutor has the right to bring into his account and charge the minor with amount paid by him as the minor's proportion of the debts and charges of a succession in which the minor was an heir where the property of that succession has been partitioned between the tutor and the minor's co-heirs, and the tutor has received and charged himself with the minor's part of that property (which largely exceeded the amount paid out by the tutor) and the revenues thereof. The fact that the debts of that succession were not paid at the time of the partition is an immaterial circumstance, as in a partition no partition is usually made of the debts, each heir remaining bound for his proportion thereof. C. C. 1371.

Sims, Tutrix, vs. Billington.

Community funds received by the widow after her husband's death, and prior to her appointment as tutrix of her minor child, must be accounted for in her account of tutorship. She is entitled to show that they were paid out for the benefit of the community.

The court can not compel the minor, without her consent, to receive in payment of claims due her by her tutrix, and by her step-father as her co-tutor, a store building placed by the latter on her separate property.

A tutor can properly claim credit for premiums of insurance paid on the residence building upon the separate property of the minor.

A tutor is properly charged in favor of the minor for all movables converted by him, with legal interest from date of conversion.

APPEAL from the Tenth Judicial District Court for the Parish of Avoyelles. *Cullom, J.*

J. C. Cappel for Plaintiff, Appellee.

W. Hall, Joffrion & Joffrion for Defendant, Opponent, Appellant.

Argued and submitted May 18, 1898.
Opinion handed down June 21, 1898.

This suit involves the settlement of the tutorship of Anna Billington, now wife of Charles L. Younger by her mother, Ella Simms, now wife of William H. Jackson, the said Jackson acting as co-tutor with his wife.

Incidentally connected with this suit is the settlement of the community of acquets and gains which existed between Ella Sims and her first husband, George W. Billington.

George W. Billington and Ella Sims were married on March 10, 1876.

George Billington died in April, leaving one child, Anna Billington, issue of his said marriage.

The widow, Mrs. Ella Billington, married William H. Jackson in February, 1881.

Up to that date no steps whatever had been taken toward opening the succession of George Billington, the widow having taken possession of all the property without legal proceedings.

On the 28th of September, 1883, she filed a petition in which, after reciting her second marriage, and that she had thereby forfeited her

right to the natural tutorship, she not having, prior to said marriage, taken legal steps to retain the same, she prayed that a family meeting be convoked looking to the appointment of a tutor to the minor, Anna. The meeting was held under order of court and recommended that the mother be appointed tutrix and her husband co-tutor. The court so ordered.

On the application of the tutrix an inventory was made in September, 1883, of the property belonging to and dependent upon the succession of George Billington and the community between him and his wife, Ella Sims. On this inventory the "home property" was put down as being the separate property of George Billington, no allusion whatever being made to the residence building upon the same. The property was valued at four hundred dollars.

An engine was also put upon the inventory as separate property, being valued at three hundred dollars.

An item of five hundred and twenty-three dollars and fifty-three cents was also placed upon the inventory as separate property, that amount of separate funds of the deceased being declared to have been received by the widow after her husband's death.

On February 10, 1897, the minor, Ella Billington, married Charles L. Younger. On the 13th of April following Mrs. Younger prayed that her mother and step-father be cited and ordered to file an account.

Before doing so the mother and step-father filed a petition in which they averred that the inventory was incorrect in some particulars. They prayed that a new inventory be taken, and it was ordered, and a new inventory was taken.

On this inventory the engine, which had figured before as separate property, was made to appear as community property. The "home property" was still put down as separate property and valued at four hundred dollars, but the residence and outhouses upon that property were put down as belonging to the community and valued at six hundred dollars.

A certain "store" building on that property valued at four hundred dollars, which Jackson had erected on the home place after his marriage, was declared to form no part of the property, either of the succession of Billington or the community, but to belong to the community between Jackson and his wife.

The item of five hundred and twenty-three dollars and fifty-three cents was dropped entirely from the inventory.

Sims, Tutrix, vs. Billington.

Anna Billington's grandmother, Rachel Billington, left a will which lapsed by reason of the renunciation of all rights thereunder by the universal legatee. A suit was then brought in behalf of the minor, Anna Billington, by her mother as tutrix and her step-father as co-tutor, for the partition of that succession between Anna Billington and her aunt, Mrs. Hardie. A partition in kind was ordered to be and was made. No mention of the debts of that succession was made at the partition. The mother and step-father of the minor took possession of the property allotted to her, to-wit: two tracts of land and some movables. Mrs. Ella Sims, wife of Jackson, and Jackson filed an account under the order of the court through which was sought to be finally settled and liquidated all rights which the minor had in the separate estate of her father—in the community between him and his wife and in the succession of the grandmother, Rachel Billington—and to ascertain and terminate the responsibilities of Jackson and his wife as tutrix and co-tutor of Mrs. Younger. Mrs. Younger opposed the account in various particulars—she especially resisted the claim that either the engine referred to or the buildings upon the home place belonged to the community—she insisted that her mother and co-tutor should be charged with the value of the engine and interest, and with the item of five hundred and twenty three dollars and fifty-three cents with interest thereon from the date of her mother's second marriage; that they should be charged with rent of the home property at the rate of two hundred dollars per year and interest thereon, the rent to begin at the date of the second marriage; that they should be charged with the value of three horses and three cows and calves with interest thereon. She opposed a charge brought against her for board, tuition, clothing, etc., at the rate of seventy-five dollars a year from the date of her mother's second marriage, aggregating nine hundred and seventy-five dollars, and the claim made as for taxes paid on the property belonging to her; she opposed all claims advanced as for debts of her grandmother as having been paid by her step-father. Also all legal costs and charges and commissions; she opposed the claim advanced for premiums of insurance paid on the home residence.

The court disallowed the charge for nine hundred and seventy-five dollars for board, tuition, etc., and struck off from the account an amount of four hundred and fifty-five dollars for which accountants

had charged themeslves for as the rent of the home place since the date of the second marriage, holding that the use by Jackson and wife of the part of home place other than that on which the "store" had been built was remuneration sufficient for all claims for board, tuition, clothing, etc., but that rent was chargeable for the use of the store site. It decreed, however, that in lieu of rent for that portion of the ground, the store building itself, which was valued at four hundred and sixty dollars, should be made to belong to Mrs. Younger. It decreed that the tutrix should be allowed as a charge against the minor one-half the value of the residence placed on the property of George Billington, and that an additional item of three hundred dollars be charged on the final account against the minor—it decreed "that the item appearing on the original inventory of five hundred and twenty-two dollars and fifty-three cents and charged against the tutrix could not be considered a legal charge against the tutrix, it being community property, the same having been expended for community debts amounting to three hundred and sixty dollars, by the tutrix, and the remainder used for the support of the widow and minor prior to her marriage with Jackson. It further decreed that the three hundred dollars, which figured on the account as the price of an engine which the widow had sold, were community funds and should be divided equally between Mrs. Younger and Mrs. Jackson; the court finding that the engine had belonged to the community. It decreed the homologation of the account as so amended by it—decreeing the costs to be paid by the succession.

Accountants filed in court a conditional acceptance and acquiescence in the judgment "in so far as the decree accorded the store building of W. H. Jackson, valued at four hundred dollars, to opponent in lieu of rent," the condition affixed being that the judgment as rendered should be accepted by Mrs. Younger or affirmed on appeal, the building to be taken as a substitute for rent; in case of reversal of the judgment they reserved all rights to urge ownerhip of the store.

Mrs. Charles L. Younger appealed.

Appellees answered the appeal, praying "that the judgment of the lower court, disallowing item two of the final account, amounting to nine hundred and seventy-five dollars, for expenses of minor, and the item of four hundred dollars, value of the store building,

separate property of W. H. Jackson, co-tutor, wherein the said building was decreed to the minor opponent in lieu of rent, be amended by allowing the said items as charged on said final account, and thus amended said judgment be affirmed in all other particulars."

The opinion of the court was delivered by

NICHOLLS, C. J. An examination of the evidence in the case satisfies us that the engine, whose price, after being sold by Mrs. Billington, was placed on the first inventory taken, as an asset of the separate estate of her husband George Billington, was properly placed there. There is some conflict of testimony as to the date of its purchase, but we think it was bought in 1875, prior to Billington's marriage. The entry on the inventory remained unquestioned as to its correctness up to the time that the minor called for an account, and during the intervening period the relatives of the minor specially familiar with the facts of the case have died. Jackson and his wife were both present when the entry was made, and raised no objection when matters were fresh and disputed claims were susceptible of easy proof. The court erred in decreeing the engine to have been community property, and the price thereof, three hundred dollars, to be community funds, belonging one-half to the opponent and the other half to her mother. The engine was the separate property of George Billington, and the entire price of three hundred dollars belonged to opponent, and tutrix and her husband, W. H. Jackson, are chargeable with and must account for said amount *in solido*.

We are of the opinion, under the testimony as matters stand, that the residence building upon what is referred to herein throughout as the "home place" was erected upon it by Billington in 1878, after his marriage. There is considerable doubt as to whether the lumber out of which it was constructed, or a portion thereof, did not belong to him prior to his marriage. Mrs. Billington testifies that the funds with which payment was made were sums received by her husband for work done by him as a mechanic after his marriage. There was no attempt made to contradict that statement, and legal presumption supports it. Succession of Boyer, 33 An. 508. There are several reported cases in our decisions where the court has felt itself justified in inferring that improvements put up by a husband on his separate property, or paid for during marriage, and individual or sepa-

rate debts paid for during marriage, were paid through funds belonging to his separate estate, but the facts of cases of that character must be exceptional to authorize us to act on such an assumption. An interval elapsed between Billington's marriage and the erection of the house long enough to have enabled him to realize sufficient money during the period to have met the payments called for, and his means before marriage were not shown to have been so large as to almost necessarily lead us to impute their unexplained disappearance to outlays made for the building. It is possible that the whole sum of eleven hundred and thirty dollars and ten cents, proceeds of bridge, paid at different intervals between May 10, 1878, and January 10, 1880, may have arisen from a debt due to Billington before his marriage, but no evidence was introduced to show the character of the contract under which they were paid, nor the time it was entered into. Of the amount stated seven hundred and eighteen dollars were received by Billington himself after his marriage, and the balance by his widow. The facts of the case should have been shown.

Comparison of the facts of this case with those of Succession of McLellan, 14 An. 763, and Succession of Boyer, 33 An. 509, will show the clear distinction between them under the evidence found in the record.

Buildings and improvements placed by the husband on his separate property during marriage and paid for with community funds do not become the property of the community—they belong to the husband; but payments so made give rise to a charge in favor of the community against his separate estate. This claim is neither for the cost of the improvements nor is it for the value of the buildings. In the Succession of Ella Roth, 33 An. 541, affirming Mercier vs. Canonge, 12 Rob. 385, we said that "it was well settled that the recompense due to the community is the enhanced value resulting to the separate property from the estate at the date of the dissolution of the community, and that the result was reached by making an average of the valuations placed by all the several witnesses on the store and land and store together, and on the land or store alone." See also on this subject, Mrs. Johanna Dillon vs. Luke Dillon, 35 An. 93. The law governing the case is announced in Art. 2408 of the Civil Code as follows:

"When the separate property of the husband or the wife has been

increased or improved during the marriage, the other spouse or his or her heirs shall be entitled to the reward of one-half of the value of the increase or amelioration, if it be proved that the value or ameliorations be the result of the common labor expenses or industry, but there shall be no reward due if it be found that the increase is due only to the ordinary course of things, to the rise in the value of property or the chances of trade."

We understand that portion of the judgment which decrees "that an additional item of three hundred dollars be charged on said final account against said minor," to fix three hundred dollars as being the amount chargeable against the minor for and on account of the increased value of the home property on account of the building placed and appellee's acquiescence in the judgment to that effect, but appellant having taken the ground that the building was separate property, paid for out of separate funds, has not informed us whether, assuming that her position be not accepted and that she be chargeable with any portion of the price of the improvements, the amount fixed by the court would be satisfactory to her or not; we therefore fix the amount, as we understand it to have been fixed by the lower court, at three hundred dollars.

Accountants are entitled to repayment for taxes paid on the property belonging to the succession of Billington after Mrs. Billington's second marriage; but the evidence in the record on that subject is not clear and at all satisfactory to us. The tax bills are made out mostly in the name of Jackson, and the taxes upon the different properties are so merged together and confused that we are unable with precision to fix how much was due by the succession. Accountants should before making out their account have separated the taxes so as to show beyond question what particular portions of the taxes were due upon the property of the succession, and by proper evidence show the correctness of the separation as made. We can not be expected to make calculations and detail work of that character. The items of taxes must be held not proved and the judgment sustaining them reversed, and the matter is left open for future examination and decision.

The legal charges and costs and attorney's fees incurred by accountant in the matter of the succession of George Billington should be divided between the minor and accountant equitably according to the extent of the interests of the respective parties, as

announced in the Succession of Webre, 49 An. 1491, as the settlement of the husband's succession carries with it the settlement of the community in which accountant, Mrs. Jackson, is interested—any cost incurred for the special benefit of one or the other of the parties to be charged to that particular party. The costs and attorney's fees incurred in the matter of the succession of Rachel Billington should have been paid equally by Mrs. Hardie and the minor, Anna Billington. The judgment should be and it is hereby reopened on the subject of costs and attorney's fees in both, succession to be taken up and disposed of *de novo* in the District Court. The tutor is entitled to ten per cent. commissions on the amount of the revenues of the minors, not upon the amount of the property or of the property and the revenues. A comparison with the revenues, as shown by the account when homologated, will fix the amount of the commissions.

Under no circumstances could the expenses of the minor for board, clothing, tuition, etc., exceed her revenues (C. C. 350) so as to leave a "debt" hanging over the minor at the termination of the tutorship which, being enforceable, would, if she were not prepared to pay it, in all probability sacrifice her property and ruin her. The lawmaker contemplates that expenses of this character should either be met as they spring up by taking from the minor's revenues or from his capital by authorization of a family meeting under Art. 350, C.C., or that they be not permitted to spring up at all. The minor's "revenues" under this rule must be taken to be what remains each year, after the payment of taxes of that year.

Accountants have charged the minor with nine hundred and seventy-five dollars on this score. The evidence shows that all the parties are in very moderate circumstances—the step-father keeping a small country store, built by him upon a ten-acre tract of land belonging to the minor, and he and his wife (opponent's mother), their four children and opponent herself, all lived together in the residence built upon the place during the first marriage. Opponent is shown to have very seldom left her home, and it is fair to presume that her wants were small, as were the expenses incurred on her account. Living as an inmate of her own home with her mother, step-father and her half brothers and sisters younger than herself, she was very naturally called upon to perform, and the testimony shows that she did perform, services

of various kinds, such as a family so circumstanced would be likely to need from a member of the family. With that factor present it is exceedingly difficult to gauge the proper extent of any claim to be brought against her by her parents. The difficulty in the case is increased by there being a conflict in the testimony as to the extent and continuity of the services rendered by opponent. Several decisions have held that no charge whatever should be made against the child as between her parents and herself. It is intimated that a step-father, standing in lieu of a parent, should govern himself and be governed by the same rule. Succession of Boyer, 36 An. 511; Succession of Gros, 23 An. 106; Walker vs. Barrow, 43 An. 867; Succession of Sutton, 20 An. 151. One brother even who has boarded and given tuition to another brother is supposed to have done so from feelings of natural affection in the absence of special circumstances calculated going to show the contrary. 6 An. 100, Verret vs. Belanger. Accountants have made an "estimate" of what they consider proper to be charged to the minor, but have not given the data upon which that estimate is based. What have been the revenues of the minor? The only amount which had taken definite shape up to the time that the judgment of the District Court was rendered was the amount received by accountants from rent received from the property which fell to the minor in the partition of the Rachel Billington estate. The only other source of revenue is the rent of the "home place," the extent of which rent is one of the matters in litigation in this suit.

On the account (filed June 21, 1897) accountants charge themselves with four hundred and fifty-five dollars as rent for that property since 1883, or less than thirty-five dollars a year. The court substantially fixed it at about nina hundred and twenty dollars, or about seventy-five dollars a year, compensating all that amount for board, etc., except the sum of four hundred and sixty dollars. This would fix the expenses of the minor at about thirty dollars per year for the corresponding time. We think that a reasonable rate if that amount should be found to fall within the minor's revenues. We think, however, that the rent of the home property is fixed at too low a rate. It consisted of ten acres of land, upon part of which Jackson, after his marriage, constructed a store, which he has used ever since—a fair dwelling with four rooms and a hall down, and two rooms up stairs, a couple of stables and outbuildings. We think the rent of

property of that character in the country should certainly be worth at least one hundred and fifty dollars a year.

Opponent complains that accountants should have been permitted to have been brought into their account and have considered by the court any matters connected with the succession of Rachel Billington in which she acquired an interest during the tutorship as heir of her grandmother.

The minor being under tutorship when that succession opened the tutors of the minors finding a will of the deceased in existence detrimental to opponent's interests came to an amicable settlement with her aunt (her grandmother's legatee) by which the latter renounced all advantages under the will and consented to take the succession with the minor, share and share alike, and to have the same partitioned. Opponents brought suit for that purpose and the property of the succession was divided in kind. The tutor as such took possession for the minor of the property so allotted to her and were bound to account to her for it at the termination of the tutorship. They placed the same on their account and undertook to account for their administration of it while tutors charging themselves with certain revenues and crediting themselves with various amounts. Whether accounts in respect to these matters be correct or not is a different matter from their right to present their gestion as to this particular property as a part of their general account as tutors. We think they had the right to so present them subject to contest.

Opponent complains that the tutors should have paid any portion of the debts left by Rachel Billington. We see no ground for complaint if the debts were due and the tutors paid for the minor no more than what was really her share of the debts. Art. 1371, C. C., declares that in a partition no partition is made of the passive debts of the succession—that each heir remains bound for the share he takes in the succession.

The debts of the succession of Rachel Billington were small in respect to the value of the property received by the heirs.

Opponent claims that the tutors paid a larger proportion of those debts than the minor was liable for; that they paid in entirety some debts instead of paying the minor's virile share. There seems to be some ground for that complaint. Some of the taxes paid seem to have covered property other than that received by the minor, and the mortgage note paid by the tutors seems to have been paid in full

instead of by contribution. As this case will have to go back we think it best to reopen the matters connected with the settlement of the Rachel Billington succession, and leave them open for future examination and decision.

Opponent complains that accountants should have been permitted to establish by testimony the amount that Mrs. Billington had during her widowhood paid out for debts of the community, and for the support of opponent and herself out of the five hundred and twenty-three dollars which appeared on the first inventory, as they did not place the amounts so expended on the account, so as to notify her of proposed proof on the subject. She insists, however, that this amount of five hundred and twenty-three dollars was correctly admitted in the first inventory to belong to the separate estate of her father. The amount in question seems to have been received by Mrs. Billington after her widowhood from Mr. Hardie as part of the "net proceeds of the bridge." They are that part of the proceeds of the bridge which were turned over after Billington's death to his widow, the other part having been received by himself during his lifetime.

The fund was that which we have already referred to as having to be taken as a community fund in the absence of evidence to the contrary. We must so consider the part which was turned over to Mrs. Billington. We think the amount was erroneously placed on the first inventory to the credit of the husband's separate estate. We think that the matter of the expenditure of this amount should be reopened and left open for future examination and adjustment. Opponent was not notified that it should be the subject matter of litigation.

The court erred in decreeing that the store building erected upon the "home place" by W. H. Jackson, should be taken by opponent in place of "rent." The ownership of the building was in Jackson—he could not be made to lose or opponent be made to acquire the ownership of the same without their respective consent. If "rent" should be found to be due by accountants it will have to be paid by them, unless compensated in some legal way.

We think the charge made for repayment of insurance premiums paid on the residence building on the home place a proper one.

Accountants should be charged for all movables converted by them with legai interest from date of conversion.

We think the best method of disposing of this case is to reverse

We are firmly convinced that as to this item our decision is olutely correct.

t must, in consequence, in this respect remain unchanged.

The next ground of appellant for a rehearing is numbered 3 (three) l sets forth that our holding that the tutor had paid more than the nor's share of the debts of the seccession of Rachel Billington s error.

This was only left open for future hearing and determination, so t complainant has on that score no cause to find fault, as the ques- n is left open and is not affected adversely by our decree.

The next ground of the application, numbered (4) four, asserts t there was error on our part in our having decided that the tutor d not shown sufficiently exact amount of taxes paid for the minor. We thought and still think that an account should be made out of ese taxes, showing amount of taxes paid for the minor.

And that it should have the support of sufficient evidence to nder it entirely certain that the taxes charged were paid for the nor.

5. Our reopening the question and permitting evidence as to m of five hundred and twenty-two dollars and fifty cents is com- ained of by appellee.

It is asserted that the widow expended this sum for debts and sup- rt of herself and minor prior to her second marriage.

We remanded the case as relates to the question here on the round that further evidence should be introduced in support of the aim. We do not think that as to this item we should rescind our dgment.

A minor is concerned. We think further evidence can well be fered in support of this claim.

Lastly: As relates to the costs of appeal a question also raised.

Where a judgment is reversed as in this case they are due by ppellee. Nothing takes the case of the ordinary rule.

After having rescinded our decree, only as relates to the item wo thousand two hundred and fifty dollars rental as above set rth, we refused the application for a rehearing. The amendment e have made could, in our view, be made on the application for a ehearing and without granting a rehearing.

State ex rel. Barrow, Tutor, vs. Ogden, Clerk.

No. 13,002.

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STATE EX REL. EUGENE BARROW, TUTOR, vs. J. N. OGDEN, CLERK DISTRICT COURT.

The rules of the Supreme Court direct to omit (in the absence of special instructions from appellant) copying in the transcript of appeal all ordinary process and return thereon, such as citation and writs.

Statute 104 of 1894, relating to shorthand reporters, their fee and the transcript of testimony, is not repealed by statute 203 of 1898 relating to clerk's costs.

APPLICATION for a Writ of *Mandamus*.

J. F. Pierson for Relator.

Respondent *pro se*.

Submitted December 10, 1898.
Opinion handed down December 19, 1898.

The opinion of the court was delivered by

BREAUX, J. The relator is an appellant in case entitled R. H. Prayn vs. I. T. Young, Sheriff, *et al.*

The respondent is clerk of the District Court for the parish of East Baton Rouge.

The relator avers that the oral testimony in the case entitled as above was taken by a stenographer, and that his written notes of the testimony were duly filed in the lower court soon after the trial of the case, and are now in the custody of the clerk.

He alleges further that Statute 3 of 1894 makes it the duty of the clerk in preparing the transcript of appeal when the testimony has been taken by a stenographer and its transcription has been filed to embody in the transcript the original transcription, for which the clerk of court is not allowed to charge. He avers that the clerk declines to comply with this law.

Relator sets forth in his petitien that the transcript has not been in other particulars made in conformity with the rules of the Supreme Court.

Respondent returns, in answer to the order *nisi* that he copied into the transcript all the pleadings and documents filed, proceedings had and evidence adduced on the trial of the case, and that in the

absence of any instructions from the relator or his counsel to omit any of them it was his duty to copy them all; that he has charged costs at the rate authorized by Statute 203 of 1898, which repeals all former statutes relating to costs.

We take up the questions for decision in their inverse order.

There was a slight oversight in matter of respondent's interpretation of the rules of the Supreme Court.

He avers that it was his duty, in the absence of contrary instructions by the appellant or his attorney, to copy all papers and documents.

The position finds no support in the rules regarding transcripts.

Those rules direct, in the absence of special instructions from appellant, "all" ordinary process and returns thereon, such as citation, writs, *mesne* or executory, will be omitted from the transcript, and no one document is to be copied twice.

It is in place to state that the clerk filed the transcript here properly in compliance with the order *nisi* of this court. He reserved all of his rights to be heard as if the transcript had not been filed.

As relates to the state of the transcript as it is now, we have found no ground for relator's objection "that it is detached and separately bound." It is now bound in volume form. We have read it and found it well enough prepared. It gives no cause of complaint. Documents copied twice, writs and citation and other papers copied increase very little the bulk, and are not confusing, inserted as they are.

The question reduces itself on this point to a small amount for costs, which appellant and appellee can well adjust by reference to the rules of the Supreme Court.

Lastly, as relates to the claims for costs for inserting in the transcript a copy of the testimony of the witnesses as having been prepared by the clerk himself or by one of his deputies, and not by a shorthand reporter.

We infer that a court reporter was appointed, and took down the testimony, as we read in the transcript of appeal: "W. H. Jack, Jr., was then sworn as court reporter in this case regularly."

The issues as presented give direct support to our inference.

The question involved is whether the statute 104 of 1894 was repealed by statute 203 of 1898?

The former provides that the stenographer in reducing "his notes to writing shall make a duplicate copy of the testimony without extra charge, the original of which, in case of appeal to the Supreme Court, shall be embodied in the transcript, while the duplicate copy shall remain in the record. The clerk, under the law of 1894, is not allowed to charge for the testimony so embodied in the transcript.

The statute of 1898 only confirmed Sec. 5 of the law adopted in 1890, authorizing the appointment of shorthand reporters by the clerk himself or by the judge.

Respondent urges that Statute 203 of 1898 establishes a general fee bill, or bill of costs, regulating and fixing the fees and compensation allowed clerks.

The paragraph of the law of 1898 invoked reads:

"For taking down testimony: For each one hundred words, ten cents.

"For making transcript of record on appeal to the Supreme Court, for each one hundred words, fifteen cents."

Respondent contends that the repealing clause of the statute of 1898, which reads, "all other laws (not embraced in the act) on the same subject matter be and the same are hereby repealed," is upon the same subject matter as Statute 3 of 1894, and therefore repeals it.

Strictly, is it upon the same subject matter? In one case the purview of the law was to fix the fees and compensation of the clerk, in the other to regulate and fix the fee of the shorthand reporter and save costs to litigants in cases appealable to the Supreme Court.

The latter, the shorthand reporter, is to act as reporter only upon the application of one of the parties, and the appointment is left to the discretion of the court, provided it does not interfere with the clerk's appointment.

In case no reporter acts, it follows that the usual charge is to be made by the clerk.

In case he or his deputy acts as shorthand reporter, he is entitled to the fee allowed the shorthand reporter. As relates to the transcript, the two laws are not irreconcilable. We did not discover, upon examination, that the purview of the new law was to repeal the old law. In view of the repeal, this anomalous condition would arise; we have seen that under Sec. 5 of the law of 1890 (No. 28), the clerk is authorized to appoint a shorthand reporter, and whenever called on to act, the reporter's fee would amount to the rate before mentioned, and in addition he would be entitled to his own

fee, thus increasing the amount of cost for each one hundred words to forty-five cents, which, in our judgment, never was intended by the law-making power.

As we read the statutes before us, the same subject matter refers to all clerks' fee bills, and not to other particular statute, having in view the employment of shorthand reporters and the expedition of trials in the courts of justice.

The legislator acted upon the subject independently and separately, and embodied the intention in the particular law of 1894.

A subsequent statute, in general terms, treating the subject in a general manner as relates to the fee of an officer, does not repeal the particular statute. In other words, the purpose, as we understand the intention, was to make a change as related to the clerk, and not as to the reporter, to whom not the least reference is made.

It is clearly settled, the leaning of the court should be against the doctrine of repeal by implication or liberal construction. The two laws should stand, unless it be evident that the last repeals the particular law. If reason arises in support of each position, about equally good, the decision, in our view, should be against declaring a law repealed. We would not, upon light grounds, change a system of reporting, established by legislation and to which all are now accustomed.

If we should decide that the law, as relates to the compensation of shorthand reporters, was repealed, the law itself authorizing the employment would lose its vitality.

For reasons assigned, it is ordered, adjudged and decreed that respondent deliver the transcript of appeal in this case to the relator, after the latter will have paid him the amount due, in accordance with the views before expressed, and that to that extent the rule *nisi* is affirmed, and the *mandamus* is made peremptory.

NICHOLLS, C. J., absent.

No. 12,867.

STATE EX REL. ANSELM B. MURRAY VS. HON. FELIX VOORHIES, JUDGE OF THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF IBERIA.

The provision in Art. 117 of the Constitution that the District Court shall hold continuous sessions of ten months, the Judge sitting alternately in each parish of the district as the public interest may require, is operative of its own force without legislation.

ON APPLICATION for a Writ of *Mandamus*.

Walter J. Burke & Bro. and *Weeks & Weeks* for Relator.

Respondent Judge *pro se*.

Submitted on briefs June 18, 1898.
Opinion handed down June 24, 1898.

The opinion of the court was delivered by

MILLER, J. The relator, alleging himself to be the plaintiff in a suit pending in the Nineteeth Judicial District Court for the parish of Iberia, applies for the writ of *mandamus* to compel compliance by the judge of that court with the requirement the relator conceives is imposed by the 117th Article of the Constitution of the State, that District Courts shall hold continuous sessions during ten months of the year; and in districts embracing more than one parish, the judge shall sit in each parish alternately as public business may require.

The petition avers the pendency of the relator's suit, and, omitting other allegations unnecessary for the determination of the question presented, avers that the judge is not engaged in holding court in the parish of St Martin, constituting, with Iberia, the Nineteenth Judicial District; that relator is desirous of the trial of his case; that there are over one hundred cases untried in Iberia; that under the Constitution, the sessions of the District Courts are required to be continuous; that the respondent judge has been requested to hold sessions in Iberia, but the judge declines to do so, on the ground that Art. 117 of the Constitution is inoperative unless carried into effect by legislation, and the relator claims the writ of *mandamus* to compel the judge to hold court continuously in the parish of Iberia for ten months of the year, when not sitting in St. Martin. The answer of the respondent judge denies the power of this court to issue the *mandamus* to compel trial of a suit not susceptible of being brought to this court, because the amount involved is under two thousand dollars; denies that any application has been made for the trial of the suit; avers at the last term it was

continued on the motion of relator's counsel, and that his petition shows no denial of justice to authorize the writ. The answer further sets forth that the intervention of the defendants in the pending suit of plaintiff, joining the relator in his present demand, is a departure from settled practice; that if this court should be of opinion it has jurisdiction to issue the writ on the showing made by the petition, the respondent denies that any application was ever made to him to hold court in Iberia under Article 117 of the Constitution prior to the notice accompanying the answer dated June 10, 1898, notifying the respondent judge of the purpose of the attorneys for plaintiff and defendant in the pending suit of Murray vs. Upton *et als.* to make the application to this court; the answer proceeds to aver substantially that since 1892, in pursuance of the rules of court adopted by direction of the Constitution of 1879, he has held the full number of terms in the parish of Iberia to which it was entitled; that the last term in the parish of Iberia closed on the 14th of May; thereupon respondent began the term in St. Martin, and adjourned *sine die* on the 7th June, the bar of St. Martin coinciding with respondent in the opinion that legislative action was requisite for the continuous sessions, provided for in Art. 117 of the Constitution, and requesting the adjournment, and the answer insisting that Art. 117 can not be put in force without legislative authority, refers to the Governor's message as confirming that view, denies that until that legislation respondent can be required to hold the sessions contemplated by Art. 117 of the Constitution, and claims that the article of the Constitution gives respondent discretion as to holding court not within the control of the writ of *mandamus*.

The Constitution vests in this court the control and supervision of all inferior courts to be exerted by writs of *mandamus*, *certiorari*, prohibition or other remedial writs. Art 94. This jurisdiction is given without qualification, and manifestly extends in a case like this to compel a session to try appealable as well as unappealable cases. The mandate of the organic law that the District Court of the State shall hold continuous sessions is one of importance to all litigants, and is in the public interest. If the mandate is not obeyed we can see no basis to deny the resort to that compulsive power conferred on this court, and which affords, in our view, the only relief, if the constitutional mandate under consideration is denied execution by the inferior court to which it is addressed.

The control and supervision which this court must exert under the plain terms of the Constitution over all inferior courts leaves, in our opinion, no doubt of our power to issue the writ of *mandamus* if the basis exists asserted by the relator, nor can we perceive the ground on which we can deny to the relator an interest as a litigant to demand the relief he seeks, in effect that the court shall be held in that mode the Constitution prescribes for the dispatch of the public business.

The District Courts, as now constituted, remain undisturbed until the organization of the District Courts provided by the Constitution. Art. 118. Under the system in force, up to the adoption of the Constitution, the requirement was that in judicial districts of more than one parish there shall be four annual terms of court in each parish fixed by law or the rules of court. Constitution 1879, Art. 117, Act No. 70 of 1880, No. 22 of 1892. If the business before the court of one of the parishes is limited an adjournment soon followed, and the *interregnum* before the term in the other parish begins was lost, to the detriment of suitors anxious for the speedy trial of their case. To guard against this evil and to secure the prompt administration of justice, the present Constitution introduced the requirement of continuous session of the district courts, the session to be for ten months of the year, the judge to sit in each parish alternately as the public business may require. The constitutional article contains other provisions not pertinent to this controversy, and closes with the explicit direction that the article shall take effect from and after the adoption of the Constitution. If we correctly appreciate the position of the respondent it is, that until legislation he supposes to be requisite, there can be no terms of the District Courts, hence the adjournment *sine die* of the District Court of St. Martin. It would require the clearest language to authorize the conclusion that the convention intended that interruption of the public business claimed by the argument as flowing from the organic law. The obvious import is continuous sessions of the District Court during ten months, the judge to sit alternately in each parish as the public business shall require. The old system of fixing terms was superseded by the one continuous term of ten months. It is claimed the beginning of the term is not fixed, nor where it commences, nor is the two months of vacation designated. This, in our view, does not lessen the force of the constitutional mandate that

the article shall take effect from the adoption of the Constitution. Of its own force the Constitution acted on the District Court, and modified their sessions to conform to the organic law. The court being in session when the Constitution went into effect, the organic law made, or should have made, the session continuous, the judge sitting alternately in each parish, subject to the right of the court to fix its two months of vacation, at the end of which the new term begins. It could hardly be expected the change from the old to the new Constitution could occur without some question arising of the character presented, and it appears that the opinion of the bar of St. Martin coincides with that of the respondent judge, who has furnished us an elaborate argument in support of his position. Our examination leads us to the conclusion that supplying by necessary implication that which the Constitution intends solves the difficulty supposed to arise in giving immediate effect to the constitutional provision in question directing that immediate effect. The Nineteenth Judicial District Court adjourned in the parish of St. Martin in June; the continuation of the session in Iberiais, in our opinion, required by this article of the Constitution.

It is therefore ordered and decreed that the writ of *mandamus* herein applied for issue to the judge of the Nineteenth Judicial District Court, commanding him to hold court in the parish of Iberia, thereafter in the parish of St. Martin, and alternately in each parish as the public interest may require, the session of the courts for both parishes to be continuous, with the right of the judge to designate two months for his vacation, as required by Art. 117 of the Constitution.

No. 12,882.

State of Louisiana vs. Num Harris.

To review a decision on appeal in a criminal case, a case must be so brought before the Court by bill of exceptions as to disclose the error, unless the error is patent.

There was no bill of exceptions and no error patent on the face of the papers.

APPEAL from the Criminal District Court for the Parish of Orleans. *Baker, J.*

M. J. Cunningham, Attorney General, and *R. H. Marr*, District Attorney, for Plaintiff, Appellee.

John Q. Flynn for Defendant, Appellant.

Submitted on briefs May 7, 1898.
Opinion handed down May 16, 1898.

The opinion of the court was delivered by

BREAUX, J. An information was filed against Num Harris on the 17th day of March, 1898, charging him with having feloniously committed an assault by wilfully shooting at F. Fourio.

The jury found him "guilty" as charged.

A motion for a new trial was made by the accused. It was overruled by the court.

The accused was then sentenced to service in the State penitentiary for two years, and to pay the cost of prosecution.

No bill of exceptions was taken during the trial; there is here no assignment of errors and defect patent on the face of the record.

Although there was no assignment of errors we have *ex industria* read and given due consideration to the point argued here in the brief filed in behalf of the accused.

Defendant through counsel contended that the information was faulty, and did not sufficiently set forth the crime charged.

The crime was charged in the language of the law.

This court has in repeated decisions held that an information, or indictment for an offence denounced by statute should be charged in the words of the statute.

There are no questions of law before us which would justify us in granting relief to the accused.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 12,789.

STATE OF LOUISIANA VS. JOHN REED.

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Evidence showing that deceased and the accused lived alternately in concubinage with the same woman in whose presence the killing occurred, was received over objection of defendant that same was irrelevant. *Held:* Competent for prosecution to prove a motive for the crime.

The fact that a witness for the State was once himself under suspicion, and even arrest, in connection with the homicide, is no ground for the exclusion of his testimony. Even though an accomplice, he would still be competent as a witness, that fact affecting the credibility, not the admissibility, of his evidence.

arge of the trial judge, or portions thereof deemed preju
ected to at the time given, or before the jury retires for del
of exceptions seasonably reserved. If this be not done, su
s will not be noticed, except in the clearest instances of
error patent upon the face of a written charge coming
of undoubted prejudice to the accused.

EAL from the Nineteenth Judicial District Court
f St. Martin. *Voorhies, J.*

J. Cunningham, Attorney General, and *James Si*
ney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff

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ard Simon for Defendant, Appellant.

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ued and submitted April 9, 1898.
nion handed down May 16, 1898.
earing refused November 7, 1898.

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opinion of the court was delivered by

ANCHARD, J. Twice, under this indictment for mu
ed been convicted, and twice has the death penalt
him.

the 49th La. An. 704, will be found the report of
irst trial. On an erroneous ruling of the tria
ined, the verdict and sentence was set aside
nded.

econd trial below resulted in a similar verdict
he case is again before us on appeal.

grounds upon which reversal is now asked are
bills of exception.

first relates to evidence offered on part of the
e that the accused and the deceased lived altern
age with a certain woman, who, it had already bee
nt at the quarrel between the two men immediat
homicide, as well as when the homicide occurr
ted to by defendant on the ground that it ha
e case and was irrelevant. To an adverse ruling
pted. The court's reason for admitting the testi

it was competent for the State to prove a motive for the crime. And so it was. State vs. Crowley and Others, 33 La. An. 782.

The second bill records the objection of the accused to the testimony of one Francis Frank, offered by the State to prove that Jacques Comeau, the deceased, met his death at the hands of the defendant.

The demand for the exclusion of his testimony rested on the allegation that at one time this witness was charged with being an accomplice in the crime for which the accused was on trial, and had been arrested and held in custody as such.

The trial judge admitted the testimony, assigning reasons: (1) There was no evidence before the court that the witness was an accomplice or had been held in custody as such; (2) that if he were an accomplice, he was not charged as such, nor was he under any charge, nor on trial on any plea of complicity in the murder of Comeau; (3) that even as an accomplice, if such he be, he would still be competent as a witness, that fact going to the effect of the testimony (the credibility of the witness) rather than to its admissibility.

This ruling was not erroneous.

Act 29 of 1886; State vs. Mack, 41 La. An. 1079; State vs. McManus, 42 La. An. 1194; State vs. Ashbury *et al.*, 49 La. An. 1741.

It seems that when Comeau was found dead and the belief was entertained that he had been murdered, the sheriff arrested several parties, one of them the witness Frank, on suspicion of complicity, and held them a few days in custody.

Investigation appearing to fasten the homicide upon the accused, he was held to answer the crime charged, and the other parties discharged.

Subsequently no action was taken against any of the parties originally under suspicion, save the accused and one Anais Parks, his paramour, who were jointly indicted for the murder. The witness, Frank, was not indicted, nor even formally charged as being a principal, or accessory before or after the fact. Under these circumstances it can not be said he was an accomplice, but even had he been he would have been competent to testify. Besides, the trial judge charged the jury, as requested by counsel for the accused, that if they believed this witness was an accomplice they should not, in a case of this magnitude, convict solely on his testimony; that there should be corroboration *aliunde*.

State vs. Reed.

Following conviction, a motion for new trial on behalf of the accused was filed, grounded upon the allegation of insufficiency of the testimony to warrant the verdict.

The ruling of the court *a qua* denying the same forms the subject of the third bill of exception.

The question of sufficiency or insufficiency of evidence to convict is one over which this court has no jurisdiction. This is fundamental, and has been affirmed so often in repeated adjudications that it has become unnecessary to cite the cases.

The jury, in a criminal cause, are the judges of the evidence and it is their province to decide whether, or not, the testimony submitted is sufficient, or strong enough to convict. Having decided that it is, and having returned a verdict of conviction, it rests *within the sound discretion* of the trial judge to grant, or not, a new trial. And when, as in this instance, he refuses it, we will not disturb such ruling unless it is made manifest he has abused the discretion vested in him by law.

The fourth and last bill of exceptions challenges the correctness of the ruling denying defendant's motion in arrest of judgment. Three grounds are set forth:

1. That the trial took place on the 13th of January; that counsel for accused requested the charge of the court to the jury to be reduced to writing; that this was assented to; that no written charge was filed on January 13; and that a paper or document, purporting to be the charge in writing delivered to the jury, was filed only on January 15, two days subsequent to the trial.

2. That illegal matter is contained in the charge filed, to-wit: that it assumes the killing of Comeau by the accused.

3. That the endorsement of the verdict "Guilty as charged" on the indictment was of no specific date.

As to the first ground, the trial judge, in his opinion giving reasons for denying the motion in arrest, states that when the demand for a written charge was made, he had the charge intended to be delivered already prepared, and the same had been transcribed into a bound copy book; that he so informed counsel for accused, exhibited the charge to him, and asked if he would agree that it be read to the jury from the copy book, with the understanding that a copy thereof should be made and filed; and that counsel assented to this arrangement and it was carried out, an exact copy being furnished and filed

two days later. It is not necessary to add anything to this recital of facts. It disposes of this objection.

As to the second ground, that the judge *assumed* as proven the killing of Comeau by the accused, it is based on this statement found in the charge: "Deliberate malice is manifested by external circumstances. Thus the killing of Comeau is an external circumstance, from which you shall infer whether it was done with or without malice prepense."

It is urged this is tantamount to saying that the accused had killed Comeau, and that since one of the questions arising in the case and presented to the jury was whether Comeau was killed or not by a passing train (his body having been found on or alongside of a railway track), it was prejudicial error.

The statement challenged undoubtedly *assumes* the killing of Comeau. More than that, it *implies* that he was killed by the accused.

It is error on both grounds. It was for the jury to find as a fact that Comeau was killed; it was not for the judge to assume he was killed. It was for the jury to find as a further fact that the killing was by the accused; it was not for the judge to use language which plainly implied he thought or believed the accused did the killing. The theory of the defence was that Comeau was killed by the railway train.

However improbable or unfounded in fact such theory may have been thought to be by the trial judge, he should have been careful not to use language tending to weaken on the minds of the jury whatever impression in regard to same and favoring it, the evidence may have made. If the killing had been by the train, while this was an "external circumstance," it was not one from which the inference of malice could be drawn as against the accused, who alone was on trial. And when the judge referred to the killing of Comeau as an external circumstance from which the jury should infer "whether it was done with or without malice prepense," it had the direct tendency to withdraw from the attention of the jury the theory of the possible killing by the railway train. If the killing had been by the train, the question of malice could not arise as an issue to be determined in the case.

On this ground the accused is entitled to relief.

It is, therefore, ordered, adjudged and decreed that the verdict and sentence appealed from be annulled, avoided and reversed, and that the case be remanded to be proceeded with according to law.

No. 12,899.

STATE OF LOUISIANA EX. REL. P. M. KENNER VS. EMILE ROST, JUDGE.

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The petition for an injunction did not set forth the facts needful to show that relator was entitled to an injunction, and therefore *mandamus* did not issue to compel the District Judge to grant the writ of injunction for which the relator applied.

The relator was a party to a suit to authorize his wife, and in effect testified in the suit that he had no claim on the property.

After judgment he was without right to an injunction to prevent the execution of the judgment in which it was decided contradictorily with him that the one in whose favor the judgment was pronounced had the right of possession.

ON APPLICATION for Writs of *Mandamus* and Prohibition.

Hiddleston Kenner for Relator.

Robert D. Dugué and *Farrar, Jonas, Kruttschnitt & Gurley* for Respondent.

Submitted on briefs, at Chambers, July 23, 1898.
Opinion handed down, at Chambers, August 2, 1898.
Rehearing refused, at Chambers, reasons assigned, August 17, 1898.

The opinion of the court was delivered by

BREAUX, J., Relator applied for writs of *mandamus* and prohibition, whereby he seeks to compel the District Judge to grant him a writ of injunction.

He alleged before the District Court, in his petition for an injunction, that certain named persons are threatening to disturb him in and evict him from a dwelling house and premises in the execution of a judgment in a suit entitled Jos. Weill *et al.* vs. Emile Richaud *et al.*

He avers that he was not a party to the suit and was not named in the judgment.

That he is in possession of the house and premises from a date anterior to the contemplated eviction of more than one year.

The respondent judge, as relates to the facts, sets forth that the

dwelling house and premises form part of a plantation sold by the wife of relator to purchasers named by him; that the relator was at the time separate in property from his wife. That the vendor reserved the right of remaining on the property, free, to the thirty-first day of December, 1894.

That Richaud claimed to hold under a lease from her, made after the 31st of December, 1894.

That suit was brought by the purchasers against the asserted lessee, and against the heirs of the wife (she being dead when the suit was brought for the ownership and possession of the place).

It appears that citation was served on the husband, who was a party to the sale.

That he filed an exception, which was overruled. Afterward he pleaded a general denial as an answer; he denied that he was an heir of his late wife; he averred that her succession was not completely represented, that she had children who had not been made parties, and that the property was in possession of tenants, not parties to the suit.

That he did not claim as owner or that he was in possession.

That during the trial he in substance admitted that he had never owned the property.

The respondent annexed to his return a copy of the act of sale, which was offered in evidence in the case, showing that, as stated by him, the late Mrs. Kenner sold the property to Weill; that she was authorized by her husband, who now claims possession, to sell to Joseph Weill & Bros.

There was a judgment pronounced in the case against Emile Richaud, tenant, and the four surviving children and legal heirs of Mrs. Devia Ella Kenner, decreeing that the purchasers (plaintiffs in the suit) were entitled to the possession and ownership of the property.

It thus appears that relator was a party to the sale made by his late wife to Weill & Bros., and that he authorized her to sell the very property of which he now claims possession.

That he was one of the defendants in the suit brought, and in which judgment was pronounced, as just stated.

A question of possession and no question of title was at issue. In the suit the relator did not claim title or possession, but in substance disclaimed both.

In the case now before us for *mandamus* and prohibition, relator does not allege that he was in possession as owner or under any other right entitling him to possession.

The petition for an injunction does not set forth any of the facts required by Art. 49 of the Code of Practice: "Possession as an owner; the right to usufruct, or the use of the property or real right of any kind."

The relator was concluded by the judgment pronounced against his late wife from asserting any right of possession in himself in the manner called for by the article just cited.

Where it is manifest, as in this case, that the one applying for an injunction has no right to an injunction, the court can refuse to issue the writ.

Where it appears on the face of the application, or of the papers forming part of the application, or inseparably connected with the issues, that there is not the least ground for an injunction, the refusal to grant it is within the court's discretion.

The regularity of the proceedings to which the relator was, as we have heretofore stated, a *party*, is not questioned, and the truth of the averments made in that case are not denied.

How can the relator stand in judgment for a possession of property of which his wife was divested contradictorily with him, and in a case in which he in addition testified in effect that he had no right?

One seeking an injunction must show a clear or equitable right.

When no necessity is shown for the injunction as a means of protecting a right it should not issue.

Relator has not asserted a right which is not absolutely shown groundless.

We are constrained to decline to make the writ peremptory.

It is ordered, adjudged and decreed that the writ of *mandamus* applied for in this case is refused, and the rule *nisi* heretofore issued is discharged.

ON APPLICATION FOR REHEARING.

BLANCHARD, J. A careful review of this case confirms the conclusion announced in our opinion in chief, that the application for injunction was groundless, and, therefore, properly refused by the judge *a quo*.

Mandamus will not lie to compel the granting of the writ of injunction where it appears that the applicant therefor is without standing to invoke the same.

Rehearing refused.

JUSTICES BREAUX and MILLER concur in refusing the rehearing.

No. 12,906.

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50 1136
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IN RE A. J. MURFF, APPLYING FOR WRIT OF ERROR TO THE COURT OF APPEALS, FIRST CIRCUIT, IN CASE OF T. F. BELL VS. A. J. MURFF.

1. The power to review by writ of *certiorari* the decisions of the Court of Appeals was conferred on this court mainly to secure uniformity of jurisprudence, and to authorize such review when the question decided by the Court of Appeals was one of law and public importance. The provision in the Constitution of 1898, conferring on this court this power to issue writs of *certiorari*, is given in the terms of the acts of Congress of March 3, 1891, authorizing the Supreme Court of the United States to review by *certiorari* the decisions of the Circuit Courts of Appeals, and the jurisprudence of the Supreme Court of the United States, under the act of 1891, furnishes a guide for us in the exercise of this new jurisdiction. Constitution of 1898, Art. 101; Act of March 3, 1891; 26 Statutes, p. 828, Sec. 6; 141 U. S., p. 583; 144 U. S., p. 47; 162 U. S.. p. 435; 165 U. S., p. 443.
2. The writ will not issue to review decisions of mere questions of fact.

Joannes Smith and *Murff & Webb* for Relator.

Petition filed July 28, 1898.
Opinion handed down July 30, 1898.

The opinion of the court was delivered by

MILLER, J. The questions determined by the Court of Appeals arose with reference to the title of the plaintiff's assignor; the prescription applicable to the action; whether the judgment for the property in a petitory action was *res judicata*, concluding the owner's subsequent suit for revenues; and whether the possessor, under a tax title decreed void, was liable for rents recognized by the judgment to exist from the time the possessor was sued by the owner for the property. I can see nothing in the determination of these questions by the Court of Appeals to call for the writ of *certiorari* not given to clothe this court with appellate jurisdiction, but to issue

only in exceptional cases mainly to secure uniformity of jurisprudence. The other ground, substantially, that the Court of Appeals has not given effect to Art. 210 of the Consitution, or to the decision of this court in Bristol vs. Murff, 49 An. 357, I have examined. It was no part of Art. 210 of the Constitution, in so far as it bears on the question in this case, to do more than require the refunding to the purchaser in the instances specified in the article of the price paid by him at the tax sale. Neither the article nor our decision modified or affected in any manner the purchaser's liability for rents, a question to be determined by the law irrespective of Art. 210 of the Constitution. I see no basis to issue the writ.

No. 12,903.

IN RE L. D. MCLAIN ET AL.

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50 1136
50 1351
51 1367

The writ of *certiorari* under Art. 101 of the Constitution of 1898 will not not issue to review decisions of the courts of appeal of mere questions of fact. See *In re* A. J. Murff praying for the writ. 50 An., not yet reported.

APPLYING for Writ of Error to the Court of Appeals, First Circuit, in the case of L. D. McLain vs. N. Burgess.

W. A. Van Hook for Relators.

Petition filed July 20, 1898.
Opinion handed down July 20, 1898.

The opinion of the court was delivered by

MILLER, J. The petition shows the determination by the Court of Appeals on the respective titles of the parties in a petitory action. The Supreme Court has no appellate jurisdiction to review judgments of the courts of appeal. Article 101 of the Constitution adopts the provisions in the act of Congress, March 3, 1891, 26th Statutes, p. 828, Sec. 6, Lau Ow. Bew vs. United States, 144 U. S. 58, authorizing the writ of *certiorari* to Circuit Courts of Appeal. The jurisdiction of the Supreme Court of the United States under that section was doubtless in contemplation. Generally, the writ issues to secure uniformity of decision by the courts of appeal and

other cases of importance presenting legal questions. There is no warrant to use the writ to correct supposed errors of the court in determining the effect of conflicting titles, as in this case. The application is denied.

No. 12,767.

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51 1625

CITY OF NEW ORLEANS, MAYOR AND BOARD OF CIVIL SERVICE COMMISSIONERS VS. BOARD OF FIRE COMMISSIONERS.

If there be other points or defences in a case upon which its decision may well turn, the court will pretermit an expression of opinion upon a constitutional question that may have been set up as matter of defence.

The civil service law adopted for the city of New Orleans includes within the scope of the civil service all positions (except that of chief engineer) in the *fire force* only.

It leaves untouched by the civil service other positions not clearly within the meaning of the words "fire force."

As to such other positions the fire board may appoint and promote independently of the civil service.

The position of secretary-treasurer of the fire board held not to be included within the meaning of the term "fire force" as used in the statute.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

Samuel L. Gilmore, City Attorney, (*Howe, Spencer & Cocke* of Council) for Plaintiffs, Appellants.

E. A. O'Sullivan for Defendants, Appellees..

Farrar, Jonas, Kruttschnitt & Gurley for Moulin, also Defendant and Appellee.

Argued and submitted April 20, 1898.
Opinion handed down June 20, 1898.

The opinion of the court was delivered by

BLANCHARD, J. This is a contest between the Board of Civil Service Commissioners, on the one side, and the Board of Fire Commissioners, on the other side, of the city of New Orleans, over the validity of the appointment of Thomas J. Moulin to the office of Secretary-Treasurer of the Board of Fire Commissioners. See 49 An. 1323.

The question presented is whether Moulin, who is made a party defendant, was legally chosen on the 22d of March, 1897, to the position mentioned.

There is no disputed issue of fact in the case. On the 19th of March, 1897, the then existing Secretary-Treasurer of the Board of Fire Commissioners resigned, and at a regular meeting of the board held on March 22nd Moulin was elected to fill the vacancy. He entered upon the discharge of the duties of the office and still continues to discharge the same.

In May, 1897, the Board of Civil Service Commissioners brought this action, the object of which is to have the election of the said Moulin declared illegal and void as being in contravention of the Civi Service law enacted for the city of New Orleans and made part of the charter of the city adopted in 1896. See Secs. 39 to 67, inclusive, of Act No. 45 of the acts of 1896.

The three members of the Board of Civil Service Commissioners, provided for by the act, who had been appointed by the mayor and confirmed by the council, qualified by taking the oath on the 29th of January, 1897, and partially organized on that day by choosing one of their number President of the Board.

On March 19th—the day the vacancy occurred in the office now in dispute—the Board met and completed its organization by the provisional appointment of a secretary, assistant examiner, stenographer and porter. A motion was then adopted that all positions in the police force, except that of superintendent and "all positions under the Board of Fire Commissioners in the fire force, except that of Chief Engineer * * * are hereby classified and included in the provisions establishing the civil service."

It was next ordered that a communication, which had been prepared, addressed to the Board of Fire Commissioners, relative to the office of secretary-treasurer of said Board, be sent to the latter.

This communication, which bears the date of March 19, 1897, in substance, apprised the Board of Fire Commissioners that the Civil Service Board had organized, had proceeded with the classification of the offices and places of employment in the city, that rules for examinations, appointments and removals, in conformity with the charter, would be forthwith published, and that the Board of Civil Service Commissioners would be ready within fifteen days to examine all applicants for the position of Secretary-Treasurer of the Fire

Board just made vacant by the resignation of the incumbent. It further announced that the position named was subject to classification under the Civil Service law, and could be filled only through that medium and pursuant to the rules and regulations prescribed by the Civil Service Commissioners. In support of its contention that this office was covered by the Civil Service, Sec. 57 of the Charter was cited.

The communication then suggested that if a temporary appointment to fill the vacancy was made necessary by the exigencies of the public business, such temporary appointment could be made by the President of the Board of Fire Commissioners, with the approval of the Board of Civil Service Commissioners, under Sec. 46 of the Charter, such designation, however, to remain in force not exceeding sixty days and only until a regular appointment under Civil Service rules could be made.

The Board of Fire Commissioners, advised that the position of its Secretary-Treasurer was not covered by the terms of the Civil Service statute, proceeded to the election of Mr. Moulin as heretofore stated.

Notwithstanding this the Board of Civil Service Commissioners proceeded on March 31st to give notice of competitive examination for the position of secretary-treasurer of the Fire Board, which notice was duly published, and the examination was held on April 22nd, resulting in the selection of Philo A. Tucker, who was, on May 4th, certified to the Fire Board for permanent appointment as its secretary-treasurer,

The Fire Board replied, reiterating its position that its secretary-treasuryship was not subject to the civil service provisions of the city charter, and that no vacancy existed in said office, Mr. Moulin having been elected two months previously.

This was followed by the present suit.

As a matter of fact, the evidence discloses that the date when the rules and regulations for the government of the Civil Service Commission, in respect to examinations, appointments and removals, were approved was March 24th, that the same were adopted as a whole on March 29th, and published first on April 1st, to take effect, under the law, on April 12th.

The secretary of the Civil Service Board stated as a fact, on the stand, that between the 22d of March (the date of the election of

Moulin) to the 12th of April there were no rules governing examinations, appointments and removals.

The grounds of defence urged against plaintiffs' demand are:

1. The unconstitutionality of those sections of Act 45 of 1890 (city charter), establishing the Board of Civil Service Commissioners, and providing for civil service in the city of New Orleans, in so far as the same purport or assume to regulate, change, alter or amend the constitution, powers and duties of the Board of Fire Commissioners, created by Act No. 83 of 1894, for this, to-wit: That in the particulars aforesaid the said act fails to express its object in its title, and is, therefore, violative of Art. 29 of the Constitution of 1879.

2. That the Board of Civil Service Commissioners was not organized and ready with its list of eligibles when the vacancy to which Moulin was elected occurred; no rules and regulations had been formulated; no classification of the various offices for civil service purposes had been made; no examination had been held; and that, under these circumstances, the Board of Fire Commissioners had the right to take independent action.

3. That the provisions of the act in question, especially Sec. 67, do not apply to the fire department, of which the secretary-treasurer is a member, but to the *fire force* only, which does not include the office aforesaid.

Judgment below was in favor of the defendants, the court holding that at the time of the election of Moulin the law establishing the civil service was not in force, because of the adoption of no rules and regulations and the existence of no eligible list arising from competitive examinations previously had.

Plaintiffs appeal.

With regard to the first defence urged, we do not find it necessary to pass upon the question of unconstitutionality raised. If there be other points in a case upon which their decision may well turn, courts will pretermit an expression of opinion upon a constitutional question that may have been set up as matter of defence.

With regard to the second ground of defence, the one upon which the trial judge determined the case, his position in regard thereto would be absolutely unassailable were it not for the concluding sentence of Sec. 48 of the Act No. 45 of 1890, which reads as follows:

"To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with

the written approval of the board (of Civil Service Commissioners), make temporary appointment, to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this act can be made."

Plaintiffs contend that the Civil Service Commission having given notice to the Fire Board of the classification of the office of secretary-treasurer within the civil service, and that within the sixty days an eligible candidate for the vacancy would be presented, the Fire Board was without authority, under the law, to appoint any one to the position for a period exceeding sixty days' duration, and could only appoint for that time with the approval of the Civil Service Board.

An objection to this contention readily suggests itself and raises a doubt of the soundness of the position, and it is this: whether or not what was done on the 19th of March by the Civil Service Commission in regard to classification of offices really amounted to the classification contemplated by Secs. 42 and 48 of the Civil Service law. In other words, had there been a sufficient classification of this office, within the meaning and intent of the law, at the time the vacancy occurred and was filled by the election of Moulin?

But we may leave this question likewise undetermined, since it is not necessary to the decision of the case, the court preferring to rest its affirmance of the judgment below on the third and last ground of defence urged.

Section 67 of the act under review declares: "The powers and duties of the Board of Fire Commissioners shall remain as now prescribed by law, except that all appointments and promotions *in the fire force* (except that of chief engineer) shall be in accordance with and subject to the provisions of Secs. 39 to 64, inclusive, and to the rules and regulations prescribed by the Board of Civil Service Commissioners; in all other respects the authority of said board shall remain undisturbed." (Italics ours.)

Prior to the enactment of this law, the Fire Board had the exclusive and independent appointment of all of its employees, including promotions. The new law extended, in the main, over the operations of the Board, in respect of appointments and promotions, the sheen or the shadow, according as it may be viewed, of the civil service, but not entirely. It includes within the scope of the civil service all positions (except chief engineer) "*in the fire force*" only, and leaves

untouched by the civil service other positions not clearly within the meaning of the words "in the fire force." As to such other positions, the Fire Board could appoint and promote independently of the civil service.

The practical interpretation to be given to the words "fire force," as used in the statute, excludes the secretary-treasurer of the Board. He is the clerical and financial employee of the Board. He is in this sense a part of the Board itself. He keeps its minutes, attends to its office affairs, its correspondence, receives, safely keeps and disburses its funds, and gives bond conditioned for the faithful performance of such duties. He is required to keep his office open from 9 A. M. to 4 P. M. each day, except Sundays and legal holidays. He is not on duty otherwise. He has nothing to do with the extinguishment of fires; is not required at all to attend fires; does not have to report to those charged with such duties. He wears no uniform or other insignia to distinguish him as a member of the fire force. He is in no sense a part of the fire force in the common acceptation of that term. When one speaks of the police force, or fire force, he is usually understood to refer to the body of officers and men stationed about the city, in the one case, to preserve order and protect life and property, and, in the other case, to be on the alert for announcement of fires and conflagrations occurring, move rapidly to the scene of the same, with fire engines, hose, hooks and ladders, trucks and other equipment, and there, under the discipline and command of trained leaders, designated for the purpose, seek to subdue and extinguish the conflagration. The Board of Police Commissioners, in the one case, and the Board of Fire Commissioners, in the other, are not of the police force, or fire force, in this sense. Neither is the secretary-treasurer of the latter Board.

The words of a law are to be understood in their most usual signification, and they are to be invested with such meaning as is implied in their general and popular use. C. C. 14.

The "fire force," in the popular sense of the phrase, includes the chief and assistant chief of the fire department, the engineers, captains, lieutenants, drivers, strokers, tillermen, pipemen, firemen, etc. They are required to wear the prescribed uniform when on duty, and when not on duty to wear some distinguishing badge by which they are known as members of the force. They are mustered

into companies, and the men are subject to the orders of the captains of their respective companies, and other superior officers, both at their houses and at fires. All this force, except the chief engineer, is made subject, as respects appointment and promotion, to the civil service rules and regulations.

The secretary-treasurer of the Fire Board was not mentioned as excepted from the operation of the law for the reason that there was no necessity for naming him as excepted. Not coming within the definition of the term "fire force," he was never *included* to be excepted.

We hold him to be a ministerial officer of the Fire Board, not a member of the fire force, as that term is understood, and, therefore, not within the grasp of the civil service established for the city of New Orleans.

Judgment affirmed.

12,821.

STATE OF LOUISIANA EX REL. AUGUSTUS C. FOWLER VS. EMILE ROST, JUDGE, ET AL.

Parties disregarding orders of injunction do so at their peril and subject themselves to punishment for contempt, unless they establish that the act enjoined was one which it was beyond the power of the court to restrain.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

A. E. Billings, H. N. Gautier and *Ambrose Smith* for Relator.

Ernest T. Florance for Respondent.

Submitted on briefs April 27, 1898.
Opinion handed down May 30, 1898.
Rehearing refused June 28, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. Relator averred that in the suit of the Allopathic State Board of Medical Examiners vs. Augustus C. Fowler, in the

District Court for the parish of Jefferson, a preliminary writ of injunction was issued by the judge of said court, prohibiting and restraining him from practising medicine in any of its departments in the State of Louisiana, until he should have first obtained the certificate prescribed under the provisions of Act No. 49 of 1894; that subsequently, upon the trial of said cause, and in pursuance of the provisions of that act and Act No. 13 of 1896, being an act amendatory of said Act No. 49, final judgment was rendered in favor of the plaintiffs and against relator, making said writ of injunction perpetual, and thereby prohibiting and restraining relator from the further pursuit of his profession in practising medicine in any of its departments until and unless relator had complied with all of the provisions of said statutes; that from said final judgment relator sued out a suspensive appeal to the Supreme Court, where same was pending and undetermined; that under said appeal relator had attacked said judgment for nullity, based on the alleged unconstitutionality of said statutes upon which said judgment was predicated and under which same was rendered, and said judgment was issued.

That subsequently, on the 4th of April, 1898, the plaintiff in said cause instituted proceedings in said District Court, praying to have relator punished for the contempt of the authority and orders of said court by reason of alleged violation by relator of said writ of injunction, and in return and answer thereto relator filed an exception to the jurisdiction of said court to try and determine the issues thereby raised, on the ground of the unconstitutionality of said acts of 1894 and No. 13 of 1896, same having been enacted in violation of Arts. 35 and 37 of the State Constitution, as fully and specifically set forth in said exceptions; that said exceptions were overruled by the court on April 21, 1898, which then and there ordered relator to appear before said court on April 23, 1898, in order that the penalty might be inflicted upon him as punishment for such alleged violation of the authority and order of the court.

That said court was not competent to decide the issues involved in said contempt proceedings, and in deciding same usurped authority and transcended its lawful power and jurisdiction; that said judgment of said court was not subject to review by appeal, and that relator was without adequate legal remedy for the irreparable injury thereby inflicted upon him save through the exercise of the supervisory control over inferior courts.

He prayed in the premises for writs of *certiorari* and prohibition, and that they might be made perpetual and judgment rendered, decreeing said contempt proceedings null and void.

The District Judge having been ordered to send up the record in the matters referred to, to the end that their validity might be examined into and to show cause why his action therein should not be decreed null and void, and why further action in the premises should not be prohibited, answered, annexing to his answer the record called for. For answer he averred that as appeared from the record a writ of injunction issued from the District Court for Jefferson parish on respondent's order on the 16th of January, 1897, forbidding relator from practising medicine in the State of Louisiana. That proceedings were filed in that court, charging relator with a violation of said injunction; that upon trial thereof respondent found him guilty of violating said writ. That under the Constitution and laws of the State he had authority to issue writs of injunction and, therefore, the issuing of the writ was within his jurisdiction, and being so he had power to punish for contempt of court resulting from said violation. That the correctness or incorrectness of his judgment in issuing said writ could not be inquired into in a proceeding for contempt, but could be reversed only on appeal from the judgment granting the writ. That the question of the constitutionality of Act No. No. 49 of 1894, which was urged as affecting the jurisdiction of the court, was not a jurisdictional question for this, that said act could not grant or take away any of the jurisdiction of the court, the same being defined by the Constitution. That as he possessed the jurisdiction to issue a writ of injunction for a civil cause, the question as to whether he exercised the jurisdiction properly in the given case could not be raised collaterally.

OPINION.

When the orders given in this case were granted we understood from relator's pleadings that the acts which were set up as those constituting a contempt of court had been committed after the District Court had itself granted relator a suspensive appeal from the judgment perpetuating the injunction. We understood him to contend that whether the court was warranted in permitting such an appeal or not, so long as the order remained unrevoked it stood as a protection from any adverse action on the part of the

court granting it, under the maxim at least of "*actus curiæ non gravabit.*" That independently, however, of this maxim, the order of appeal had withdrawn the case from the further jurisdiction of the District Court. We have ascertained from the return made and the briefs filed and arguments made that the acts referred to took place in the interval between the issuing of the preliminary injunction and the trial of the case on its merits, and that the claim made on the part of relator is not that the granting of a suspensive appeal had any bearing in the case, but that he relied upon his being able to establish his charge that the law on which the injunction was based was unconstitutional, and that in view of such unconstitutionality he was justified in violating the injunction pending litigation touching that question.

In support of this position he relies upon *State ex. rel. Liversey, 34 An. 741.*

We do not propose to enter into any extended discussion of the circumstances under which parties would be justified in disregarding the injunctions of courts. It suffices to say that they must be very exceptional in character and that persons so taking the law into their own hands do so at their peril. One material difference between the Liversey case and this one is that in the former this court was of opinion that the act enjoined was one which it was beyond the power of the court to restrain, while in the case at bar we have recently decided that the act prohibited was one which was subject to legal regulation and had come under legal regulation by an express special law. Under this state of facts the District Court had full authority to rule relator into court for contempt and to deal with the case as its facts justified. The correctness of its conclusions on that subject are not before us in the present proceeding.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the orders which have been granted by this court herein be and the same are hereby set aside and relator's application be and the same is hereby denied.

No. 12,275.

Succession of Pablo Sala.

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1. The parties designated by Act No. 130 of 1894 as those to be charged under its provisions with a succession or inheritance tax are foreign heirs and legatees.

2. The words *personal goods* in the first clause of Art. XI of the treaty, entered into on the 27th of October, 1795, and proclaimed on the 2d of August, 1796, between the United States and Spain, refer to and cover *movable* property only. Real estate or immovable property is referred to and dealt with in the treaty only in its third clause.

3. The only action taken by the two governments in respect to real estate, or immovable property, was to deal with and provide for the consequences of the special case, where foreigners in either country should be prohibited from inheriting immovable property. The effect of this limited action is to leave Act No. 130 of 1894 (unless unconstitutional) operative upon immovable property as against foreign heirs and legatees, except to the extent that it is controlled and limited under the third clause of the treaty, under the condition of affairs therein specially anticipated and provided for.

4. Act No. 130 of 1894 is an act raising revenue and appropriating money, and should, under Art. 35 of the Constitution, have originated in the House of Representatives. Having originated in the Senate it is decreed unconstitutional.

5. There is nothing in the language of Act No. 130 of 1894 making the payment of a succession or inheritance tax by foreigners a condition precedent to a right of inheritance. The law permits the foreigner to inherit, but, having inherited, charges him with the tax. Succession of Pargoud, 18 An. 367; Succession of Rabasse, 49 An. 1405.

ON APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Branch K. Miller for Charity Hospital of New Orleans, Plaintiff and Appellant.

Henry Denis for Foreign Legatee, Defendant and Appellee.

Argued and submitted February 2, 1897.
Opinion handed down March 15, 1897.
Rehearing granted June 19, 1897.
Argued and submitted on rehearing February 25, 1898.
Opinion handed down March 21, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. Pablo Sala, a resident of the parish of Orleans, died in said parish on the 25th of October, 1894, leaving a last will and testament in which he appointed George W. Nott his testamentary executor, and in and by which he constituted as his universal legatee his sister, Dona Maria Sala y Fabrigas, residing in Lloret de

Mar in Spain. Inventories were taken of the succession from which it appeared that the deceased left in the State real estate and also movable property and credits. Nott qualified as executor.

In April, 1895, the Charity Hospital at New Orleans brought suit in which it prayed that there be judgment in its favor, condemning the executor, Nott, to pay over and deliver to the treasurer of the Charity Hospital the sum of twelve thousand five hundred dollars, or such sum as might be equal to ten per cent. upon all sums, or the value of all property which might fall to or become due to said Maria Sala, universal legatee of Pablo Sala.

The demand was based upon the provisions of Act No. 130 of 1894 and upon the allegations that in this succession there fell to the universal legatee, Maria Sala, under and and by virtue of the last will and testament of the deceased, property and assets amounting to, at least, one hundred and twenty thonsand dollars after all the debts of the succession had been paid or discharged. That George W. Nott was the executor of the deceased and was in charge of and had the administration of the succession property belonging to or falling to the universal legatee. That said legatee resided out of the State of Louisiana and was not a citizen of any other State or Territory of the United States, but a citizen or subject of the kingdom of Spain. That it was the duty of the executor to retain in his hands the tax for the benefit of the Charity Hospital of ten per cent., for which, under the provisions of said Act No. 130, the said legatee was liable, and to pay the same to the treasurer of the Charity Hospital.

The act referred to is entitled "An act to amend and re-enact Arts. 1221, 1222 and 1223 of the Civil Code relative to the tax due by foreign heirs, legatees and donees, repealed by Act No. 86, approved April 20, 1877."

It reads as follows:

"Be it enacted by the General Assembly of the State of Louisiana, That Arts. 1221, 1222 and 1223 of the Revised Civil Code relative to the tax due by foreign heirs, legatees and donees, repealed by Act No. 86 of 1877, Extra Session, be amended and re-enacted so as to read:

"ART. 1221. Each and every person not being domiciliated in this State, and not being a citizen of any State or Territory in the Union, who shall be entitled whether as heir, legatee or donee to the whole or any part of the succession of a person deceased, whether

such person shall have died in this State or elsewhere, shall pay a tax for the benefit of the Charity Hospital in New Orleans of ten per cent. on all sums on the value of all property which he may have actually received from said succession, or so much thereof as is situated in this State, after deducting all debts; when the inheritance, donation or legacy consists of specific property, and the same has not been sold, the appraisement thereof in the inventory shall be considered as the value thereof.

"ART. 1222. Every executor, curator, tutor or administrator having the charge or administration of succession property belonging in whole or in part to a person residing out of the State and not being a citizen of any other State or Territory, shall be bound to retain in his hands the amount of the tax imposed and to pay over the same to the treasurer of said hospital, in default whereof every such executor, curator, tutor or administrator and his securities shall be liable for the amount thereof.

"ART. 1223. It shall be the special duty of clerks of court to see that the tax imposed by the preceding section be collected and paid over; and each of such clerks shall be bound to furnish the auditor and the treasurer of said hospital once in a year a statement or list of the successions opened in his parish whereof persons who are neither residents of this State nor citizens of any other State or Territory in the United States are heirs, legatees or donees, in whole or in part, and of the amount accruing to such persons, and any clerk failiug to furnish such statement or to comply with the provisions of the law relative to vacant successions shall be responsible to the State for the amount due."

Before plaintiff's petition was put at issue Dona Maria y Fabrigas was, by decree of the District Court, recognized as the universal legatee of the deceased and put in possession as such.

This decree was rendered with the consent of the Board of Administrators of the Charity Hospital, under an agreement entered into between the board and the legatee, that in order to secure the Charity Hospital in case final judgment should be rendered in favor of the plaintiff on the present demand, a certain plantation, known as the Zeringue plantation, should not be sold by the legatee. Dona Maria Sala y Fabrigas (Maria Sala) having been placed in possession, answered plaintiff's petition. Having first pleaded the general issue she admitted that she was the universal legatee of Pablo Sala,

and that she was a subject and citizen of the kingdom of Spain, but further answering she averred that she was not liable for the tax claimed, that the provisions of Act No. 130 of 1890 were inoperative and of no effect as to her for the reason that she is protected against the said law by the treaty of Spain with the United States of America, entered into of the 27th of October, 1795, notified on the 25th of April, 1796 and proclaimed on the 2d of August, 1796, which treaty was still in force and operation. That the inhabitants of the State of Louisiana are not subject to pay any dues, taxes or imposts of any kind upon successions, legacies, or donations to which they are, or may be, entitled, and that no such dues, taxes or imposts are imposed or levied upon them as such heirs, legatees or donees, and therefore she, under the treaty, was not liable to a tax. That Act. No. 130 of 1894 was in violation of Art. 35 of the Constitution.

The portion of the treaty relied on is its eleventh article, which is as follows:

ARTICLE XI.

"The citizens and subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other by testament, donation or otherwise, and their representatives being sujects of the other party shall succeed to their said personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are, shall be subject to pay in like cases.

"And in case of the absence of the representative, such care shall be taken of the said goods as would be taken of the goods of a native in like case until the lawful owner may take measures for receiving them.

"And if questions shall arise among several claimants to which of them the said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are. And where on the death of any person holding real estate within the territories of the one party, such real estate would by the laws of the land descend on a citizen or subject of the other were he not disqualified by being an alien such subjects shall be allowed a reasonable time to sell the same and to withdraw the proceeds without

molestation, and exempt from all rights of detraction on the part of the government of the respective States."

The District Court rendered judgment in favor of the defendant, rejecting the claim of the Charity Hospital, and it appealed.

The position of the plaintiff is thus stated in the *syllabus* of the brief filed in their behalf:

"Article XI of the Treaty of 1795 between the United States and the kingdom of Spain guarantees to the citizens or subjects of the contracting parties acquiring property by testament, donation or inheritance, situated in the territory of the other, specific rights as to movable and immovable property so acquired; the rights as to each class of property are different and distinct from the other; as to movables, the only guarantee given is that the citizens or subjects of the one shall pay no dues or charges not imposed upon the citizens or subjects of the other situated in like circumstances (and a portion of our citizens are liable to this tax); that as to immovables, the only right conferred is that where the laws of the State in which the property is situated prohibit an alien from acquiring real estate, such alien shall have a reasonable time to dispose of his legacy or inheritance and to remove the proceeds without molestation.

"As under the laws of this State a Spaniard may acquire real estate by a title either gratuitous or onerous, the case contemplated by the treaty can not arise."

Plaintiff maintains that it is the duty of the court to enforce the law in every respect in which its provisions are not squarely covered by the treaty; that a portion of our own citizens are liable to pay this tax. Defendant urges that the words "personal goods" in the treaty do not mean "personal property" in the sense of the common law of England and the United States, or movables in the sense of the civil law. That it is evident that the expression "personal goods" is synonymous with the Spanish term "*bienes personales*," which, like the French word "*biens personels*," signifies "property personal to the party," whether it be movable or immovable, and includes both. That personal or movable property in Spanish would be "*bienes meubles;*" * * * that as the article of the Spanish treaty saving the succession property of the citizens of both countries from taxation is the same *verbatim* as the article of the Italian treaty, the decision in the Rixner succession (48 An. 552) should dispose of the present case."

She pleads the unconstitutionality of Act No. 130 of 1894 should the plea be necessary to protect her rights. We think that the two governments in stipulating that "heirs, legatees and donees should pay such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases," intended to give to the very flexible word "inhabitants" as broad a signification as would be needed to insure to the citizens of each country the full protection which it was the obvious intention of both the contracting parties to secure. Were it true (although the tax imposed by the act of 1894 is referred to in the title of the act as a tax due by "foreign heirs, legatees and donees"), that the General Assembly had in view the imposition of a succession tax upon citizens of Louisiana living away from the State, we would not be justified in holding that that fact would bring the defendant under the provisions of that act. Upon that hypothesis only an extremely small and exceptional fraction of the people of Louisiana would be brought under the operation of the statute, and we would see no parallelism in our imposing a tax on citizens absent from this State and imposing one on Spanish heirs or legatees absent from Louisiana. It was suggested on one occasion by a judge of this court that a similar statute (subsequently repealed) was enacted partially with a view of striking a blow at absenteeism, then prevailing to a great extent, but if such was really the motive it would be difficult to find a ground on which we could predicate an intention on the part of either country to extend the provisions of such a *quasi*-penal statute so as to make it cover citizens of the other residing at their own home. To extend a statute imposing a succession tax upon heirs or legatees citizens of Louisiana who reside abroad to Spanish heirs or legatees, living in their own country, would be to take out of the treaty most of its life, leaving its benefits almost nominal. We would not feel warranted in giving to the treaty the narrow scope contended for, leading, as it would, to results evidently not contemplated. We are of the opinion that the object of the treaty was to secure the citizens or subjects of each from being discriminated against under the laws of the other for or on account of their alienship. This object would be entirely thwarted if the Spanish heirs and legatees living in Spain could be successfully discriminated against by being made to fall under the ban of statute discrimination, either actually or apparently aimed at

what would be (if so aimed) only exceptionally and at a very small proportion of the people of the State. Most Spanish heirs and legatees would be in that precise situation. We would hold that Spanish heirs and legatees under the treaty were entitled to share in the benefits accorded generally to the people of the State. We do not think, however, that the statute of 1894 was aimed at any portion of our people. The title of the act, as we have already noticed, discloses that its provisions were directed against aliens, for the tax is therein referred to as one due by "foreign" heirs, legatees and donees. The first section of the statute, which is that which imposes the tax, designates as the parties to be taxed persons not domiciliated in the State and not citizens of any State or Territory in the Union. This designation of the parties to be charged with the tax is not broadened by any subsequent section of the statute—the first section controls the act throughout. For a double reason we think that plaintiff's demand against defendant, in so far as it is based upon the movable assets of the succession, is not well founded.

We are next to consider what the situation is in respect to the tax claimed upon the immovables of the estate. The treaty deals directly and expressly *eo nomine* with immovables only in respect to the legal results which would be made to flow under the laws of either country, should foreigners be prohibited from owning real estate. It concedes the existence of a continuing power and authority in the two governments to control and regulate the disposition of immovable property within their respective borders—a power of control which governments have much more jealously and tenaciously adhered to and insisted upon than they have upon a similar control over movables. Civil Code, Arts. 9 and 10. In view of that continuing power and with reference to a possible exercise of the same by either country in its harshest and broadest discrimination against foreigners through an obsolete prohibition of their owning immovable property the two governments stipulated that should this reserved power be so brought to bear by either upon aliens the citizens of the other should be none the less protected in their substantial rights of ownership in respect to the same. The property was to be made to enure to the benefit of the foreign heir by being converted into money and the money so obtained was to be received and held free from all charges against it by the government. The immovable was to be considered practically for the purpose of ultimate benefit to

the Spanish heir as if it had been a movable from the opening of the succession. By relation back and for that purpose it was to be dealt with as a movable.

Plaintiff's position is that the effect of the failure of the two governments in express terms to take any action in the treaty in reference to immovable property other than the special action just mentioned, is to leave the law of 1894, except under that special condition of affairs, operative against foreign heirs and legatees in all other respects as to that species of property, unless the law itself be unconstitutional. We are therefore called on to see whether we are authorized to give to the words "personal goods" found in the first paragraph of the eleventh article of the treaty the meaning attributed to them by the defendant and make them cover immovable property. The treaty appears to have been drawn up in English. Whether there was or was not a Spanish duplicate of the same we do not know. If there was a duplicate we have not been informed what words appear therein as those corresponding to the terms we are now considering. Defendant concedes that as English words they convey an idea opposed to that for which she is contending. The right of disposal in connection with the words "personal goods" in the first paragraph of the article is there referred to as an absolute one, not one which was in contemplation of parties susceptible of being withdrawn by either, while the language employed in dealing with the special case of aliens who might be prohibited from inheriting real estate does not, though found in the same article, present the case by way of *proviso* or exception to what had already gone before, but as an independent proposition on an independent subject not connected with the rights which had already been therein fixed and provided for.

We are of the opinion that the words "personal goods" in the first clause of Art. XI of the treaty were intended to cover and do refer to and cover movable property exclusively, and that immovable property or real estate is referred to and dealt with in the treaty only in its third clause.

We are further of the opinion that the only action taken by the two governments in respect to immovable property was to deal with and provide for the consequences of the special case where foreigners in either country should have been prohibited from inheriting real estate, and that the effect of this limited action is to leave the

act of 1894 (unless unconstitutional) operative upon immovable property as against foreign heirs and legatees, except to the extent that it is controlled and limited under the third clause of the treaty under the condition of affairs therein specially anticipated and provided for.

The view which we take of the treaty forces upon us an examination of the constitutionality of Act No. 130 of 1894. The statute is attacked as being in conflict with Art. 35 of the Constitution, which requires that all bills for raising a revenue and appropriating money to originate in the House of Representatives. It is conceded that the act originated in the Senate. Plaintiff denies that the act is one raising revenues, or appropriating money. It claims that the statute is a legal limitation upon the right of inheritance; that it simply affixes as a necessary condition for the existence of a capacity to receive by succession the payment of a certain sum; that the claimant can not urge the right and, at the same time, repudiate the condition on which it was granted; that the money ordered to be paid is that of the individuals who pay it and not funds of the State, and therefore there can be no "appropriation" made in the sense that term is employed in Art. 35 of the Constitution; that the House of Representatives is designated as the body to originate bills for revenue upon the theory that the citizens of the different parishes are specially concerned in the imposition of taxes, as it is from them and their proporty that they are to be taken, and the members of the lower house are considered more directly the representatives of the taxpayers than are members of the Senate—that these moneys are to be drawn from aliens, and the people of the State have no interest or concern in the question whether they should be made pay, and if so, how much the amount should be.

We see nothing in the language of the statute making the payment of the tax a condition precedent to a right of inheritance. The law permits the foreigner to inherit, but, having so inherited, charges him with the payment of the tax. The property and property rights of the foreigner found within the State are subject to taxation as is other property. C. C. 9. Its ownership is immaterial. The fact that a succession right accrues to foreign heirs or legatees, and the funds to arise therefrom are liable to be immediately transferred to a foreign country, furnishes no good or sufficient legal reason why, while in the State, they or their owners should not be taxed like other

persons, or other property therein. The legislation is proper revenue legislation.

The beneficiary of the fund to be raised from foreign heirs, legatees and donees under the act of 1894—the Charity Hospital—is a public institution of the State—one sustained almost exclusively by State appropriations, authorized to be made on its behalf under Art. 204 of the Constitution. All moneys reaching its administrators under the act would reach it as having been derived really from the State, lightening, to that extent, the necessity of State direct aid. Neither the mere form or process by which and through which the funds would be transmitted to the institution, nor the limited number of persons to be affected by the legislation, would change the character of the contribution or alter the real source from which they came. In our opinion the act is one intended to raise a revenue by a tax on property rights in the State, and one in reality appropriating the revenue to be derived therefrom to one of the public institutions of the State. That legislation of the character of that contained in the act of 1894 has been considered in the light of legislation concerning taxation will appear from an examination of the revenue acts of 1848 and 1850.

For the reasons herein assigned it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

MR. JUSTICE WATKINS concurs in the decree and that part of the opinion which relates to the unconstitutionality of the legislative act.

MR. JUSTICE MILLER concurs in the decree.

ON APPLICATION FOR REHEARING.

NICHOLLS, C. J. Upon the argument on the rehearing of this case, counsel of the appellee presses upon us very earnestly that we have given to the words "personal goods" in the treaty too restricted a meaning. He directs our attention to the French text of a number of treaties entered into between the United States and different governments in which the words "*personal property*" (*biens personels*) are used in place of "*personal goods*," and he insists that the words "personal property" therein were employed simply to characterize property as belonging personally to the subjects of the one or the other country, and not as descriptive of *movable* property and as contradistinguished from immovable property or real estate. An examination of the French texts referred to shows that the words "personal

property" have been ordinarlly used in treaties of a character closely resembling that of the Spanish treaty we are now considering instead of the words "personal goods," but we can not reach the same conclusions from that fact that counsel does. Under the view taken by counsel, the word "personal" could be dropped out entirely as "*surplusage*," the intentions of the treaty-making powers being fully made known without it. We do not think that that word was either inadvertently or unadvisedly inserted. In the French treaty of 1853 "*personal property*" is brought sharply into mention and contrasted with *immovable* property as being a distinct class from it.

Article XI of that treaty declares that—

"In all the States of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing *personal and real property* by the same title and in the same manner as the citizens of the United States * * *. As to the States of the Union by whose existing laws aliens are not permitted to hold *real* estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

We think that the language adopted in these various treaties was so adopted by reason of a recognition by the different powers of the right of the others to control the *ownership of immovable property* within their respective territories and to leave them free to take such action in respect thereto as to them might be deemed right, except in so far as was made the subject *matter of specific stipulation* in the treaties themselves. This specific stipulation generally extends no further than to guarantee in favor of the subjects of the contracting parties, who would be called to the inheritance of real estate in the territory of the other, but for the fact of alienage, not the *actual ownership of such property* but the practical *benefits* of ownership by permitting them to sell the property, or to have the same sold for their benefit without restriction or "detraction."

By this stipulation, the unwillingness or policy of either of the contracting parties to permit aliens to own real estate within their borders would be respected, without, however, carrying the effect of such policy any further than was actually necessary for its own enforcement.

Subject to the single restriction provided for, the State was left in full possession of the right recognized *in* Mager vs. Grima, 8 Howard,

494, and Frederickson vs. State, 23 Howard, 445. In the former case, the Supreme Court of the United States said: "Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of the Union at this day, real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given subject to a deduction of ten per cent. for the use of the State."

The State of Louisiana has not made the right of Spanish subjects to inherit real estate within her territory conditioned or contingent upon the payment of ten per cent. upon the value of said real property for the use of the State. It has, however, enacted a law that Spanish subjects so inheriting shall pay a tax. We find nothing in the treaty prohibiting the State in the matter of *real estate* from passing such a statute. In our opinion, the treaty stipulations do not reach that branch of the case. It is argued that reaching such a conclusion would lead up to incongruous results. It is said that it can scarcely be reconciled with logic that in a State where hostility to aliens is so great, that they are prohibited from taking real estate by inheritance, the foreigner would be able to get under the treaty the full benefit of the inheritance, while in a State showing a much more liberal spirit toward aliens and permitting them freely to inherit, they should find themselves confronted with a payment of tax of ten per cent.

The legal privilege of a continuing ownership in the foreigner after inheritance of the property inherited is left out of view in this statement, but whether the results reached be incongruous or illogical or not, we are not able to control them. We are called on to declare non-effective, a statute of the State by reason of alleged treaty obligations, and an examination of the treaty has brought us to the conclusion that the particular obstacle set up in bar of the enforcement of the law can not stand. This conclusion forces us back into a consideration of the law from the standpoint of its constitutionality under the Constitution of the State on the ground discussed and disposed of in our original opinion.

A re-examination of the question has not brought us to a conclusion different from that which we have already reached and expressed. The history of the statute shows it to have been enacted as a revenue measure as its principal motive and object. We see no reason to suppose that there has been a change of policy on the part of the people of the State in dealing with the [right] of aliens to inherit real estate. The right of foreigners to inherit real estate in this State has not been made to be conditioned or contingent upon the payment of a tax, as we recently declared in the Succession of Rabasse. Spanish subjects living in Spain inherit freely from persons dying in Louisiana owning real estate. They have the right to accept unconditionally the successions falling to them, and should they (having done so) sell the real estate inherited to third parties, the rights of the vendees *quoad* the *title* of the property sold would be proof against any attack made against it that the vendor's right was conditional or contingent. Succession of Pargoud, 13 An. 367.

We find a great difference between this statute and one under which moneys are to be received only incidentally and subsidiarily as a result or consequence of a main object had in view by the statute (other than the raising of revenue), even though the moneys so received should be directed by the statute when received to be applied to State purpoees.

We are of the opinion that the judgment heretofore rendered by us should remain undisturbed, and it is so ordered and decreed.

JUSTICE WATKINS concurs in the decree on the ground that the Louisiana statute is unconstitutional.

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No. 12,232.

STATE OF LOUISIANA VS. B. R. FORMAN.

An ordinance of the City Council declaring a penalty for non-compliance with an order given by an officer of the Board of Health to repair any vault found leaky, which fails to cast upon any particular person or persons the duty of making the repairs, is too vague and uncertain to be made the basis of a penal or criminal action.

ON APPEAL from the First Recorder's Court of the City of New Orleans. *Finnegan, J.*

B. B. Howard for the Board of Health, Plaintiff and Appellee.

Benjamin Rice Forman, Defendant and Appellant, *in propria persona*.

Argued and submitted December 17, 1896.

Opinion handed down February 21, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 21st of July, 1896, one J. McCormack, an officer of the State Board of Health, made an affidavit before the recorder of the First Recorder's Court of New Orleans to the effect, "That on the 21st day of July, 1896, at about 9:30 o'clock A. M., at 819 Camp street, between Julia and St. Joseph streets, in this district and city, one B. R. Forman did then and there violate Ordinance No. 6022, Sec. 17, relative to repairing of privy vaults, all against the peace and dignity of the State.

Wherefore deponent charges the accused with violating Ordinance 6023, "Sec. 17, and prays that he be arrested and dealt with according to law."

The defendant appeared pleading that the city ordinance under which the charge was made was illegal and unconstitutional, null and void: (1) Because the city had no right to delegate arbitrary power to the Board of Health officers, and no power to compel defendant to advance money for another, or work for, or upon the property of another, and to do so would deprive him of his money and property without process of law.

He later on pleaded that no ordinance had been passed requiring defendant to repair any privy vault, and if any such ordinance should be produced he denied that the property in question belonged to him, or that he had any interest therein, or that he had any money in hand belonging to the owner at the time of the alleged notice; that any ordinance which might propose to compel defendant to do any work upon the property of another, or to advance any money for repairing the property of another, would be in violation of the Constitution of the State and of the United States taking property away him from without due process of law.

After hearing, the recorder "fined the defendant ten dollars or fifteen days."

Defendant appealed.

In the Supreme Court defendant assigned for error apparent on the face of the record: 1. That an officer of the Board of Health had no power to institute a prosecution in the name of the State of Louisiana, for the alleged violation of an ordinance of the city of New Orleans. 2. The charge was void for uncertainty, as it did not charge any act or omission to do any act in violation of any valid ordinance of the city of New Orleans. 3. No ordinance of the city of New Orleans was offered in evidence, so the defendant might be informed of the nature and cause of the accusation against him. 4. If the court would take judicial notice of the alleged Ordinance 6022, Secs. 17 and 35, then the ordinance was void for uncertainty; it did not say who might be ordered to empty, repair or rebuild a vault; it illegally delegates a power of government to another body or officer—the city of New Orleans itself, exercising delegated powers, could not delegate those powers to another. 5. While the city of New Orleans has the power, under Sec. 7 of Act 20 of 1882, and Act 41 of 1890, to provide that any owner, tenant or occupant of any premises must keep the privy vaults clean and in repair; and that if on being notified by an inspector of the Board of Health, in writing, specifying the cleaning or the repairs necessary, such owner, tenant or occupant should fail to clean, repair or rebuild such vault in the manner directed in a time to be fixed in the ordinance, he should be fined and imprisoned, no such ordinance had been passed, and defendant denied that the city of New Orleans had the power to delegate to the Board of Health, or its officers, who should or might be ordered to empty or to repair or rebuild a privy vault, and it had no power to compel an agent or attorney of the owner, who had no funds of the owner of the premises in his hands to advance the money out of his own pocket to repair or rebuild a vault, and any such action would deprive such agent or his attorney of his property without the process of law in violation of Art. 6 of the Constitution.

6. On the facts disclosed in the record no violation of any city ordinance was shown.

7. For these and divers other illegalities apparent on the face of the record, the judgment and sentence of the recorder, that the defendant pay a fine of ten dollars or imprisoned twenty days was illegal, and defendant prayed it be reversed and defendant discharged, and that he have judgment against the city of New Orleans,

or the Board of Health, or J. McCormack, as the court should adjudge, for costs.

OPINION.

The ordinance under which appellant was convicted reads as follows:

"Sec. 17. Whenever any privy vault shall be found defective or leaky, the Board of Health through its proper officer may order the same to be emptied and repaired or rebuilt.

"Sec. 35. The penalty for any violation of any section or portion of this ordinance, shall be a fine not exceeding twenty-five dollars recoverable before the recorder of the district, wherein the offence was committed, or in default of payment of the fine, imprisonment not exceeding thirty days for each and every offence."

We have to accept as true that the vault of the premises referred to in the evidence was defective or leaky—that the Board of Health had ordered defendant to repair the same, and that he had failed, and neglected to do so, inasmuch as those facts have been so found by the recorder, and we can not go behind his finding. We have to examine the rights and obligations of parties from this standpoint.

Under our limited appellate jurisdiction in matters of this character, several of the questions presented by appellant can not be reached.

If the city ordinance had on its face designated the mode and manner of its execution, and that method had been illegal or unconstitutional, that fact, being part of the ordinance, would be properly examinable by us; but where it is silent on this subject, and the illegality of the method of enforcement arises not from the ordinance, but from the error of the parties entrusted with its execution, relief must be sought by *certiorari* or prohibition, or both—not by appeal. Had appellant sought relief in that form he would have presented a very strong case, as the ordinance complained of authorizes a penal, not a criminal action, and it should have been brought in the name of the city of New Orleans. We say this much, as it may prevent useless future litigation on that subject.

Appellant contends that the evidence establishes that he is an attorney at law, and his functions as agent are confined to receiving rents, and that as such he can not constitutionally be ordered to advance moneys of his own for the use and benefit of the owners of the property. The evidence shows that the property in question

was occupied by third parties under a lease executed by appellant as agent of the owners. We are not prepared to say that the acceptance of an agency requiring for its proper performance an outlay of money should not, by the very fact of such acceptance, carry with it the duty and obligation on the part of the agent of making necessary outlays for that purpose, not only as between his principal and himself, but as between himself and the public authorities when such duty has been imposed by law.

By Sec. 3 of Act No. 85 of 1832, the Legislature has expressly charged parties who collect the rents of property with the obligation of furnishing such premises with adequate means of water supply, but though ordering the inspection by officers of the Board of Health of private premises for the purposes of insuring their cleanliness and healthfulnes, it has not imposed affirmatively any duty in respect thereto upon agents of owners.

The General Assembly has, by Sec. 7 of Act 20 of 1882, delegated to the Common Council the power to pass an ordinance upon that subject, but we are not advised of any other ordinance than the one which is herein complained of.

That ordinance declares a penalty for non-compliance with an order given to repair any vault found leaky given by an officer of the Board of Health, but it nowhere casts, by ordinance, upon any particular person or persons the duty of making such repairs.

Ordinances regulating this subject, which do not on their face affirmatively impose the duty and specify the parties charged therewith, are, in our opinion, too vague and uncertain to be made the basis of a penal or criminal action based upon the ordinances. The ordinance, in our opinion, is illegal.

We are of the opinion that the judgment appealed from is not sustainable. For the reasons assigned:

It is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and the suit dismissed.

MILLER, J.—I concur in the decree.

MR. JUSTICE BLANCHARD takes no part, not having been a member of the court when the case was argued and submitted.

No. 12,575.

MRS. EMMA CLARA LAMBERT, WIDOW, VS. THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, AND L'HOTE & CO.; L'HOTE & CO. VS. PENN MUTUAL LIFE INSURANCE COMPANY—CONSOLIDATED.

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1. A policy of life insurance, taken out by a husband in favor of his wife, can not subsequently be assigned by him to her prejudice. The doctrine announced in the Pilcher case, 33 An., and the Putnam case, 42 An., sustained as the jurisprudence of the State.
2. And it makes no difference that he secured from her what purports to be an assignment, without consideration, of the policy to him before he assigned it to his creditor.
3. A donation made in the form of an onerous contract (without consideration and really intended as a donation in disguise) to have effect as such must be passed before a notary public and two witnesses.
4. An innocent stakeholder, without interest in a pending litigation, depositing in court, by consent of the judge thereof, the full amount he owes, or in his hands, and which is the object of dispute between contesting claimants, the rightfulness of whose claims is the subject of the litigation, should be relieved from further liability, and not held for interest and costs subsequently accruing.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

Thomas J. Semmes and *J. J. O'Connor* for Mrs. Lambert, Plaintiff and Appellant.

Fenner, Henderson & Fenner for L'Hote & Co., Plaintiffs, Appellees.

Dinkelspiel & Hart for Defendant, Appellant.

B. B. Howard and *H. O. Hollander* as *amicus curiæ* on Application for Rehearing.

Argued and submitted March 22, 1898.
Opinion handed down May 2, 1898.
Rehearing refused June 29, 1898.

The opinion of the court was delivered by

BLANCHARD, J. In January, 1891, the insurance company, defend-

ant herein, issued a policy of insurance upon the life of Louis H. Lambert for the sum of ten thousand dollars.

By its terms this amount was made payable to said Lambert, his executors, administrators, or assigns, on the twentieth of January, 1911. But should he die before that time, then the amount was made payable to his wife, plaintiff herein, at his death.

In other words, it was a twenty-year endowment policy, of which his wife was the beneficiary in the event of his death before the lapse of the twenty years, and of which he himself was to be the beneficiary should he be alive at the maturity of the endowment.

Something over three years after the issuance of the policy an assignment thereof was made as follows: "For value received we hereby sell, assign, transfer and set over all our right, title and interest whatsoever, of, in and to twenty-payment life policy No. 69,732 on the life of Louis H. Lambert in the Penn Mutual Life Insurance Company of Philadelphia unto Louis H. Lambert."

This was signed first by the husband and then by the wife, in the presence of witnesses. As a matter of fact, Mrs. Lambert received no consideration from her husband on account of this assignment.

Three days later the husband, in similar terms, transferred all his right, title and interest in the policy to L'Hote & Co. in trust, first, to pay themselves any indebtedness he might be due them when the policy became a claim, and, second, to pay the remainder, if any, to him (the husband) or his executors, administrators, or assigns.

These assignments were, respectively, notified to the insurance company.

The policy passed into the possession of L'Hote & Co., who advanced Lambert, on the day of the assignment, six hundred dollars. Besides this he owed them a large amount.

In June, 1896, Lambert, the assured, died.

From the time they became pledgees of the policy to the death of Lambert, L'Hote & Co. paid one thousand and fifteen dollars and seventy-eight cents as premiums thereon. Including this amount, Lambert was, at his death, indebted to them in the sum of twelve thousand nine hundred and sixty-four dollars and seventeen cents.

L'Hote & Co. furnished proofs of death to the company and demanded payment of the policy. But immediately following the death of the assured, the attorneys of Mrs. Lambert had served

written notice on the company that she claimed to be legal owner of the policy and demanded payment of its proceeds to her.

Under the circumstances the company declined payment to either, though admitting its liability on the policy.

Whereupon Mrs. Lambert instituted suit against the company and L'Hote & Co. She recites she was induced by her husband to assign her interest in the policy to him in order that he might transfer the same to L'Hote & Co. to secure an indebtedness he owed them; that this assignment by her was without consideration, prohibited by law, null and void; that her husband's transfer of the policy to L'Hote & Co. could and did convey no interest which she possessed in it; and that L'Hote & Co. were without legal right to claim the policy or collect its proceeds. She prayed judgment accordingly and for the amount of the policy against the company.

This was followed later by an action by L'Hote & Co. against the company. They recited the fact of the transfer of the policy to them by the assured and their possession of it, the prior renunciation or assignment of her interest in it by Mrs. Lambert to her husband, the indebtedness of the husband to them at his death, and the assurance given them, both by Lambert and the agent of the company, that the policy was the absolute property of the husband. They prayed judgment against the company for the amount of the policy.

The two suits, pending at the same time, were, by order of court, consolidated.

L'Hote & Co., for answer to the suit of Mrs. Lambert, pleaded the same state of facts set up in their own action on the policy against the company.

The latter, answering both suits, avers that it had nothing to do with the assignments which had been made of the policy beyond receiving notices thereof; that none of its agents had any authority to give the assurance, claimed by L'Hote & Co.; that the policy was the absolute property of the assured; that said assurance, if given, was without the company's knowledge or consent, and is not binding upon it, referring to a clause in the policy stipulating that: "In no case does the company guarantee the validity of an assignment."

It then, in effect, states its position to be that of stakeholder merely; admits that it owes the amount due under the policy; is ready, willing and anxious to pay the same to the party legally

entitled thereto; and that it has not been able safely to discharge the obligation because of the rival claims of contending parties.

It then, as plaintiff in reconvention by way of interpleader, recites it has been compelled to employ counsel to defend two suits in order to be protected from double liability in a matter in which it is without interest, tenders and deposits in court nine thousand seven hundred and sixty-nine dollars and eighty-six cents, the exact amount due under the policy, prays that both claimants be ordered to accept the tender, and to be discharged from the suits, leaving the matter to be settled between them, the amount thereof, deposited, to be awarded as the court may determine after due and proper hearing.

The judgment below rejected the demand of Mrs. Lambert and decreed L'Hote & Co. entitled to recover from the insurance company nine thousand seven hundred and sixty-nine dollars and eighty-six cents, with legal interest from judicial demand, and that the costs of suit be paid jointly by the company and Mrs. Lambert.

The company appeals, suggesting error to its prejudice in so far as it is condemned to pay interest and costs.

Mrs. Lambert appeals and asks reversal of the judgment rejecting her demand to be decreed entitled to the amount due on the policy.

The policy, which is the basis of both suits (consolidated), was a contract between the insurance company and the assured, out of which grew two distinct and independent obligations and two distinct and independent rights. Thus, the husband (the assured), if he lived until the year 1911, was to have the benefit of the contract; if he died before 1911, the wife was to have it. Hence, during the first twenty years of the life of the policy, the obligation of the company was to the wife and to her alone, and upon the happening of the event, which matured the policy, within that period, she being alive, no one was to be considered, or dealt with, in connection with its settlement except herself.

After the lapse of the twenty years, the husband being still alive, the wife, if living, or, if dead, her heir, ceased instantly to be the obligee and the husband became such alone and the settlement of the policy was to be made solely with him. While, therefore, both the spouses were, in a sense, during the first twenty years of the life of the contract of insurance, its beneficiaries, the degree in which they respectively held this *status* was different and their rights therein were separate and independent, the wife during that

period being the *active* beneficiary, the husband the *passive*, his rights being dependent upon his existence continuing to the end of the endowment period. So, the happening or fulfilment of the condition which developed the *passive* character of his relation to the policy into the *active* beneficiary thereof, ended the wife's connection with it as such altogether. It follows that the rights of both were conditional. Hers did not attach except upon the condition of his death before the lapse of the twenty years; his did not attach except upon the condition that he lived through the twenty years.

This would seem to demonstrate that the husband had an assignable interest in the policy independent of the wife. But he could convey or assign no greater right or interest in it than he himself possessed.

The insurer and the assured agreed that the place of contract should be the city of Philadelphia. It is so stipulated in the application for insurance annexed to the policy, which application is declared to be the basis of the contract.

They could legally so stipulate. Norton vs. Pritchard, 106 U. S. 124; Dicey Conflict of Laws, p. 567.

The court will take judicial cognizance of the fact that the common law is the basis of the jurisprudence of the State of Pennsylvania, as well as judicial notice of what the common law is. Copley vs. Sanford, Executor, 2 La. An. 335. At common law a stipulation in favor of a third person, if for his benefit, is presumed to be accepted by him. Oliver vs. Lake, 3 La. An. 78. It is familiar doctrine that in the absence of proof of the existence of a statute varying or changing a rule of the common law in comman law States, the courts will presume the rule obtains. There was no proof adduced of a contrary statute.

The wife's acceptance, therefore, of the stipulation in her favor in this policy of insurance, viz.: that it was to be paid to her in the event of the husband's death before the lapse of the endowment period, is presumed.

So, the question, that the stipulation in the contract in favor of a third person (the wife) was revoked before acceptance, can not arise. This might be different did the contention between the parties, that a State other than Louisiana should be the place of contract, derogate from the force and effect of any law prevailing here founded upon considerations of public order or policy. But the

acceptance of such a stipulation, presumed by the common law, may be made, under our law, either by express declaration to that effect, or impliedly by the doing of some act evidencing the intention to accept. C. C. 1890, 1902, 1810, 1811. This being so, it is difficult to see what public policy here established is sought to be avoided by giving effect to the common law doctrine of the presumption of acceptance of a benefit by a third person in whose favor made. We do not wish to be understood as deciding that under our law it is necessary for a wife to indicate her acceptance of a stipulation of insurance in her favor in order to give it validity or effect.

It is to be observed that this is not a controversy with the insurance company as to the right of the parties to recover from it. The company does not seek by the application of some law in Pennsylnia (the place of contract) to avoid a liability unquestioned under the Louisiana law. On the contrary, it admits its liability, and its only concern in the case is to protect itself from double liability. The controversy is between two parties of the same domicile (Louisiana) who claim the money which the company is willing to pay to the proper person; and as both base their claim on the policy, and this policy makes Penusylvania the place of contract, it would seem that neither is in a position to dispute the applicability of the law prevailing there so far as the same may properly be recognized as affecting the matters at issue in these suits.

The contention of Mrs. Lambert is that being the beneficiary of the policy in the event of the death of her husband within the endowment period, and that event having happened, she alone is entitled to the money. Confronted by her act assigning all her right, title and interest in the policy to her husband, who, in turn, assigned it to another, she replies (1) that the assignment of the policy was in inself a contract, separate and distinct from the policy of insurance, was made in Louisiana, by parties in Louisiana, and is to be governed by the law of Louisiana; (2) that such a contract, being not one of those which the law of this State permits husbands and wives to make between themselves (C. C. 1790, 2446), or permits the wife to make with another so as to bind herself for her husband's debts or those of the community (C. C. 2398), is without effect and void; (3) that if the assignment by her, being without consideration, is classed in the category of donations, it is void because not evidenced by an authentic act.

The contention of L'Hote & Co. is that, for a good and valid consideration, the policy was duly and regularly assigned and delivered by the husband to them; that the wife at that time had no interest in the policy, having legally parted with all her right, title and interest therein previously to her husband.

Confronted with the plea that the wife could not by contract or convention with her husband part with her right and interest in the policy, they reply that the stipulation in a contract of life insurance between the assured and the insurer in favor of a third person, not a party to the contract, as beneficiary, is a stipulation *pour autrui*, and as between the assured and the beneficiary is a pure gratuity, a donation, governed by all the laws regulating donations, except those relating to form; that when such beneficiary is the wife of the assured, the stipulation in her favor falls within the letter and spirit of the rule announced in C. C. 1749 and is revocable by the husband at will; that this revocation may be either express or tacit, and is effectively accomplished by any conduct of the husband which implies an intention to revoke, and the conduct of the husband in this case clearly evidences such an intention; and that the rule of law embodied in C. C. 1749 is one founded upon considerations of public policy and for the preservation of public order, from the force of which parties can not by their conventions derogate.

With great research and ability counsel for L'Hote & Co. support these propositions, citing the decisions of the French courts and quoting the opinions of the learned jurists of France whose commentaries upon the Code Napoleon have assisted so greatly in moulding our own jurisprudence. It must be conceded that the French authorities are full and clear on the point that all donations between the spouses are revocable at the will of the donor, that this rule of law is founded upon considerations of public order and policy, and that a life policy of insurance in favor of a wife as the beneficiary thereof is a gift, a donation, in this sense, revocable at will by the husband, applying to the same the provisions of Art. 1096 of the Code Napoleon, from which the corresponding article of our Civil Code, 1749, is taken—being a literal reproduction of the former.

If the question were a new one before our courts there would seem to be no great difficulty in following this enlightened lead.

But in two cases, in comparatively recent years, where the wife's rights in an insurance policy as against the husband's attempted

assignment of the same to his creditors, underwent a careful consideration, a different rule was established which we feel called upon to sustain.

We refer to Pilcher vs. Ins. Co., 33 La. An. 322, decided in 1881, and Putnam vs. Ins. Co., 42 La. An. 740, decided in 1890.

In both those cases, while it was not disputed that the taking out of the insurance by the husband on his life in favor of the wife was a gift, a gratuity, a donation to her, his power, right or authority afterward to assign or dispose of the policy for his own benefit is denied, and her right and interest in the policy is referred to as her separate property not disposable by the husband.

Indeed, strong and emphatic language is used, the court, in the first named case at page 331, saying: "We hold that the right of the beneficiary wife in the policy could only be terminated by its lapse;" and in the latter case using this language, quoted from the *syllabus:* "A life insurance policy in which a married woman is named as beneficiary vests a complete title in her as separate, paraphernal property, which cau not be pledged as security for the debts of her husband or of the community."

When these decisions were rendered, C. C. 1749, relied on now by the opposition as defeating the rights of this wife, stood as it stands now. There has been no change of the law in this respect. Counsel for L'Hote & Co. say in their brief, in respect to the two cases referred to: "The court in those cases * * * simply overlooked a plain and unambiguous provision of the Code," meaning Art. 1749. It is then said that those decisions make no reference to the said articles, or to the authorities thereunder. Continuing they say: "This defence was not made," and assert that if it had been there can be little doubt it would have been sustained. Again: "The defendants in those cases had a right to waive these defences, and if they chose to do so, the court was not bound to apply them. The only point presented for determinatiou in those cases was whether such contract of insurance gave the wife a vested interest before the death of her husband. The court decided * * * that it did; that the contract constituted a valid gift to the wife. If anybody had then called attention to the fact that under our law every gift from husband to wife during marriage is revocable at will by the husband, we submit there would have been a different solution of the cases."

These observations of counsel caused a reference to the briefs filed on behalf of the insurance company in the two cases cited.

We fortunately found the brief in the Pilcher case, and its perusal shows counsel to be in error. The point was there distinctly and broadly made that constituting the wife the beneficiary of the policy was a stipulation *pour autrui*, which may be revoked at any time before acceptance, and various authorities were cited in support thereof, including C. C. 1749; Merlin, Questions de Droit, Vol. 6, p. 30, *verbo* Stipulation *pour autrui*; Code Napoleon Annoté Sirey et Gilbert, and others.

So this defence *was* urged in the two cases, but unsuccessfully.

We have already shown that by the common law of Pennsylvania, made the place of contract by the contracting parties, the acceptance by the wife of the benefit stipulated in her favor is presumed.

But if act of hers signifying acceptance were needed, it can be found in the attempted assignment of the policy to her husband. How could she assign if there were no acceptance, no right vested in her which had become assignable? That act of assignment can well be given effect to as evidencing an acceptance of the stipulation made in her behalf in the policy, while, at the same time, it is without effect and void as a transfer or conveyance of her rights.

It was not one of the contracts which our law permits husbands and wives to covenant between themselves, nor allows the wife to make so as to bind herself or her property for her husband's debts or those of the community. C. C. 1790, 2398, 2446. It was the case of a husband prevailing upon his wife to transfer her property to him without consideration, in order that he might pledge it to his creditor as security for debt. This is in the teeth of a prohibitory law and is null. Nor could the consent of the wife to the arrangement infuse validity or legality into it.

The creditor or pledgee, in this instance, is charged with direct notice of the wife's rights, for the policy shows on its face that she was its beneficiary if the husband died before the endowment period had matured.

Nor can we assent to the proposition that the assignment of the policy by Mrs. Lambert to her husband is valid as a donation, as contended for it on the authority of C. C. 1746. It is quite true that under that article one of the spouses may during marriage give to the other whatever he or she might give to a stranger. But this must be done pursuant to the directions of the law relative to donations. C. C. 1536. The donation of incorporeal things, such as

credits, rights or actions, must be by public authentic act. This assignment was not such act. It is sought to overcome this difficulty, however, by the contention that the assignment is made in the form of a sale by private act, and though not a sale because without consideration, it is yet good, in this form of an onerous contract, as a donation, although not clothed with the formalities requisite for the validity of a donation. Several old decisions (5 M. 693; 2 La. 215) are cited as sustaining this view. These cases were decided under the Code of 1808, whose Art. 58 provided that, "all acts *containing* donations must be passed before a notary and two witnesses," etc. An essential difference, both in language and effect, will be noted between that article of the Code of 1808 and Art. 1523 of the Code of 1825, now Art. 1536 of the Revised Code, in respect to the form of donations.

The donation in the 2 La. case, p. 215 (Trahan vs. McManus), was upheld because it did not profess on its face to be a donation, though it was in reality one in the guise of an onerous contract under private signature.

As it was not an act by its terms containing a donation, it was held not to contravene the provisions of Art. 53 of the then Code. But this article was changed in the Code of 1825 so as to make the law declare that "an act shall be passed before a notary and two witnesses of every donation," etc.

The 2 La. case, therefore, is not an authority under the altered conditions. This was pointed out in Brittain vs. Richardson, 3 R. 81, where it was declared that all donations *inter vivos* must be passed before a notary and two witnesses. See also 10 La. 90; 7 N. S. 424; 1 La. An. 237; 2 La. An. 766; 15 La. An. 491; Farrar vs. Michaud, 22 La. An. 358.

The conclusion we announce on this subject is that a donation made in the form of an onerous contract—that is to say, an onerous contract which is not such because without consideration and really intended as a donation in disguise—to have effect as a donation must be passed before a notary public and two witnesses.

The judgment below which awards the proceeds of this life policy to L'Hote & Co. must be reversed.

But since they paid as premiums on the policy the sum of one thousand and fifteen dollars and seventy-eight cents, they should recover that amount out of its proceeds, with legal interest from

July 6, 1896, the date of filing of first suit on the policy. While the sum so paid may rightly be considered as advances made to the husband and charged on his account current, it enured directly to the benefit of the policy and the rightful beneficiary thereof, and it would be inequitable not to permit them to recover it from the proceeds of the policy.

With regard to the appeal by the insurance company we do not think it should be required to pay interest after the date of its second deposit of funds in court, June 18, 1897. The deposit first made, February 2, 1897, was insufficient, in that it did not include interest and costs to that date. This was later corrected, but not until after judgment had been rendered by the court *a qua* and this appeal taken. We believe it a just principle to announce that an innocent stakeholder, without interest in a pending litigation, depositing in court the full amount he owes, or in his hands, and which is the object of dispute between contesting claimants, the rightfulness of whose claims is the subject of the litigation, should be relieved of further liability, and not held for interest and costs subsequently accruing.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from, rejecting the demand of Mrs. Emma Clara Lambert, widow, and decreeing L'Hote & Co. entitled to recover from the Penn Mutual Insurance Company of Pennsylvania the sum of nine thousand seven hundred and sixty-nine dollars and eighty-six cents, with legal interest from November 27, 1896, until paid, be annulled, avoided and reversed, and proceeding to render such judgment as should have been rendered in the first instance, it is ordered and decreed that the said insurance company owed on the policy of insurance declared on in these consolidated suits the sum of nine thousand seven hundred and sixty-nine dollars and eighty-six cents, with legal interest thereon from July 6, 1896, until June 18, 1897, and, in addition, a sum sufficient to pay the costs incurred in the suit entitled Mrs. Emma Clara Lambert vs. The Penn Mutual Life Insurance Company and L'Hote & Co., up to and inclusive of June 18, 1897.

It is further ordered, etc., that the sum of nine thousand seven hundred and sixty-nine dollars and eighty-six cents deposited in court by said insurance company on February 2, 1897, and the further sum of three hundred and twelve dollars and sixty cents, depos-

ited June 18, 1897, be accepted as an acquittance of said obligation on the part of said insurance company.

It is further ordered, etc., that Mrs. Emma Clara Lambert, widow, do have and recover from said sums so deposited as aforesaid, the sum of eight thousand seven hundred and fifty-four dollars and eight cents, with legal interest thereon from July 6, 1896, until June 18, 1897.

It is further ordered, etc., that L'Hote & Co. do have and recover from said amounts so deposited as aforesaid, the sum of one thousand and fifteen dollars and seventy-eight cents, with legal interest thereon from July 6, 1896, until June 18, 1897.

It is further ordered, etc., that all costs in suit numbered 50,270 on the docket of the lower court up to and inclusive of June 18, 1897, be paid out of the funds deposited in court by the said insurance company, any shortage thereof, on interest and costs, to be made up by said company; and that all costs incurred in suit numbered 51,597 on the docket of the lower court, as well as the costs of this appeal, be taxed against L'Hote & Co.

[The Chief Justice concurs in the order refusing the rehearing. BREAUX, J., and BLANCHARD, J., dissent, and think a rehearing should be granted.]

CONCURRING OPINION.

WATKINS, J. In my opinion the judgment appealed from should be reversed, because it has been settled by repeated decisions of this court that a policy of life insurance which is taken on the life of a husband, payable to his wife as the beneficiary, becomes *eo instanti* the separate paraphernal property of the wife under her administration and control and which can not be surrendered or assigned by the husband.

But in the course of none of its decisions has this court held that such a policy passed a title to the wife by donation *inter vivos*, notwithstanding that it has held that it was in a certain sense a gratuity. The court has had no occasion to decide the character of her title; and, indeed, it is necessarily innominate.

The policy is only payable upon the happening of the death of the insured, and is specially conditioned upon the premiums being regularly paid. It must be conceded that the wife has an insurable interest in the life of her husband, and it has been held to be immaterial by whom premiums are paid.

Thus circumstanced, the policy of insurance possesses no element of a donation *inter vivos*, neither in form nor essence.

A life insurance policy made payable to wife, or wife and children as beneficiary, or beneficiaries, is separate property of the beneficiary and beyond the control of the husband. Pilcher vs. New York Life Ins. Co., 38 An. at p 324 (at bottom); citing Succession of Kugler, 23 An. 455; Succession of Hearing, 26 An. 326; Succession of Clark, 27 An. 269; Succession of Bofenschen, 29 An. 714, p. 325 (at top and in centre of the page).

In opinion on rehearing by Judge Fenner (pp. 330, 331) is found the following expression, viz.:

"The gift to her had been fully executed and the resultant interest was *her separate and indefeasible property*." (My italics.)

Again:

"If such an assignment had been made it would have been illegal, null and void, and would not have divested Mrs. Pilcher's interest in the policy, which would have continued unimpaired as long as the policy," etc.

(P. 331) "If, as held in Louisiana, in repeated decisions, the insurance by the husband for the benefit of his wife, is such a valid gratuity in her favor as to make her right under the policy at his death her absolute and separate estate, the like effect logically attaches *pro tanto* to the valuable interest under the policy," etc.

In Putnam vs. Insurance Company, 42 An. 739, under circumstances quite similiar to those stated in the *Pilcher* case, we said:

"In law this policy"—the one in which Mary S. Putnam was named as the beneficiary—"inured to her separate, paraphernal benefit; though not separate in property from husband, the insured, and its character of paraphernal property could not be changed to that of separate property of the husband, nor that of the community without her consent, lawfully obtained. As such it could not be placed as security for the husband's debts. To this effect are many authorities"—citing the *Pilcher* case and the decisions therein cited.

In addition thereto, the opinion cites the following cases, viz.:

Lemon vs. Life Insurance Co., 38 Conn. 294; Barey vs. Bruno, 71 N. Y. 62; Barey vs. Life Insurance Company, 59 N. Y. 587; Dalton vs. Willner, 52 N. Y. 312; Burroughs vs. Life Insurance Co., 97 Mass. 359; Knickerbocker Life Insurance Co. vs. Wiltz, 99 Mass. 159; Life Insurance Co. vs. Burroughs, 34 Conn. 305; Chopin vs. Fellows, 36 Conn. 132; Bliss on Life Insurance, Sec. 348.

In Stuart vs. Sutcliffe, 46 An. 240, the life insurance policy was made payable to the assured, his executors, administrators or assigns, and same was *during the life* of Wm. Stuart, who bought the policy, assigned to John Klien as collateral security for debt; but while recognizing the validity of that assignment, we drew a distinction between that character of policy and one made payable to the wife, or wife and children of the assured. We quoted with approval the following extract from the *Hearing* case, viz.:

"If the policy issues to the wife the amount stipulated belongs to her when the event insured against happens, and she can not be forced to inventory it as a part of her husband's estate. The object he had in view would be defeated if a contrary doctrine prevailed."

Succession of Hearing, 26 An. 326. The opinion then quotes and affirms the *Putnam* and *Pilcher* cases in terms.

In Tutorship of Crane, 47 An. 896, we said:

"It has been settled by repeated decisions of this court that money which is collected after death of the husband or the father, upon a policy of life insurance made payable to his wife and children, is not an asset of the matrimonial community, but of their *separate* estate," citing with approval all of the foregoing authorities.

In each of the four cases cited the same principles of law were announced, and have been steadily maintained, and of their absolute correctness, in my opinion, there can be no doubt.

But if their correctness be doubtful, the rule of *stare decisis* should be maintained, and the rights of the wife and children protected against the creditors of impecunious fathers and husbands.

For these additional reasons I concur in the opinion of the majority.

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No. 12,835.

MRS. GEO. C. TERRY AND HUSBAND VS. MRS. LIZZIE S. GILKESON, EXECUTRIX, ET ALS.

In case the form of a sale is resorted to for the purpose of obtaining the apparent security of a special mortgage and vendor's lien, it will be treated as a mortgage pure and simple in an action by the wife who enjoins its execution in executory proceedings on the charge of simulation and illegality as an effort to bind her paraphernal property for the individual indebtedness of her husband. And, that, being so considered, same draws to it all the legal consequences which attend a mortgage in fact which has been executed for like purposes.

Terry and Husband vs. Executrix et als.

APPEAL from the Fifth Judicial District Court for the Parish of Ouachita. *Potts, J.*

A. A. Gunby for Plaintiff, Appellant.

Munholland & Munholland for Defendant and Appellant.

Argued and submitted May 31, 1898.
Opinion handed down June 24, 1898.

The opinion of the court was delivered by

WATKINS, J. In December of 1897 defendant obtained an order of seizure and sale in the foreclosure of a special mortgage of three thousand dollars and interest on the plaintiff's 'Lyndhurst' plantation in the parish of Ouachita, and the latter enjoined said executory proceedings on the ground, principally, that the note and mortgage were executed exclusively for the purpose of securing a debt her husband that was due to John M. Gilkeson, of whom the defendant is executrix.

On the trial the plaintiff's injunction was perpetuated and the mortgage was annulled and its registry ordered canceled and erased from the record, on the ground that same was given as security for the debt of her husband, in violation of a prohibitory law of Louisiana, and therefore void.

It further ordered and decreed that there be judgment in favor of the defendant in reconvention for the amount of certain taxes which J. M. Gilkeson had paid upon the property mortgaged.

Each of the parties prosecuted an appeal from so much of the judgment as was considered prejudicial to them, respectively.

The theory of the plaintiff is that she is owner of the property in question as her own separate paraphernal property, under her administration and control, as an inheritance from her deceased father, who was a citizen and resident of the State of Louisiana, where he died possessed of said property; and that she being a citizen of this State inherited same at her father's death, and was there married to her husband, Col. Ira C. Terry, of St. Louis, Mo., at which place their matrimonial domicile was thereafter established.

That "on the 15th of December, 1894, in order to secure a debt of her husband to John M. Gilkeson, of St. Louis, (she) made a pretended sale of said property to J. M. Gilkeson for the pretended price of ten thousand dollars in cash in hand paid, when in fact no price was paid whatever, and no sale was made except on paper. That on the same day said J. M. Gilkeson pretended to sell and convey said property back to (her) for the price of ten thousand dollars, acknowledging the receipt of seven thousand dollars in cash, when in fact no cash was paid, and for the balance of said pretended price (she) executed a note for three thousand dollars due January 1, 1898, and three notes of two hundred and forty dollars, each, for the interest on said three thousand dollar note;" and that to secure the payment of those several notes, the aforesaid mortgage was given.

She further represents that these transfers were simply intended to operate a mortgage on her separate property to secure a debt of her husband; and that she received no part of the consideration for said mortgage note and interest notes; and that same did not in any manner inure to the benefit of her separate property or estate.

That said act of mortgage, disguised as a sale, is and was in plain and direct contravention of a prohibitory law of the State of Louisiana, and, therefore, null and void absolutely.

That she was not examined by a judge and none of the forms of law for binding the real property of a married woman were observed; and that the pretended sale of her property was a simulation and disguise for the mortgage aforesaid.

Apprehending that the defendant intended and would attempt to seize her property in the attempted enforcement of said mortgage, plaintiff prayed for and obtained an injunction—she having at that time already obtained the order of seizure and sale.

Her prayer conforms to her allegations.

The defendant tendered an exception of no cause of action, and on the same filed an extended answer, the principal points of which are the following, viz.:

That the defendant admits that the act of sale from plaintiff to Gilkeson was executed before a notary and Louisiana commissioner of deeds in St. Louis, Missouri, and that the property thereby conveyed and mortgaged "was inherited by the plaintiff from her parents as alleged, and as such was her paraphernal property."

But the averment is made that no law of the State "prohibits a

married woman from alienating her paraphernal immovables, nor from giving a vendor's priviege on same to a person acting in good faith, for a valuable consideration accruing to her separate benefit."

That said deed, mortgage and note evidenced real, serious and *bona fide* transactions, and the note and mortgage are binding on the property of the plaintiff.

That a part of the three thousand dollar note had for its consideration an individual note of the plaintiff for fifteen hundred dollars, which she executed in favor of Gilkeson-Sloss Commission Company on the first of February, 1895, which was secured by a special mortgage contemporaneous therewith.

That the plaintiff "was duly authorized to make the mortgage (enjoined) by examination before a competent judge, and that a certificate was duly issued from Hon. R. W. Richardson, then judge of the Fifth District Court of the parish of Ouachita, and that said mortgage was duly executed and signed by Lewis D. Allen, Jr., who bore an authenticated special power of attorney from the plaintiff to execute the same," etc.

The further averment is made that one hundred and sixty-nine dollars and eighty-nine cents of the three thousand dollars was paid to James G. Trimble, in the redemption of the property mortgaged, from the tax sale, and which she had permitted to go to sale for the non-payment of delinquent taxes, on July 28, 1894—it having been redeemed on January 10, 1896.

That the remainder of the three thousand dollars was paid "to the plaintiff or her authorized agent and husband, I. C. Terry, who was *acting as such* from 1880 to 1897, on drafts and acceptances from time to time; and that said sums were expended in payment for improvements on the said plantation of the plaintiff, and in the expense of making crops thereon.

"That at the time of these transactions, as at the present time, the plaintiff was leasing and conducting her said Lyndhurst plantation for her own separate account and benefit."

Then follows the allegation of the wrongful issuance of the writ of injunction and the consequent damages—aggregating eight hundred dollars.

Assuming the character of plaintiff in reconvention, the defendant claims that the plaintiff is indebted to her in the further sum of one hundred and forty-four dollars and ten cents, with interest from

the 6th of June, 1896, for taxes paid by J. M. Gilkeson on the property of the plaintiff for the year 1896, "as more fully appears by a draft, drawn by her husband as agent, and tax receipt from D. A. Johnson, sheriff and tax collector of the parish of Ouachita," etc.

Then follow the general averments, viz.:

"That the mortgage and vendor's lien be declared valid and enforced and that same be declared of full force and effect and binding and executory on plaintiff's property."

Her prayer is in conformity with the foregoing allegations, and in addition thereto she makes the following special prayer, viz.:

"Respondent prays in the alternative, that if for any cause the special mortgage should be annulled and the injunction sustained, that respondent may have personal judgment against the plaintiff in reconvention for and in the full sum of three thousand eight hundred and sixty-four dollars and ten cents, with eight per cent. per annum interest," etc., * * * or such portion of such aggregate amount as is proved to have inured to plaintiff's separate and exclusive benefit and to the improvement of her paraphernal property."

The effect of the averments of the defendants taken as judicial admissions of the facts involved and necessary to a proper decision of this case are the following, viz.:

1. The act of sale from the plaintiff to J. M. Gilkeson was executed before a notary and Louisiana commissioner of deeds in St. Louis, Missouri.

2. That the property thereby conveyed was separate paraphernal property of the wife which came to her as an inheritance from her parents as alleged in the plaintiff's petition.

3. That a part of the consideration of the three thousand dollar note, which is the subject of the executory proceedings which are enjoined, was a note for one thousand five hundred dollars which plaintiff had executed on the 1st of February, 1895, in favor of Gilkeson-Sloss Commission Company; that one hundred and sixty-nine dollars and eighty-nine cents was the amount J. M. Gilkeson had expended in the redemption of her property from tax sale, and that the remainder of that sum was paid to the plaintiff through her husband, who was *acting* as her general agent "on drafts and acceptances from time to time," and which sums "were expended in payment for improvements on the plaintiff's plantation and in the expense of making crops on the same."

4. That plaintiff was duly authorized to make the mortgage enjoined by examination before Judge R. W. Richardson of the Fifth Judicial District, who gave a proper certificate of authorization therefor.

5. That "said mortgage was duly executed" and signed by an agent who had been specially authorized for that purpose.

6. "That at the time of these transactions, as at the present time, the plaintiff was leasing and conducting her said Lyndhurst plantation for her own separate account and benefit."

These admissions, taken collectively, plainly imply and import that the plaintiff was the owner of this Louisiana plantation in her own separate paraphernal right; that the proceedings evidenced or were intended to evidence a mortgage upon this separate property ostensibly for three thousand dollars, which she owned, but which amount was chiefly made up of drafts and acceptances for her husband and amounts alleged to have been expended in improvements of plaintiff's plantation and expenses in making crops on her plantation.

In other words, the answer, in effect, admits that there was no consideration for the *sale* from plaintiff to Gilkeson which was executed in St. Louis, but that it was only a means resorted to of placing the property in his hands so that he could subsequently reconvey it to her and thus obtain a conventional mortgage and vendor's lien that could be enforced by executory proceedings and sale. This idea is further reinforced by the fact that an application was made to a Louisiana judge to grant a certificate of authorization for that purpose, and the judge signed a certificate, notwithstanding it possessed the form of a sale with mortgage retained therein. But that certificate was unavailing for any necessary purpose for the reason that it is made a condition precedent that the judge must examine the wife at chambers, separate and apart from the husband, "touching the objects for which the money is to be borrowed, *or the debt to be contracted.*" R. C. C. 127.

And that article further distinctly provides that "if he shall ascertain either one or the other are for her husband's debts, or for his separate benefit or advantage," he shall not grant his certificate. *Ibid.* Berwick, Wife, vs. Sheriff, 49 An. 201.

The admissions in the answer clearly show that the wife was never examined by the judge who granted the certificate; and further,

that had she been examined by the judge it would inevitably have been made to appear that the three thousand dollars was principally made up of drafts and acceptances of the husband while *acting* as general agent of his wife.

Not only so, but that notwithstanding the plaintiff is admitted to have been at the time in possession of her property, leasing same to tenants, and conducting her own business for herself, that a large part of the three thousand dollars was "expended in payment for improvements on the plantation of the plaintiff and in the *expense of making crops on the same.*"

This statement is very confusing, to say the least of it.

If the plaintiff was operating the plantation for herself, on her own account, and leasing it, it ought reasonably to have been sufficiently remunerative to have kept improvements paid for, without incurring an additional debt therefor; and that will be taken for granted in the absence of countervailing evidence.

If the plaintiff was administering her own plantation, leasing it, then she had no occasion for the services of an agent in the premises, general or special.

If the plaintiff was leasing her plantation she evidently had no occasion for the expenditure of these large sums of money "in the expense of making crops thereon."

From the quotation we have made from the defendant's prayer, demanding personal judgment against the plaintiff, this proceeding has been converted from one *via executiva* to one *via ordinaria*, and one of the consequences of this change is that the defendant becomes a plaintiff *pro hac vice*.

Under these circumstances, if she was not otherwise—which we are not prepared to concede—the executrix carries the burden of establishing the fact, that the debt demanded inured to the plaintiff's separate and paraphernal benefit, or that of her paraphernal property; because the requirements of the Code, with reference to their private examination by the judge, were not attempted to have been complied with.

The proof clearly shows that plaintiff's husband paid the taxes claimed in the answer, as well as the redemption price of the land. The receipts were taken in his name; and the plaintiff swears they were so paid. If Gilkeson let Colonel Terry have the money, that circumstance does not constitute the plaintiff his debtor. The proof

shows that he owned a plantation in the parish of Ouachita in the immediate vicinity of that of his wife. He therefore had means of his own at his command. And the proof further shows that he was the owner of an interest in the tract of land that was redeemed from the tax sale.

With regard to the note and mortgage of one thousand five hundred dollars which figures in these proceedings, the emphatic statement of the plaintiff as a witness, frequently repeated, is that that mortgage was given to secure an obligation of her husband to Gilkeson-Sloss Commission Company, "for moneys advanced to *him* to buy cotton with;" and that her husband subsequently paid the debt, but, for some reason, did not get possession of the note. In confirmation of that statement she annexed the contract between them to her testimony. Her husband was not permitted to testify.

We are of opinion that the whole case is with the plaintiff.

Defendant's counsel have made "the best out of a bad bargain."

Entertaining these views, the judgment appealed from must be amended in favor of the plaintiff.

It is therefore ordered and decreed that the judgment appealed from be so amended as to perpetuate plaintiff's injunction in its entirety and to reject the defendant's demands for taxes paid, and reimbursement for moneys expended in redemption of land sold for taxes.

And that as thus amended the judgment be affirmed; and that the defendant be adjudged to pay all costs of both courts.

No. 12,568.

METROPOLITAN BANK VS. AARONS-MENDELSOHN COMPANY, LTD.

ON MOTION TO DISMISS.

The extended return day for the filing of the transcript of appeal occurring on a *dies non*, the appellant is entitled to the whole of the next day to file same, or to apply for an additional extension—the extended return day not having occurred in term time.

ON THE MERITS.

In a suit to make the defendant the purchaser of property from insolvent debtors, liable on the ground, the defendant aided the debtors in defrauding their creditors, the price paid by him must have the weight given to it in the revocatory action

If the price is adequate the sale will not be set aside because the debtors applied the price to pay one of the creditors, though the purchaser may have been informed of that intended application of the price.

The revocatory action is the remedy under our law for creditors seeking relief against sales or other dispositions of the debtor's property in fraud of creditors. Civil Code, Arts. 1970, 1978, 1982, 1989, *et seq.*

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

Lazarus, Moore & Luce and *Dinkelspiel & Hart* for E. Blanc, Receiver, Plaintiff, Appellant.

Farrar & Lemle for Elias Aarons, Defendant, Appellee.

Submitted on motion to dismiss, December 13, 1897.

Motion overruled and opinion handed down December 28, 1897.

Argued and submitted May 5, 1898.

Opinion handed down June 13, 1898.

Application for rehearing withdrawn by consent November 10, 1898.

ON MOTION TO DISMISS APPEAL.

WATKINS, J. The ground upon which the appellee seeks to dismiss this appeal is that the appellant's second extension of the return day thereof had neither been requested of this court or granted by it until after the date when the first extension had expired—the order of the court granting the first extension having extended the time for the return of the appeal to the first Monday and first day of November, 1897, and that granting the second extension having been made on the second day of November, 1897.

The application for the second extension of the return day of the appeal was filed on the second day of November, 1897, and the order of this court granted an extension on and allowed three judicial days thereafter within which to file the transcript of appeal—that is, until the 4th of November, 1897, the court being in session. And in conformity with that order the transcript of appeal was filed in this court on the 4th of November, 1897. The first Monday was the first day of November, 1897.

True it is that in the first application which was made by the

appellant for the extension of the return day for the pnrpose of affording the clerk time to prepare the transcript, the first Monday of November, 1897, was mentioned as the date to which the time was extended, and that the order of the court conformed to said suggestion.

But it is equally true that said averment and order were in exact conformity with the language of the Constitution, viz.:

"The Supreme Court shall hold its sessions in the city of New Orleans from the *first Monday in the month of November*," *etc.* Art. 84.

That it so happened this year, 1897, that the first Monday of November occurred upon the *first day* of that month, relieves the appellant from the necessity of strict compliance with the order of court extending the return day—the *first day of November* being under the law a day of public rest, and a legal "holiday," or *dies non*. Act 93 of 1892.

That statute declares that all commercial paper which shall by law or commercial usage be required to be protested for non-payment "shall be deemed to be due, and shall be due and payable on the first day not a Sunday or legal holiday succeeding the third, or last day of grace, if the third or last day of grace be a Sunday or legal holiday," etc.

It seems but reasonable and just that a like interpretation should be by this court placed upon this statute with regard to the return day for appeals, in that it equally affects all judicial proceedings, and stays and restrains judicial action thereon upon *dies non*.

The decision of the court in Bienvenu vs. Factors and Traders Insurance Company, 28 An. 901, is not in point, for the court say:

"The question presented is, has the appellant a delay of grace for filing the transcript after the day to which the return is extended if such extended return day is *not a judicial* though a *legal day?*

"The question must be answered in the negative.

"It is well settled that no days of grace are allowed after the day to which the extension is granted.

"The further time granted for bringing up the appeal, under Art. 883, C. P., is simply an extension of the days of grace, a postponing of the return day by order of the court, which becomes fixed, if not moved or postponed, by *antecedent order of the court.*"

Counsel for the appellee cites and much relies upon the decision of our immediate predecessors in Sun Mutual Insurance Company

vs. Bynum, 32 An. 28, and it is true that their citation therefrom does support their proposition, but the quotation made is from the syllabus and not from the opinion.

The court in that opinion refers to the case of Surrat vs. L'Hote, then recently decided, and said:

"We held that when an extension is granted to a day *not in term time*, the transcript may be filed on the first day of the ensuing term, and, as here, the term of this court commences on the first Monday in November and lasts until the end of May, and as it was *during term time* that the delay was extended and *exptred*, the appellants could have preserved their right by simply applying for a further extension."

It is plain that the syllabus of that case disagrees with the text.

In that case the return day was extended during term time, and that day arrived and the delay *expired in term time;* but in the instant case the delay expired on a day when the court was not in session and had not convened because the day fixed for the extension and for the convocation of the court was not a legal day but a *dies non*.

Under this state of facts it was utterly beyond the power of the appellant to have obtained a further extension, because the court had not convened for the term, and could not convene on the date fixed in the Constitution because it was *not a legal day*.

In State *ex rel.* Luling vs. Judge, 24 An. 333, it was said by the court:

"It appears that the return day as extended was the 28th of February, which was Sunday. * * *

"The return day occurring on Sunday, we think the appellant was entitled to the whole of the next day to file his appeal."

Applying the principle announced in that opinion to this case, the appellant was legally entitled to apply on the day he did for an additional extension of the return day.

In our examination of the case cited, and others, we have found no countervailing authority.

The motion to dismiss is not well grounded.

It is therefore denied.

ON THE MERITS.

MILLER, J. This is an appeal by the receiver of the Aarons-Mendelsohn Company, Limited, from the judgment dismissing his demand against Elias Aarons for five thousand dollars.

The corporation was organized in 1892, Augustus Aarons and harles Mendelsohn being the principal shareholders; Elias Aarons, ainst whom this suit is directed, and another party holding one are each, and at a later period two others became subscribers to the ock. In 1895 the corporation became embarrassed; sundry suits ere begun, and attachments against the corporate property were ued, the effect of which was to close the business of the corporation, charter having been decreed forfeited on the return *nulla bona* on e of the executions. The debts of the company were between rty and fifty thousand dollars; its assets were the stock of mer- andise sold at the sheriff's sale for thirty-three hundred dollars aving, after satisfying the lessor's claim, eighteen hundred dollars; e bills receivable and book accounts were purchased by Elias arons for one thousand five hundred dollars, and the tobacco edged to various creditors were sold by them to him for the amount the debts for which the tobacco was pledged. After all these ansactions the receiver was appointed, brought this suit against lias Aarons, and from the judgment against the receiver he appeals.

The petition of the receiver alleges that the officers of the cor- oration, its shareholders and the defendant, related or connected marriage, combined and colluded to place the property of the orporation beyond the reach of its creditors; the corporation being solvent, to the knowledge of defendant, an employee, and cogni- ant of the financial condition of the corporation; that in further- nce of this combination the defendant, under color of a collusive nd fraudulent sale about the time the receiver was appointed, took ossession of the bills receivable and accounts of the corporation nd is receiving and illegally appropriating the collections; that here are no other assets except of inconsiderable, if of any value, o pay the creditors, and the petition prays for judgment against efendant for five thousand dollars. The answer is, substantially, he general issue, with the averments of the purchase of the stock f merchandise of the corporation at sheriff's sale under the execu- ions of their creditors; that he then purchased the book accounts nd bills receivable for a fair price paid by him; and the validity of he sale is insisted upon, but the answer avers that save the amount ollected, twenty-four hundred dollars, the assets are worthless, nd that defendant is willing to return all he purchased, including ll collections, for an amount equal to the price paid, and for his ervices and time in making the collections.

In argument the suit is presented to us as one in the nature of the revocatory action combined with that for damages for the alleged wrongful acts of the defendant in aiding the debtors to place their property beyond the reach of their creditors. The aspects of this litigation naturally suggest the revocatory action, or that *en declaration de simulation*, deemed by our law and jurisprudence ample to secure creditors against all acts of their debtors calculated to deprive creditors of recourse on the debtor's property. Civil Code, Arts. 1970, 1978, 1982, 1989, *et seq*. We perceive in the briefs the suggestion that the usual actions to avoid the prohibited acts of insolvent debtors was not deemed applicable. We have not without some doubt as to the plaintiff's right to the remedy plaintiff selects, taken the suit as he has presented it. To enforce the demand the orgnnization and course of business of this corporation has been exhibited in testimony and argument; thus we are apprised the corporation was organized in 1892; that it was preceded by a firm composed of defendant and his brother, who, with others, afterward formed the Aarons-Mendelsohn Company, Limited; that defendant's brothers, Augustus and Charles Mendelsohn, became the principal shareholders, Augustus Aarons coniributing as his part of the capital the interest of defendant in the previous firm, purchased by Augustus Aarons; that Elias Aarons, the defendant, owning at one time one share of the stock, claims to have disposed of it, but was in the employ of the corporation to its close. It is also brought to our notice that the principal attaching creditor was a relative of the members of the corporation; that another creditor was paid to the exclusion of others the entire one thousand five hundred dollars, derived from the defendant's purchase of the assets of the corporation, and there is testimony to the effect that the defendant, owing to his relationship and intimacy with the shareholders, enjoyed advantages in respect to the purchases of the merchandise and assets of the corporation not possessed by others, and the testimony is that in these purchases he had the advice and encouragement of the shareholders. In an action based on an alleged combination and conspiracy it was, doubtless, deemed proper to introduce the mass of testimony we find on this subject in the record, but, in our view, the investigation we are to make must mainly depend in their result on the purchases by defendant of the property of the firm.

In the petition it is the sale of the accounts and bills receivable

that is specially assailed, and it is mainly in relation to that sale, as we read the petition, that the judgment is claimed against the defendant for five thousand dollars. Whether in the revocatory action, or in any form of controversy involving defendant's liability to creditors arising out of that sale, the question of the value of the assets would be the prominent inquiry, ff not the test. According to the testimony the assets had accumulated since 1892, though a considerable amount was the result of more recent sales. It readily occurs that the assets of a commercial firm, in great part in their origin, dating three years back, are not apt to have anything like the value conforming to their face. The testimony is to the effect the great mass of these assets were worthless; that with two years efforts at collection there had been realized of all the assets but twenty-four hundred dollars, and defendant claims and testifies the time and expense of collecting debts due by country, as well as city debtors, equaled the excess of collections over the price paid, and we have in the record the defendant's offer to return all the assets, including collections for reimbursement of the price and the amount claimed for the expense of collection. The testimony, it is true, comes from the shareholders and the defendant, but it is upon this testimony the case has been presented and must be determined. It is claimed in argument that defendant having aided the debtors in putting their property beyond the reach of their creditors, should be condemned to pay the amount of the collections and be denied any restitution of the price he has paid; and it is insisted we can grant this relief under the prayer for judgment against defendant for five thousand dollars and for general relief. The relief we are asked to afford is the incident of the revocatory action when the defendant participates in the fraud of the debtor, or as the Code puts it, is in fraud as well as the debtor. C. C. Art. 1982. Under the testimony we must conclude the motive and object of the defendant in his purchase was to obtain the accounts, having bought the merchandise and with the view of continuing for himself the business of the debtors. The corporation had the right to sell; he had the right to buy. The law protected him in his contract and his right to reimbursement of the price if the sale should be set aside for inadequacy of the price. Civil Code, 1981, 1982. Even under the revocatory action when the sale is set aside, we do not understand the purchaser is to be denied restitution of the price

because the debtor applies the purchase price to pay one of his creditors, and although the purchaser may know the debtor intends that application of the price. This sale as presented to us in the testimony was for a fair price paid by the purchaser, prompted by the purpose to secure the accounts to aid him in the business of the late corporation he proposed to continue. With the best attention we have been unable to perceive the basis for avoiding the sale for inadequacy of price or other cause.

When the corporation failed it had pledged tobacco to the banks and others creditors. The defendant acquired the tobacco from the creditors holding it in pledge for the amount of the pledge debts. We find in the petition no allusion to these acquisitions of the firm's tobacco, but a large part of the testimony is devoted to these transactions, and it is contended in argument that defendant thereby acquired an advantage to the detriment of creditors. It was some months after the failure before the pledged creditor obtained payment. In that period it is claimed, and there is testimony in the record to the effect, that efforts were made to sell the tobacco, and pay the pledge debts, and it was after these efforts failed that the defendant having succeeded to the business of the corporation in part, we infer, the manufacture of cigars, obtained the tobacco on payment of the pledge debts. If in these transactions the creditors of the corporation sustained injury, the revocatory action is adopted to give full relief. But there are before us neither allegations or proof on which we can base any relief in respect to the tobacco pledges.

As to the sheriff's sale of the merchandise, it was open to all bidders. The defendant stood on an equal, but no better footing than all others. The fact he had better means of knowledge of the stock and its value derived from his connection with the late firm and his intimacy with its members give us no basis to hold tha sale void, or as furnishing plaintiff any cause for complaint.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

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No. 12,823.

KANSAS CITY, SHREVEPORT & GULF RAILWAY COMPANY VS. THOMAS J. DAVIS, SHERIFF AND TAX COLLECTOR, ET ALS.

Once an assessment has been completed and the roll has beeu deposited in the clerk's office and a copy thereof delivered to the tax collector for the col-

lection of taxes, neither the correctness of the levy nor the assessment can be tested in a proceeding contradictorily with the tax collector alone.

APPEAL from the Twelfth Judicial District Court for the Parish of Vernon. *Read, J.*

J. McD. Trimble, General Solicitor, *J. G. Park*, Assistant Attorney (*Pujo & Moss*, of Counsel), for Plaintiff, Appellant.

J. Henry Shepherd for Defendants, Appellees.

Argued and submitted June 4, 1898.
Opinion handed down June 13, 1898.

The opinion of the court was delivered by

WATKINS, J. This is an injunction suit which seeks to restrain and prohibit the defendant from seizing and selling certain described property of the plaintiff on the ground thatt he tax sought to be collected is illegal and void and not enforceable.

The judgment of the District Court sustained the defendant's exception of no cause of action, and decreed the defendant "ten per cent. on the amount enjoined by the suit as attorney's fees," and from that judgment the plaintiff has appealed.

The plaintiff avers that it is the owner of a certain railroad track in the parish of Vernon, and on the 17th of August, 1897, the parish assessor delivered to the tax collector thereof "a certain alleged assessment roll" whereon was charged a tax of two thousand seven hundred and forty-five dollars and twenty-eight cents on 35.64 miles of track and roadbed, upon a valuation of five thousand five hundred dollars per mile, against the Kansas City, Pittsburg & Gulf Railway Company.

That said tax is illegal, false and untrue in the following particulars, viz.:

That neither the said Kansas City, Pittsburg & Gulf Railway Company nor petitioner owned any completed railroad in said parish on the 31st of May, 1897, and that said Kansas City, Pittsburg & Gulf Railway Company does not now and never has owned any railroad track of any character in said parish; that said assessment is irregular and illegal in the following respects, viz.:

1. That no railroad track of petitioners was in existence on January 1, 1897 in said parish, and that said assessor "made no examination of the mortgage and conveyance records thereof, as to the title to, or quantity, or value of petitioner's track therein."

2. "That said assessor did not in person or by deputy visit the domicile or any office of petitioner for the purpose of filling out any tax list of the property of petitioner;" and that it never had any notice, or opportunity to fill out a tax list showing the quantity and value thereof.

3. "That said assessment list and estimate of the valuation of said property was not completed by said assessor until long after January 1, 1897, to-wit: August 17, 1897."

4. "That no assessment of petitioner's railroad in said parish, pursuant to Act 92, approved July 12, 1888, had ever been reported to said assessor."

The averment is then made that the tax collector and the parish of Vernon are threatening to seize and sell petitioner's property for the purpose of enforcing the payment of said tax; and that unless restrained by injunction they will seize and sell the same.

On the foregoing allegations, the plaintiff prays that the tax collector and the parish of Vernon be cited and enjoined, that its injunction be maintained and perpetuated; and that it have judgment in its favor "decreeing said tax to be illegal and void and of no effect."

This suit was filed and the injunction granted on the 5th of March, 1898—more than six months after the assessment roll had been completed, filed in the mortgage office, and a copy thereof had been delivered to the tax collector.

To this suit the parish assessor was not, at first, made a party defendant; but the president of the police jury was duly cited, and the tax collector accepted service and waived citation. The assessor was cited subsequently. The defendant, tax collector, by counsel, excepted to the jurisdiction of the District Court of the parish of *Vernon* to try and decide this suit; and he averred that the only court which can exercise jurisdiction over, or render judgment in this cause, is that in which the parish of *Sabine* is situated, for the reason that the president of the Board of Commissioners, who is charged with the assessment of plaintiff's property, resides therein.

He avers that the injunction herein is illegal and vexatious, and that defendants are "entitled to damages as attorney's fees of ten per

cent. on the amount of tax enjoined," and he prays for judgment in the sum of two hundred and seventy-four dollars and twenty-eight cents against the plaintiff.

It seems that this plea was tried and overruled, and that fact is conceded in the argument, and it also appears from an admission in the record. For the defendant tax collector tendered a plea of no cause of action, and prefaced that plea by a reservation of all of his rights under his previous plea to the jurisdiction of the court; and on that plea he renews his demand for attorney's fees of ten per cent. on the amount of the tax enjoined.

But the defendant tax collector reserved no objection to the ruling of the court, and tendered no bill of exceptions thereto, and no issue was joined with either the assessor or the president of the police jury.

Reduced to a last analysis, the question for decision is no cause of action *vel non*, and it is to be determined alone and exclusively between the railway company and the tax collector.

On the foregoing pleadings the contention of the defendant is that this is an attempt to have an assessment corrected for alleged formal defects which the plaintiff asserts to have existed in the preparation and confection of the assessment rolls, more than six months subsequent to their completion, and a certified copy thereof had been delivered to the tax collector preparatory to the collection of the taxes which had been extended thereon.

This theory of the defendant is emphasized by the plaintiffs' averment that the tax assessor had delivered the assessment roll to the tax collector on the 17th of August, 1897, prior to the filing of this suit in March, 1898, and that because of his attempted collection of said tax by a threatened seizure and sale of its property, an injunction was necessary.

His contention is, that even considering this suit to be one for the correction of an assessment (but we are of opinion it is not), it came too late, and was not instituted against the proper parties; or in other words, that a suit having that object in view can not be properly and legally conducted against the tax collector.

The provisions of the revenue law applicable to this relief are as follows, viz.:

"That all taxpayers shall have the right to appear before *the borad of assessors* of the parish of Orleans between the first and twentieth

of March of the year in which the assessment is made, and *in other parishes before the board of reviewers on or before the first day of November of the year in which the assessment is made*, as provided for in this act, during the session of said board, and be heard concerning the description of the property listed and the valuation of same as assessed, and they shall have the right of testing the correctness of their assessments *before the courts of justice* in any procedure which the Constitution and the laws may permit; *but the action to test such correctness shall be instituted on or before the first day of November in the year in which the assessment is made.*" Section 27 of Act 98 of 1898.

And the contention of the defendant is that any proceeding intended to correct the assessment should have been filed prior to the first day of November in the year in which same was made, and that as the plaintiff has failed to observe that requirement of the law his suit is out of time.

Questions of this kind have been frequently before this court and similar revenue statutes have been repeatedly interpreted. The following decisions are pertinent and instructive, viz.: City of New Orleans vs. Canal Bank, 32 An. 157; Gay vs. Board of Assessors, 34 An. 370; Adler, Goldman & Co. vs. Board of Assessors, 37 An. 507; Shattuck & Hoffman vs. City, 39 An. 206; Oteri vs. Parker, Tax Collector, 42 An. 374; Factors and Traders Insurance Company vs. Levi, 42 An. 432.

Not only so, but the contention of the defendant is further to the effect that once the tax has been levied by the proper authority and by the parish assessor extended upon the assessment roll and the tax roll has been placed in the hands of the tax collector for the purpose of collecting the tax, the regularity and validity of the assessment can not be tested in a suit against the tax collector.

The case of Gaither vs. Green, Tax Collector, 40 An. 362, presents and decides that question squarely—the question being the constitutionality and legality of the five-mill district levee tax.

In the course of our opinion we said:

"It is equally clear to our minds that this is a collateral proceeding—a third opposition, coupled with an injunction against the enforcement of the tax, and wherein the tax collector is the *sole* defendant.

"The law has confined the levy, assessment and collection of the special tax in question to three sets of officials:

"1. Its levy to the Board of Levee Commissioners.

"2. Its extension on the assessment roll to the parish assessor.

"3. Its collection to the State tax collector.

"There is between their respective duties a line of demarcation that is well defined and clear.

"It is essential to the validity of the tax that proper and legal proceedings should be taken in its levy and extension upon the assessment roll, because it is through the correct performance of the duties assigned that the tax is brought into existence. But once *in esse* and the tax roll placed in the possession of the collector the levying and assessing officers cease to have any relation to the tax, and are *functus officio*.

"*At this stage the legality of neither the levy nor assessment can be tested by either injunction or mandamus, directed against the collector alone.*"

That decision is altogether appropriate to the present controversy and supports the contention of defendants as it appears in counsel's brief:

"From the face of the petition it is clear that the tax roll is no longer in the hands of the assessor. He is without power to change it. From the moment of filing it in the clerk's office his control is gone, and he has no more power over it than the coroner of the parish. He has become *functus officio*."

The argument of plaintiff's counsel is to the effect that its petition disavows the ownership of the property taxed, and it can not, therefore, be taxed for its value. But the averment is that "it never owned any *completed railroad*"—quite a different thing. Substantially plaintiff's complaint is that when the assessment was made its road was in an *incomplete condition*, and consequently an assessment of it as a *completed* road was an erroneous assessment.

We are of the opinion that the judgment is correct in so far as it sustains the defendant's plea of no cause of action; but we think it erroneous and illegal in at the same time awarding the defendant damages at ten per cent. on the amount of the tax enjoined.

The maintenance of the plea of no cause of action necessarily puts the case out of court in its entirety. It is true that the dissolution of plaintiff's injunction results; but the situation is different from that of an injunction having been dissolved on rule.

In so far as the judgment awards the defendant damages is concerned, we are of opinion that it must be amended and the damages disallowed, with full reservation of the defendant's right in that respect.

It is therefore ordered and decreed that the judgment appealed from be amended by rejecting the defendant's demand for damages; and that, as thus amended, same be affirmed, the defendant's right toclaim damages in some other proceedings be reserved, and that he be taxed with costs of appeal.

MR. JUSTICE BLANCHARD takes no part in this decision.

No. 12,627.

PATRICK W. MULQUEENEY ET ALS. VS. JAMES SHAW ET ALS.

A stock subscription by which the corporation in the full exercise of its functions was organized can not be repudiated by some of the shareholders, and the corporation thrown into the hands of a receiver, merely and only on the ground taken by the dissatisfied shareholders that the subscription was illegal, the subscription having been approved by all of them, and the full amount of which the corporation retains.

The appointment of a receiver for a corporation will not be made with no allegations of mismanagement, improper application of funds or other acts of corporate maladministration, and only on the general allegation of the shareholders seeking the appointment, that they apprehend exposure in the future, if the corporation is not wound up, to liabilities not contemplated when they became shareholders. High on Receivers, Secs. 17, 11, 24, 288, 293.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Carroll & Carroll and *A. E. Blackmar* for Plaintiffs, Appellants.

Chrétien & Suthon for the Excelsior Co-operative Association, Limited, and James Shaw and others, Defendants and Appellees.

Frank Zengel for Screwmen's Benevolent Association, Intervenor, Appellee.

Joel E. Prowell for Mrs. Margaret Dieck, widow of James Palmer, and Mrs. Elizabeth Regan, widow of James Duffy, Intervenors, Appellants.

Argued and submitted March 9, 1898.
Opinion handed down April 18, 1898.
Rehearing refused June 28, 1898.

The opinion of the court was delivered by

MILLER, J. The plaintiffs appeal from the judgment against them on their rule to appoint a receiver for the Excelsior Co-operative Association, and for an injunction to restrain any further action of the officers of the association.

For many years the Screwmen's Benevolent Association has existed in this city, incorporated in 1871, under the general law for the organization of charitable corporations. Revised Statutes, Sec. 677 *et seq.* In 1895 the Screwmen's Association conceived it to be their interest to promote the formation of a body corporate and twenty-one parties, all members of the Screwmen's Association, signed the act, incorporating them as the Excelsior Co-operative Association, with an authorized capital of ten thousand dollars, divided into shares of ten dollars each, the corporation to commence business when five thousand dollars of the capital was subscribed: the object of the new corporation was the execution of contracts for the loading and unloading of ships in this port, and we gather from the testimony, it was contemplated the work secured by the contracts of the Excelsior was to be performed by the members of the Screwmen's Association. We find in the record a paper signed by the president of the Screwmen's Benevolent Association, expressing its subscription to five hundred and fifty shares of the stock of the Excelsior; there are also entries in the books of that association stating its ownership of ten thousand dollars of the Excelsior, and it is put beyond all controversy that the ten thousand dollars was furnished with which the Excelsior has conducted its business, and it is in evidence that the dividends on the subscription have been paid and employment afforded by means of the Excelsior to the screwmen as contemplated when the subscription was made; it further appears that when this suit was brought the Excelsior had on hand eleven thousand or twelve thousand dollars, owed no debts, save its stock liability to the Screwmen's Aasociation and contemplated the continuance of its business.

In this condition the present suit was brought by some of the twenty-one parties who became subscribers to that number of shares of the

Excelsior, praying that its affairs be put into the hands of a receiver, that the association be decreed not a corporation, and that its assets be divided. The grounds of the petition are, that the subscriptions to the capital stock were not obtained required as a condition precedent for going into the business of the corporation; that hence the association has no corporate capacity; that the petitioners only became aware recently of the illegality of the subscriptions, and of the fact the association had no corporate existence. The petition further avers that the president named in the charter is unfit, the grave misapprehension of law and fact under which, it is alleged, the association commenced business, and the responsibilities of the petitioners, different, it is charged, from those claimed and intended, lead to the fears of petitioners of embarrassment and trouble in the future, and they assert their right to a division of the assets of the association, and to the injunction and appointment of the receiver. The exception and answer negative the allegations in the petition; aver that the business of the association is prosperous, and, after paying dividends, has on hand a cash surplus, besides implements; the suit is charged to have been brought in bad faith, from selfish motives, arising from the failure of one of the plaintiffs to secure his re-election as secretary, and the respondents deny there is any occasion for the injunction, receiver or other relief sought by the petition. There is an intervention by the Screwmen's Benevolent Association, averring its ownership of five hundred and fifty shares of the stock of the Excelsior Company, and the solvency and prosperous business of that company; that the plaintiffs participated in the organization and all other acts of the Excelsior Company, are estopped from seeking and have no interest to demand the relief claimed in the petition, and defendants deny there is any cause for the injunction or appointment of the receiver. On the rule to appoint the receiver and for the injunction the organization of the Excelsior Association, the subscriptions to its stock, the modes and results of its business, and its financial condition, owing no debts, with no creditor, and with cash on hand in excess of that debt, were developed iu the copious testimony we find in the record, and resulted in the judgment from which plaintiffs appeal denying the relief prayed by them and affirming the legality of the defendant's charter.

During the trial the plaintiffs excepted to the ruling of the court

against questions propounded by plaintiffs to show that the president of the Excelsior Association was of drinking habits. It is claimed the testimony should have been received under the allegation in the petition that the president was unfit by reason of his health and habits. We do not think that on this general allegation the court could make any decree, and if there were acts of misconduct or mismanagement on his part there should have been the specification of the acts. On these applications for receivers "the facts relied on for the relief should be distinctly and specifically set forth;" and again, "while fraudulent conduct or danger to the property is frequently the foundation for a receivership, it will not do to allege such fraud or information generally, and a bill containing only vague and general allegations presents no case for the appointment of a receiver." High on Receivers, Sec. 17. The discussion of the other bills to the exclusion of questions touching the authority of the president of the Screwmen's Benevolent Association to make the subscription is, in our view, useless. The books of that association, the testimony that the subscription was discussed at the corporate meetings, and the incontestible fact the amount subscribed was furnished, used and recognized by the Excelsior, by entries on their books and dividends received by the Screwmen's Association, remove the fact of the subscription and the authority by which it was made, whatever its effect, beyond the domain of controversy.

On the theory that the Excelsior Association is not a corporation, plaintiffs would be deemed simply owners in common of assets. On this view the usual remedies afforded by our Code for the division of property thus held must be deemed ample, without resort to the receivership, not granted even in chancery as between tenants in common of personal property, except, at least, in special cases. High on Receivers, Sec. 20.

The main ground of plaintiff's suit is that the Excelsior has no corporate existence, because of the alleged invalidity of the subscription to its stock by the Screwmen's Association, and in this connection we are referred to the general rule, that one corporation can not subscribe to the stock of another. The Screwmen's Association organized to assist its members, to that end was accustomed to rely on the investment of its surplus funds. The real purpose of the subscription was by means of the capital thereby furnished the Excelsior, to secure dividend and the no less impor-

tant object, obtain employment for the Screwmen in executing the contracts of the Excelsior Association. Our attention has been called to the decision of our predecessors, that a number of corporations can not unite to form another. Factors and Traders Insurance Company vs. New Harbor Protection Company *et als.*, 37 An. 233. There is no uniting in this case of two corporations. It admits of serious question whether a subscription by an organization of laborers to the stock of another corporation, created to secure contracts affording employment to laborers, and when the object of the subscription is to secure that employment for the laborers, members of the subscription corporation can be deemed *ultra vires* on its part. There are cases in which the subscription by one to the stock of another corporation is upheld, when the subscription contributes to the object for which the subscribing corporation is organized. Cook on Shareholders, Sec. 64, announces the general rule with its qualification. But irrespective of the question of the principle supposed to forbid this subscription, have these plaintiffs any basis to force a receivership and the winding up of the Excelsior, upon the other shareholders and on the Screwmen's Association, with its large interest in the controversy before us resisting the plaintiffs' demands? We find the subscription has resulted advantageously in dividends for the Screwmen's Association and employment for its members. We perceive no mismanagement or losses of its funds proved, or even charged. The Excelsior Association has in its treasury, after paying the dividends to the Screwmen, funds more than adequate to pay the entire amount the Screwmen's Association furnished. No complaint in respect to the subscription and the corporate capacity of the Excelsior is made by any one save plaintiff, and the election for its officers resulting in the displacement of one of the plaintiffs, quickly followed by the present suit, is not without influence in appreciating the basis on which the plaintiffs call for the winding up of the corporation. Two of the plaintiffs have been officers of the corporation, all of them participated in its formation; all knew and approved of the subscription, and according to the testimony have shared in the benefits derived from the Excelsior as a source of the dividend and of employment for the screwmen. While defects of a radical character in organizing corporations may be deemed incapable of ratification, we do not think a subscription like that under consideration, and the

corporate capacity resting in part on that subscription, can be repudiated by parties concurring in obtaining the subscription, and who, for a length of time, have recognized and affirmed the corporation they now attack, and attack with a view to a receivership sought by one of the plaintiffs of funds applicable to satisfy the claim if urged, of the Screwmen's Association desiring no receivership and resisting plaintiffs' demand. The intervention of that association we think increases the force of the estoppel urged against plaintiffs by the other shareholders. The ten thousand dollars was obtained on the pledge of the corporate capacity of the Excelsior Company and plaintiffs concurred in that pledge. We do not think plaintiffs are entitled to reverse their position to the prejudice of the Screwmen's Association by subjecting funds applicable to their claim to the expense of a receiver, with no function, if appointed, but to turn over to the receiver funds they are content and desirous shall remain in the present custody. In our opinion, both with respect to the other shareholders and the Screwmen's Association, the plaintiffs are estopped from asserting the pretensions advanced in this suit.

In another aspect the plaintiffs' suit for a receivership and injunction can not be maintained. They exhibit no wrong. In this connection it is impressive that they have not paid any part of their stock subscription. They allege they apprehend trouble in the future from engagements that may be formed in the future by the Excelsior Company for which the plaintiffs may be held. The mere possibility of future injuries to the plaintiff seeking a receiver is not deemed sufficient to appoint receivers. With no allegations of mismanagement, misapplication or waste of the funds in respect to which the receivership is claimed, we understand no appointment of receiver in this class of cases is made by the equity courts. High on Receivers, Secs. 17, 11, 14, 288, 293.

The whole case made by the petition was developed on the trial of the rule to appoint the receiver. That and the injunction constituted the relief sought. The issue presented on the rule and the petition was the alleged right to have the corporation or association wound up because of the invalidity of the subscription and the resulting alleged want of corporate capacity. We find no reason for requiring another trial when the judgment on the rule disposes of the controversy and leaves no issue to be determined.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

No. 12,728.

FREMONT F. FRANK VS. EDWARD E. MAGEE.

The adjudication carries to the purchaser at the sheriff's sale the immovale and all its appurtenances, including its fruits pending the seizure in the control or possession of the sheriff at the date of the adjudication.

But the adjudication does not pass to the purchaser an action of damages to the land for trespasses committed or for value of trees converted by the trespasser prior to the acquisition of title by the purchaser, and in this connection the analogies of the law in reference to the rights of the execution creditor have pertinence. C. P., Art. 656; 30 An. 524, 984; 32 An. 1045.

The contract by which the owner confers on another the privilege of cutting wood on the owner's land does not permit creditors of the owner from seizing the land—least of all, when the creditor seizes under the equivalent of a mortgage with the "pact *de non alienando*" duly recorded and the seizure terminates the right to cut wood under such contracts. R. S. S. 351, 354; 31 An. 278.

ON APPEAL from the Tenth Judicial District Court for the Parish of Avoyelles. *Cullom, J.*

A. V. Coco for Plaintiffs, Appellants.

Wm. H. Peterman for Defendant, Appellee.

Argued and submitted February 11, 1898.

Opinion handed down Mrch 21, 1898.

Rehearing refused June 30, 1898.

The opinion of the court was delivered by

MILLER, J. The plaintiff appeals from the judgment, dismissing his suit for timber alleged to have been removed by defendant from a tract of land while under seizure, and for damages alleged to have arisen from defendant's acts in deadening trees on the land, the plaintiff asserting title to the timber, and to recover the damages as the purchaser of the tract of land at the execution sale that followed the seizure.

The plantation, it is claimed by plaintiff, was under seizure from May to December, 1896, under the executory process, in the suit of the State on the bond of a delinquent tax collector. The plaintiff purchased at the execution sale on the 26th December, 1896. It is in proof that the bond was recorded in 1892, and under our law that affected the plantation, then or thereafter acquired by the sheriff with a mortgage in favor of the State for the taxes collected, but not paid over by him, and for which the State issued the writ and caused the properiy to be sold at the sheriff's sale, when plaintiff became the adjudicatee. Prior to the seizure, but while the owner was sheriff and the bond was of record affecting the property seized, the owner by contract with the defendant gave him the privilege of cutting and removing timber from the tract. It is in proof that notwithstanding and during the seizure the defendant cut down a large number of trees growing on the land, deadened others, preparatory to cutting them down, removed the logs made from the felled trees, and a quantity is shown by the record to have been still in his possession and were seized by the sheriff under the sequestration issued by plaintiff in this suit.

The plaintiff's contention is that his title as purchaser at the sheriff's sale, in December, 1896, entitles him to all the timber felled and removed by defendant, pending the seizure, and plaintiff maintains that his title carries the right to recover damages caused by the deadening of the trees, and also to recover the value of all timber removed from the land and disposed of by defendant. The defendant resists the plaintiff's demand on the grounds of the contract with the owner of the land authorizing the defendant to cut and remove the timber. It is further contended on his behalf there was no seizure of the land, and in no point of view, it is insisted, has the plaintiff, as the purchaser of the land on the 28th of December, 1896, any claim for damages to the land, or for timber felled and removed from the land prior to the adjudication to the plaintiff.

This case was before us on a previous occasion. Frank vs. Magee, 49 An. 1250. Dealing with the petition as presenting different demands without determining that all were well founded, we overruled the exception of no cause of action and remanded the cause for trial on the merits. The plaintiff again appeals from the judgment dismissing his suit.

The plaintiff's argument is that the title of the purchaser at sher-

iff's sale relates back and carries all that was on the land at the time of the levy. Undoubtedly the seizure of land embraces all that was on the land at the time of the levy. That the adjudication carries the title of the seized debtor to the full extent of the possession, legal or constructive, of the sheriff, is clear enough. The argument for the plaintiff goes further, and insists that if at any period of the seizure the property seized has been injured, or any part of it removed and placed entirely beyond any control of the sheriff, that the right of action for damages for the deadening of the trees, or for the value of such property removed, is acquired by the purchaser at the sheriff's sale. The argument, it is claimed, is supported by authority, and in this connection we find a reference to the principle that the sheriff's sale carries all covenants of title with which the debtor is clothed. Warranties of title are linked with the property and pass with its sale under our law as well as at the common law, but that principle can not, in our opinion, be deemed to affirm that a right of action for damages to the property before the adjudicatee has any title passes to him as an accessory of the property. In the only decisions of obvious pertinence to this controversy, our courts reached a different conclusion with reference to the title of a purchaser—*i. e.*, that it does not carry any right to recover damages to the property for injuries accrued prior to the acquisition of such title, or to state it in another form, and that more directly applying to this case, wood cut and corded before the sale of the land does not pass to the purchaser of the land. Woodruff vs. Roberts, 4 An. 127; Nimmo vs. Allen, 2 An., p. 451. We do not think that the right of action for the value of property converted, or of damages for injury to the property prior to the seizure, can be deemed an accessory or part of the immovable, nor do we perceive the support plaintiff's argument derives from the line of authority cited that treat the sheriff's deed only as a muniment of title, additional to the adjudication, or that class of authorities that affirm the seizure as embracing all the interest of the debtor. Code of Practice, Arts. 656, 695, 696; Foley vs. Harrison, 5 An. 84; White, Richardson & Co. vs. Sheriff, 36 An., p. 984. Our courts have had frequent occasion to maintain the right of the seizing creditor to the sale of all the property seized under the writ. It is his right to have all such property faithfully preserved by the sheriff while under seizure, and it is to him the law gives a right of action for injury to the property whether by removal, or because of any other act by

which the property is diminished in value. It is this principle also that gives to the seizing creditor all "rents, revenues or issues" accrued from the immovable seized, and sustains his right of action for such rents. Summers & Brannin vs. Clark, 30 An., p. 436 White, Richards & Co. vs. Sheriff, 36 An., p. 984; Henry vs. Tricou, 36 An., p. 522; Lawrence vs. Cox, 32 An., p. 1045. If the seizing creditor under whose writ the tract of land was adjudicated to plaintiff were before us asserting his right against the sheriff for permitting, pending the seizure, the injury of the trees, or the removal and cutting of the timber, the question would be different from that now presented. The right in this respect of the seizing creditors under our jurisprudence is, we think, suggestive that the same right does not pass to the adjudicatee with no title whatever, when the injury to the property was done, or when the trees were converted. Our jurisprudence furnishes no precedent for recognizing any such right in the adjudicatee. Our conclusion is the action for damages, or for the value of the trees alleged to have been converted prior to the adjudication, did not pass by the adjudication.

The timber taken from the land during the seizure and in the possession of defendant is, in our view, to be deemed as constructively in possession of the sheriff when the adjudication was made. It formed part of the immovable. Cut during the seizure, it was quite as much in the sheriff's charge as the land itself. He could have taken it under his writ, and if his authority was resisted the courts would have enforced it. Gwynne on Sheriffs, 289. We think the adjudication must be deemed to carry to the purchaser the property in the actual as well as constructive custody of the sheriff. In this view we maintain plaintiff's title to the timber in defendant's possession that may be identified as removed from the land pending the seizure.

The defendant's contention that he had a contract with the owner of the land for the cutting of the timber can not avail him. We do not understand that the debtor can place his land beyond seizure for a debt secured by mortgage, and with the mortgage carrying into effect the pact *de non alienando* standing on the public records when the alleged contract was made, and for years before. Whether the defendant had knowledge of the seizure other than that the law supposes to be constructively conveyed by the seizure is unimportant. We take occasion, however, to say that the testimony impresses us he had actual knowledge.

It is insisted there was no seizure. If that proposition is dependant on the propesition the defendant was served with no notice, the answer is no such notice was required. There is no testimony impeaching the seizure and the entire proceedings, and the plaintiff's title, and in our view the pleadings, support the seizure, at least remove it from controversy.

If, as we hold, the plaintiff had the right to issue the sequestration for the timber carried from the land, and in defendant's possession when the writ issued, there can be no claim for damages alleged to have been caused by the writ, and hence, in our opinion, there is no basis for defendant's reconventional demand.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed; and it is now ordered, adjudged and decreed that the plaintiff be and is hereby decreed to be the owner of all the logs cut from the land in controversy and in defendant's possession when the sequestration issued, and that said logs be delivered to him; that the case be remanded to ascertain the logs thus decreed to belong to plaintiff; that the sequestration be maintained as to such logs, and that the defendant pay costs.

DISSENTING OPINION.

NICHOLLS, C. J. I think a rehearing should be granted in this case, inasmuch as at present advised, I am of the opinion that the judgment heretofore rendered is erroneous.

The State holding a mortgage on the property of Clifton Cannon, the sheriff of Avoyelles parish, secured (under the law) by the clause *de non alienando*, and holding a judgment recognizing the mortgage debt and mortgage, seized and sold the property mortgaged under a writ of *fi. fa.* to the plaintiff, Frank. While the property was under mortgage, but before the seizure of the same, Cannon had, by contract, authorized the defendant to cut timber from the land, After the seizure of the property and while it was in the hands of the executive officer of the court, Magee entered upon the land, deadened a number of trees and cut down others. Some of those cut down were still upon the land at the time of the judicial sale, but others so cut down had been sold by Magee at that date. There was no notice given in the advertisement of the property for sale, or at the time of sale, that the condition of the property was other than what it was at the time of the seizure.

State vs. Button.

The claim of the State against Cannon having been fully satisfied after the seizure and sale (independently of any claim against Magee for cutting down and selling as he did the timber on the place), the question in this case is whether or not the purchaser, Frank, has a right of action against Magee for the cutting down and the conversion of the trees, which, at the time of the seizure, formed part of the realty. I am satisfied neither the seized debtor nor any one holding under him could acquire rights by an illegal entry upon the property pending the seizure, severing trees from the land, and carrying off and selling the same. I am of the opinion that when Frank bought at the judicial sale, made in execution of the judgment enforcing the State's mortgage claim, and the State was fully paid, every right which the State had in the thing mortgaged, at the time of the seizure and at the time of the sale, passed from the State to the purchaser. The purchaser acquired not only the rights of Cannon in the thing sold, but also the right of the seizing creditor under the mortgage and under the seizure and sale. He became subrogated to all the rights in the premises which the State had, including the right of action, which it may have had prior to being paid in full against Magee. The right of action should certainly belong to some one. When the State was paid in full it passed from it to Frank, even had the right not belonged to him before, by reason of his acquisition of the property itself, and as being part and parcel thereof by relation. Frank's title to the land, under our law, became absolute at the moment of the adjudication, and his rights related back to the time of the seizure as against any claim advanced by the former owner, or any one holding under him through an illegal entry upon the property pending the seizure and a severance therefrom of standing trees. [30 N. E. 979; 74 N. W. 103.]

BLANCHARD, J., concurred with the Chief Justice.

No. 12,772.

STATE OF LOUISIANA VS. JOHN F. BUTTON.

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The minority of one of the jurors will not avail to set aside their verdict when no objection was made or questions asked on that point when the juror was tendered and accepted by the accused, nor does it make any difference in the

application of this rule that neither accused or his counsel knew of the juror's minority when he was tendered. 8 Rob. 590; 13 An. 276; 26 An. 384; 35 An. 975; 43 An. 370.

APPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Dupré, J.*

M. J. Cunningham, Attorney General, and *R. Lee Garland*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

John N. Ogden for Defendant, Appellant.

Argued and submitted April 23, 1898.
Opinion handed down May 16, 1898.
Rehearing refused June 29, 1898.

The opinion of the court was delivered by

MILLER, J. The accused, indicted for murder, convicted without capital punishment, takes this appeal.

The bills of exception present the question whether the verdict of the jury should be set aside and a new trial granted the accused on the affidavits and proofs submitted on the rule for new trial and motion in arrest, that one of the jurors was a minor, and that the fact of his minority was not known, when, without any interrogation on that point, he was accepted as a juror.

When the juror is tendered the opportunity is afforded the accused to examine the juror as to his competency. To enable the accused to inform himself with respect to the jury by whom he is to be tried, the law requires the jury list to be served on the accused two entire days before the day of trial. R. S., Sec. 992. With the right to challenge any juror not qualified to serve and full opportunity afforded to ascertain if there is cause for any such challenge, it deserves serious consideration whether the accused, after he has accepted a juror and taken the chance of an acquittal and after an adverse verdict, can claim that the verdict shall be set aside, because one of the jurors was a minor. It is urged on us that the juror had been

drawn on a previous *venire* and had served on a previous jury, presented the appearance of one who had passed his majority, and hence it is contended the accused and his counsel may well be deemed to have been misled into accepting the juror. Besides there are affidavits of the accused and of his counsel that they were ignorant of the juror's incompetency when he was called to the box. On this issue of diligence we can not overlook the ample opportunity of the accused to learn before the trial that incompetency of the juror, quickly made the ground of objection after conviction. Accepting the entire sincerity of the affidavits, we can not resist the conclusion that the diligence to be expected from the accused under the circumstances and suggested by the service itself upon him of the jury list, if exerted, would have discovered the fact now made the basis to set aside the verdict.

Our own jurisprudence has not favored applications to set aside verdicts on grounds like that urged here. Our courts have uniformly held that it was too late, after verdict, to urge the disqualification of one of the jurors; that the full opportunity was afforded to make such objections; that it should be made when the juror is presented and can not be insisted upon after the trial. In some of the cases, the circumstance that the disqualification of the juror was not known when he was accepted by the accused, was considered and held to imply a want of diligence, fatal to the objection. State vs. Nolan, 13 An. 276; State vs. Bower, 26 An. 384; State vs. Sopher, 35 An. 975; State vs. Garig, 43 An. 370. The decision of our predecessors held, that where the juror was examined on his *voir dire* and gave false answers to questions touching his qualifications, that in such case the objection to the juror's competency was a sufficient ground for a new trial. State vs. Nash and Barnett, 45 An. 1143. The decision proceeds on the ground that the accused could not be deprived of his right to a jury composed as the law directs, by the fraud accomplished by the false answers of the juror. That decision resting on the gronnd peculiar to that case, does not infringe on the line of our decisious on this subject. It is our conclusion, the objection to the juror's competency came too late, and hence the rule for new trial was properly overruled.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed.

Rehearing refused June 29, 1898.

12,760.

FLORVILLE FOY ET ALS. VS. MAYOR AND COUNCIL OF NEW ORLEANS.

An ordinary action of a judgment creditor of the city of New Orleans attacking the 1897 annual city budget subsequent to its approval by special ordinance, and also the 1898 budget six months prior to its preparation and presentation, discloses no cause of action.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Charles Lonque for Plaintiffs, Appellants, and *James J. McLoughlin*, Assistant City Attorney, and *Samuel L. Gilmore*, City Attorney, for Defendants, Appellees.

Argued and submitted April 23, 1898.

Opinion handed down June 22, 1898.

The opinion of the court was delivered by

WATKINS. J. The plaintiff, Foy, alleging himself to be a judgment creditor of the city of New Orleans for the sum of sixteen hundred and fifty-eight dollars with interest, and in the further sum of nine hundred and thirty dollars with interest, less a credit of one thousand dollars paid and credited thereon; and various other judgment creditors for sundry small amounts of two or three hundred dollars each, join in one petition and make common cause; and for the reasons therein assigned they jointly demand that the defendant "be directed to amend their budget of 1897 so as to strike therefrom all items which have been objected to * * * and that they be ordered to place (their claims) upon said budget for the full amount of their judgments," etc.; and in the alternative, that the court can not afford them full and adequate relief on the budget of 1897 "that said council be ordered to place petitioners on the budget of 1898," etc.

On the trial there was judgment in favor of the defendants and the plaintiffs have appealed.

The theory of the plaintiffs is that several creditors of the city enjoined the payment by the city of several items of indebtedness which figured upon the city's annual budget of 1897, and same was made perpetual by a final judgment of this court.

That petitioners object to certain enumerated items aggregating seventy-two thousand dollars, which had been illegally budgeted and appropriated therein.

That the plaintiff, Foy, sued out a *mandamus* to compel the City Council to budget the amounts of his aforesaid judgments, but that relief was denied, with the right reserved to attack the budget in a direct action.

That the city has recently passed two ordinances whereby said amounts have been applied to the liquidation of the expenses of garbage removal; but that said sums of money have not been actually expended by the City Treasurer.

That it is the duty of the City Council to provide annually for the payment of judgments.

The defendants first tendered a plea of no cause of action, and the judge *a quo* having referred same to the merits, they filed an answer pleading the general issue.

In the course of the discussion defendant's counsel suggested our lack of jurisdiction *ratione materiæ;* but it is not well taken. See Marx vs. Myers, 50 An. —.

It seems to us too clear for argument that the exception of no cause of action should have been, if it was not, sustained in the District Court; and this fact can not now be ascertained, for the reason that the record fails to disclose the ground on which our learned brother of that court pitched his decision.

The decisions of this court to which the plaintiff's petition doubtless refers are the following, viz.:

State *ex rel.* Foy vs. Mayor and Council, 49 An. 947, and

Badger, Receiver, vs. City, 49 An. 804.

Both of these cases were *mandamus* proceedings taken against the Mayor and City Council for the purpose of compelling said respondents to put their respective claims upon the city budget for the year 1897.

In each case judgment went in favor of the respondents, and the respective relators appealed.

In the Foy case, above referred to, there was the following reservations made, viz.: "the *mandamus* be and same is hereby dismissed under reservation of *any legal rights which he may have* as holder and owner of the judgments which he declared on."

In that immediate connection we were careful enough to say:

"We express no opinion as to the scope of the rights which the relator may be entitled as holder of the judgments on which he declares, whether by virtue of the pleadings in the case on which they were rendered and the terms of the judgments themselves he be entitled as a 'general creditor,' to be paid out of any and all funds which may be found available for the payment of 'debts' of the corporation, or whether to be restricted to some special fund or funds."

We have substantially the same difficulty still confronting us; for whether plaintiffs be the general or special creditors of the city, there is nothing in the record to show.

This matter being in doubt, and entirely undetermined, we can not see our way to granting the relief plaintiffs demand.

There are three obstacles in their way: (1) The budget was finally approved in December, 1897, by a special ordinance of the city, which bars and absolutely concludes all those who did not formally oppose same; (2) the budget of the year 1898 can not, under the law, be prepared and filed until the month of December, 1898, and consequently, *quoad hoc* this suit is premature, there being no 1898 budged *in esse;* (3) there is no substantial basis upon which this suit can rest, as neither the budget of 1897 nor 1896 can, under existing circumstances, be attacked in this form of proceeding.

For these reasons this suit discloses no cause of action. Judgment affirmed.

No. 12,743.

STATE OF LOUISIANA VS. T. J. HAND.

No appeal lies to the Supreme Court from a verdict and sentence condemning the defendant to pay a fine of ten dollars, or in the alternative suffer imprisonment in the parish jail for a period of ten days.

APPEAL from the Sixteenth Judicial Court for Parish of St. Tammany. *Reid, J.*

M. J. Cunningham, Attorney General, for Plaintiff, Appellee.

Charles T. Madison and *Charles J. Boatner* for Defendant, Appellant.

Submitted on briefs June 4, 1898.

Opinion handed down June 18, 1898.

The opinion of the court was delivered by

WATKINS, J. The defendant was indicted for the offence of wilfuly and unlawfully failing and refusing to work the public road in violation of the provisions of Act No. 117 of 1896, and having been found guilty and sentenced by the court to pay a fine of ten dollars and costs, and in default of payment of fine that he be confined in the parish jail for a period of ten days, he prosecutes this appeal.

In this court the Attorney General has filed a motion to dismiss the appeal on the ground that the Supreme Court is without jurisdiction *ratione materiæ* to entertain the same, because the defendant is charged with a simple misdemeanor, the puntshment of which is not less than five dollars, nor more than twenty-five dollars, and in default of payment of the fine assessed imprisonment in the parish jail of not less than ten nor more thirty days.

The motion is well taken and the appeal is dismissed.

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No. 12,707.

ELDER & DAVIS VS. MRS. M. C. LUDELING.

A sheriff's return disclosing that service of citation and writs of attachment and sequestration was made by handing copies thereof to a curator *ad hoc*, the same is illegal and void, because they do not conform to the positive requirements of the Code of Practice; and as those formalities stand in lieu of citation to a non-resident, and must be strictly complied with on pain of nullity, the suit must be dismissed and the writs dissolved, because the jurisdiction of the court did not attach.

ON APPLICATION FOR REHEARING.

A party sued as an absentee and non-resident of the State, and her property attached and sequestered, may be subjected to the jurisdiction of the court during the pendency of the suit by personally serving her with a citation, and thereupon a personal judgment may be rendered against her for the amount of the debt demanded.

But this service of citation does not possess the retrospective effect of curing a defective service of writs of attachment and sequestration to which the curator *ad hoc* had excepted prior thereto.

APPEAL from the Fifth Judicial District Court for the Parish of Ouachita. *Potts, J.*

C. J. Boatner and *F. G. Hudson* for Plaintiffs, Appellees.

Farrar, Jonas, Kruttschnitt & Gurley, T. O. Benton and *E. T. Lamkin* for Defendant, Appellant.

Argued and submitted January 14, 1898.
Opinion handed down February 7, 1898.
Rehearing granted March 21, 1898.
Argued and submitted on rehearing May 18, 1898.
Opinion handed down June 13, 1898.

The opinion of the court was delivered by

WATKINS, J. This suit is brought upon a stated account for five thousand six hundred and ten dollars and thirty cents, coupled with an attachment and sequestration, and from a judgment in favor of the plaintiffs for the amount of this claim, and sustaining both of said writs, the defendant has appealed.

The averment on which the plaintiffs demanded an attachment is that the defendant was "a non-resident of the State," residing "in the city of Bridgeport, State of Connecticut."

Upon this allegation, duly sworn to by the plaintiffs, the court appointed a curator *ad hoc* to represent the absent defendant, and caused writs of attachment to issue to the sheriffs of the parish of Ouachita and the parish of Morehouse, in each of which the defendant owned a plantation and other property.

The allegation upon which the plaintiffs demanded a sequestration were that they had a lien and privilege as the furnishers of necessary plantation supplies on the crops of the defendant, "and that she has removed from said plantation and shipped to a cotton factor in the city of New Orleans all the crops raised on said plantations during the year 1895, and petitioners fear and believe and have good grounds to fear and believe that the defendant will conceal, part with, or dispose of same during the pendency of the suit."

In limine the defendant appeared by counsel for the sole purpose of excepting to the suit and the writs of sequestration and attachment on the ground that same were illegal, null and void for the reason that neither the citation, the writ of attachment, nor the writ

of sequestration were legally served, copies of same having never been posted on the door of the room where the Court in which the suit is pending is held, as the law requires.

That, in the alternative, she avers that she is and has been a resident of the parish of Ouachita, and verily believes that her said residence was well known to the plaintiffs when this suit was filed; and that she can not be legally brought into Court by means of a curator *ad hoc*.

That the plaintiffs' averments on which they obtained said writs are false and untrue.

That she was not making nor attempting to make any disposition of the crops or other property on which the plaintiffs had a lien and privilege, other than that agreed on between her authorized agent and attorney in fact and the plaintiffs, and that the plaintiffs well knew that she was giving to no other creditor more than themselves, a preference on the proceeds of the sales thereof.

On the same date, the curator *ad hoc* moved to dissolve the writs and dismiss the suit on the ground that the defendant was a resident of the parish of Ouachita, and not a non-resident of the State of Louisiana.

It is obvious that the sole ground of plaintiff's attachment proceedings is the alleged non-residence of the defendant.

She is sought to be brought into court, and subjected to a large judgment, through the interposition of a curator *ad hoc* only. It is not pretended that she was personally cited and served, or that a domiciliary service was made upon her.

It is not claimed that citation was issued to and served upon her attorney in fact in the pariah of Ouachita, to whom she had given a power of attorney and authority to receive service of citation.

Conceding, then, for the purpose of defendant's first exception, that the defendant is a non-resident as she is alleged to be, the jurisdiction of the court depends upon the legality and regularity of the service of the citation and writs of attachment and sequestration.

It appears from the record that the two motions to dissolve the writs and dismiss the suit were filed on the 28th of January, 1896.

The record discloses no citation directed to the defendant, and the only process by which the plaintiff sought to obtain a judgment against the defendant was through a curator *ad hoc*.

It shows further, that the writ of attachment issued to the sheriff

of the parish of Ouachita was served by "handing a copy to E. T. Lampkin, curator *ad hoc*." That the writ of sequestration directed to said sheriff was served by "handing a copy to E. T. Lampkin, curator *ad hoc*." That the writs of attachment and sequestration which were issued to the sheriff of the parish of Morehouse were not served at all, or upon any one, or in any place.

Notwithstanding the issue was directly made by the defendant's exception, that neither the citation nor the writs of attachment and sequestration had been legally served, by affixing certified copies thereof to the door of the room where the court in which the suit is pending is held, the record is barren of testimony on the subject; and the returns of the two sheriffs show an exactly contrary state of facts.

The Code of Practice provides that if the defendant "be absent or reside out of the State, in such case the sheriff *shall serve the attachment and citation by affixing copies of the same* on the door of the room where the court in which the suit is pending is held." Article 254.

It further provides that the sheriff shall serve the writ of sequestration by "serving the petition and the copy of the order of sequestration upon the defendant."

It has been repeatedly held that the formalities prescribed in these articles of the Code of Practice stand in lieu of citation in the ordinary form, and must be strictly complied with upon pain of nullity; and the court has invariably dissolved the writs on account of the failure of compliance therewith.

And amongst other cases the following may be cited, viz.:

Putnam vs. The Grand Gulf Railroad and Banking Company, 3 Rob. 232; Kraeutler vs. Bank, 12 R. 461; Mithoff vs. Dewees, 9 An. 550; Cox vs. Bradley, 15 An. 529; Woolridge vs. Hedrick, 27 An. 79; Connell vs. Medlock, 24 An. 512; Connell vs. Medlock, 25 An. 590; Irving vs. Edrington, 41 An. 671.

Plain as the terms of the Code of Practice are, and as unmistakable as the decisions of this court appear to be, the District Judge tried and overruled the defendant's motions on Wednesday, the 16th of December, 1896.

Something was said in oral argument to the effect that the defendant had waived the benefit of her motion and exception; but such waiver is not discoverable in the record. On the contrary, it appears

from the record that the defendant did not file her answer to the suit until the 28d of December, 1896—one week subsequent to the motion to dissolve being overruled—and same is prefaced by the statement that she reserved "all her rights under her exception and motion to dissolve the writs of attachment and sequestration."

In addition to the foregoing, there is no mention made in the brief of plaintiffs' counsel in reference to any such waiver.

In our opinion, it is clear that there was neither legal service of citation or writs of attachment and sequestratiou, and that the court below erred in failing to so decide.

Finding the service wanting in the foregoing essential requirements, the jurisdiction of the court did not attach.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the suit of plaintiffs' be dismissed, and the writs of attachment and sequestration be dissolved, and that all costs be taxed against the plaintiffs and appellees.

ON APPLICATION FOR REHEARING.

WATKINS, J. On the 7th of February, 1898, we handed down an opinion in this cause reversing the judgment appealed from, dissolving the writs of attachment and sequestration, and dismissing plaintiffs' suit, same having been prosecuted against the defendant as an absentee, and the service of the writs having been found defective.

Thereupon the plaintiffs' counsel made an application for a rehearing on the sole ground "that the opinion of the court is based wholly and entirely on the assumption that no citation whatever had issued to the defendant in the cause," whereas there had been, in fact (though same had been inadvertently omitted from the transcript of appeal), citations regularly served upon both the curator *ad hoc* and upon the defendant, in person, in the parish of Ouachita.

Subsequently to the filing of said application and as auxiliary to and in aid of same, we granted the plaintiffs a writ of *certiorari* addressed to the clerk of the District Court requiring him to produce the original citations referred to or certified copies of same, to be placed in the transcript in order to complete and perfect same and make it conform to the record in the court below.

The failure to transcribe the said citations into the transcript

being a fault attributable to the clerk, and the absence of same not having been brought to the attention of either counsel in the case, we were of opinion that the ends of justice would be best subserved by granting the relief sought, even pending an application for rehearing, whilst recognizing this course of proceeding as a departure from the usual course in such matters.

The original citations having been produced and filed the question for us to decide is to what extent and in what manner does their production change the situation and necessitate an alteration in our decree, our former judgment having been set aside and a new trial granted.

The following *data* from the record is worthy of consideration, viz.:

1. The citation to the curator *ad hoc* was served on him on the 16th of January, 1896.

2. The motions to dissolve were filed on the 28th of January, 1896.

3. Citation to the defendant was personally served upon her on the 25th of March, 1896.

4. The motions to dissolve were tried and overruled on the 16th of December, 1896.

5. The answer of the defendant was filed on the 23d of December, 1896, fully reserving the benefit of her exception.

It is quite obvious that the service of citation upon the defendant, in person though it were, had no effect upon the record or the rights of parties thereunder; but that they remained just as they existed on the 23d of January preceding, and subject to the exception and motion of defendant to dissolve.

Counsel for the plaintiffs on the second hearing press the argument that the defendant did not rest her case upon an exception and motion to dissolve exclusively; but that she put at issue the merits, in a limited sense, and by so doing waived the benefit of her exception, and submitted herself to the jurisdiction of the court and thereby lost the benefit of her exception.

The following is the defendant's exception *in extenso*, viz.:

"Now comes the defendant in the above entitled and numbered suit and moves to dissolve the writ of attachment and sequestration, and dismiss the suit on the following grounds:

"1. Because she has never been legally cited. That she is a resident of the parish of Ouachita, and verily believes her residence was well known to plaintiffs when the suit was filed, and that the appoint-

ment of a curator *ad hoc* to represent her, and service of citation upon him, was illegal and void.

" 2. Even if she had been a non-resident of the State, the pretended citation would still have been null, from the fact that notice or copy of citation and of writs of attachment and sequestration were not posted at the court-house door, as the law requires.

" 3. Respondent specially alleges *that the allegations* on which the writs of *attachment* and *sequestration* were issued were false and untrue. She avers that the writs of attachment and sequestration issued in this case were obtained wrongfully, maliciously, wantonly and vindictively, without just cause in either law or fact.

" Wherefore she prays that the writs of attachment and sequestration be dissolved. And further prays that the demands of plaintiff *be rejected*, and that she may have judgment against the plaintiffs for twelve hundred dollars special damages over and above those claimed in her exception and motion to dissolve, and for costs and general relief.

" (Signed) THOMAS O. BENTON, *Attorney*."

The defendant appeared for the sole purpose of moving to dissolve the writs of attachment and sequestration, though the consequence of same was expected to be the dismissal of the suit, as she was sued as a non-resident.

The motion assigns three different grounds for the dismissal of the writs: (1) Because she had never been legally cited, not being an absentee; (2) because the writs had not been served as the law requires; (3) because the allegations on which the writs were obtained were false and untrue.

Evidently neither of these grounds of exception had any relation —even the remotest—to the *merits* of the cause, which were indebtedness *vel non*.

They conclude with the prayer: " Wherefore she prays that the writs of attachment and sequestration be dissolved."

Her further prayer relates to the rejection of plaintiff's demand for the issuance and maintenance of the writs, and the allowance of twelve hundred dollars special damages.

The record shows affirmatively that the defendant's motion to dissolve was filed on the 28th of January, 1896, and was tried and overruled on the 16th of December, 1896—near twelve months having elapsed in the meanwhile. But it was not until the 23d of

December, 1896, that defendant's answer was filed; and it contained a full reservation of all her rights under her exception.

We quote the following from the brief of counsel for the plaintiffs for the purpose of showing their total want of application to the facts of this case:

"The precise question has frequently been decided:

"In 4 Ia. 91 (Rowlett vs. Shepherd) the Court says:

"It is true, as stated in argument, that citation is the basis on which every suit must rest; but appearance and pleading to the merits is always considered to cure the defect. Here the defendant appeared and pleaded to the merits, but before doing so he expressly excepted to the want of citation. Whether under our law, where exceptions, though they must proceed in order, may be put in at the same time with an answer to the merits, the objection to the want of citation could be considered as abandoned by presenting the *contestatio lites* on other matters, need not be decided. In this instance the party went to trial on the merits, without requiring a decision on the exceptions, and this we consider a clear waiver of it.

"1 An. 323 (Livingston vs. Dick), the Court says: 'The defendant in injunction filed a written motion to dissolve the injunction, in which he alleges as grounds for the dissolution:

"'1. That he had not been served with a citation, but that plaintiff had induced the sheriff to desist from proceeding in the case. This ground hardly requires notice. The objection of absence of citation was clearly abandoned by the defendant's appearance and pleading in the cause, and going to trial before a jury upon the merits, *without any disposition made of that part of the motion.*'"

Again:

"Your Honors have had this subject under consideration very recently. In the case of Williams vs. Commission Company, 45 An. 1013, defendants, non-residents of the State, were brought into court by attachment and the appointment of a curator *ad hoc*. The sheriff, in that case as in this, served the citation and petition on the curator *ad hoc*, but failed to post them at the court-house door. Defendants moved to dissolve the attachment on the ground, among others, 'that the service is illegal, the required posting of the petition, citation and writ of attachment at the court-house door not having been complied with.'

"The court says: 'In reference to the first proposition the plaintiff's counsel argue that the defendants waived the informality of service of citation and writ of attachment by their appearance in the suit, and having furnished bond and obtained the possession of the property attached. * * *

"'They appeared in the suit and unqualifiedly delivered to the sheriff their obligation to satisfy such judgment to the value of the property attached as may be rendered against him in the suit pending. It is the appearance authorized by Art. 259 of the Code of Practice. It is characterized as an appearance in the suit. The only question for our decision is, does that appearance cure the informality of service alleged?'"

The authority of those decisions is not doubted, but their applicability is lacking altogether, because the defendant's motion to dissolve had been tried and overruled before her answer had been filed.

The point is not well taken, and can not be sustained.

We do not regard it necessary to decide whether or not the defendant was an absentee or a non-resident of the State at the time of the institution of the suit, for the reason that personal service of citation upon her, while she was within the territorial jurisdiction of the District Court, during the pendency of the suit, is sufficient to submit her to that jurisdiction at the time judgment was pronounced, at least in so far as the debt was concerned.

It is evident, that the service of the citation upon the defendant personally, on the 25th of March, 1896, could not and did not have the effect of giving life to an attachment which had not been legally and validly served.

The same reasoning applies with equal force to the writ of sequestration.

In so far as the indebtedness of the defendant is concerned, there appears to be no controversy, except with respect to the sum of four hundred and eighteen dollars, which is thus explained in the brief of plaintiff's counsel:

"The evidence shows beyond question, that in January, 1885, I. I. Davis, a merchant in Monroe, La., agreed to make advances to defendant's plantations during that year. Under this arrangement, four hundred and eighteen dollars had been advanced by Mr. Davis,

when he formed a partnership with Mr. Elder, under the firm and name of Elder & Davis. The account against the defendant for four hundred and eighteen dollars was transferred by Davis to the firm of Elder & Davis. which firm continued advances to the defendant, through the year, amounting to five thousand six hundred and ten dollars and thirty cents."

This statement is fully borne out by the record, and we are of opinion that the plaintiffs are entitled to a personal judgment against the defendaut for the entire amount claimed, and for which judgment was rendered in the court below; but in our opinion now, and as it was expressed in our original decree, the writs of attachment and sequestration should have been dissolved—the cost of the principal suit being taxed against the defendant, and those incident to the writs of attachment and sequestration against the plaintiffs.

With regard to the defendant's demand for special and general damages, we think a proper allowance should be made, but we are not impressed with their gravity; nor do we think a large sum should be awarded.

The extent of the property seized should not control our judgment, notwithstanding a large amount was seized, as the proof does not show any great amounl of injury, trouble or inconvenience to the defendant. Attorneys were employed to dissolve the writs and a curator *ad hoc* was appointed.

Without particularly specifyiog the items of damage, we are of opinion that the sum of one hundred and fifty dollars would compensate the defendant for all of her outlay in expenses and attorney's fees, including the fee of the curator *ad hoc*.

It is, therefore, ordered and decreed that our former decree be set aside, and that the judgment appealed from be affirmed, except in respect to the writs of attachment and sequestration; and that in respect of same that the judgment be amended by dissolving same at the cost of the plaintiffs, and that they be adjudged and decreed to pay the defendant as damages for the dissolution of said writs the sum of one hundred and fifty dollars, and that as thus amended the judgment be affirmed.

No. 12,618.

GEORGE C. HEMINGWAY VS. NEW ORLEANS CITY & LAKE RAILROAD COMPANY.

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The proof disclosing that the driver of a small pleasure wagon had halted his team within a few feet of a street electric car track at the intersection of Carrollton avenue and Canal street, in the city of New Orleans, to wait for a steam train and an electric street car to pass, and suddenly put his horse and wagon in motion for the purpose of crossing the track, in front of another electric car which was rapidly approaching, and only a short distance away and within easy open view—*Held:* That the street car company, its agents and employees were not guilty of culpable negligence which renders the defendant liable for the damages resulting from a collision between the car and wagon.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

O. B. Sansum (*Fenner, Henderson & Fenner*, of Counsel) for Plaintiff, Appellant.

Denègre, Blair & Denègre for Defendant, Appellee.

Argued and submitted March 7, 1898.
Opinion handed down May 30, 1898.
Rehearing refused June 29, 1898.

The opinion of the court was delivered by

WATKINS, J. The plaintiff prosecutes this suit in his own right and that of his two minor children against the defendant for twenty-five thousand dollars as the amount of the damages they sustained in a collision between one of the electric cars of the company and a wagon driven by the plaintiff on the afternoon of the first of March, 1895, at or near the intersection of Canal street with Carrollton avenue, the two children being occupants of the wagon at the time.

On the trial there was judgment in favor of the defendant rejecting the plaintiff's demands, and from that judgment the latter has appealed.

The reasons assigned by the judge *a quo* for his judgment are brief and unique, and we quote them, viz.:

"Considering the evidence in this case and the opinions of the Supreme Court in the case of Snider vs. Railroad Co., 48 An. 1; Perez vs. Railroad Co., 47 An. 1391, and Schwartz vs. Railroad Co., 30 An. 18, judgment is rendered in favor of the defendant."

In his petition the plaintiff particularizes the damages claimed thus, viz.: (1) For the pain and suffering of his minor son, Ira, three thousand dollars, and for the loss of his arm twenty thousand dollars; (2) for the pain and suffering of his minor son, George, five hundred dollars; (8) and for the personal injuries, pain and suffering he sustained one thousand five hundred dollars.

The following is a brief synopsis of the statement of the plaintiff's case as it appears in his petition, viz.:

That at about 3 o'clock in the afternoon he and his two little boys were driving out Canal street in a one-horse wagon on the lower or down town side—the plaintiff's purpose being to turn into Carrollton avenue as soon as his wagon had arrived at the west crossing thereof.

That, in the exercise of due care and caution, he stopped his horse and wagon and looked and listened for any car which might be then approaching said crossing; and that while thus looking he observed one of defendant's *steam trains* going over said crossing, and that "a certain *green* car of the defendant's, about seventy feet behind said steam train, was approaching said crossing." That he also observed "a certain other car of the defendant's, about seven hundred feet behind said green car. approaching said crossing."

That both of last named street cars were being propelled by electric force, and were being operated by the defendant's agents and servants.

That he "waited at said crossing until said *train of cars* and said *green* car passed over and away from said west crossing of said Carrollton avenue; and (he) looked and observed that the other car was a long distance away from said crossing, and that there was ample time for (his) horse and wagon to go over and beyond said crossing."

That, thereupon, he "did proceed to carefully drive and guide his horse and wagon over said crossing into said Carrollton avenue, plainly in sight of defendant's said servants and agents, who then and there had complete and absolute control of said car of defendant."

The petitioner then avers that " then and there it became and was the duty of defendant's said servants to reduce the speed or motion of said car, and to prevent said car from running at a very high rate of speed, and (thus) prevent said car from running upon or against (his) horse and wagon; but defendant's said agents and servants, not regarding their said duty, wholly disregarding the presence of (his) said horse and wagon and (his) presence, and that of his sons in said wagon, * * * would not and did not reduce the speed or motion of said car, but permitted it to move on at its highest and greatest possible speed, until if ran upon and against the body of his said wagon with great force and violence," etc.

That in " consequence thereof (his) said wagon, and (he) and (his) sons were forced and driven with great violence from the point of impact over and upon defendant's cross-ties and rails, for a long distancet, o-wit, seventy feet; and then and there (his) said wagon was turned over and broken, and (he) and his sons were thrown with great force and violence upon the ground," etc.

That (his) " body was cut, torn and bruised; and his son, Ira, was thrown upon the ground and his body cut, torn and bruised; and his right arm cut, broken and crushed, and it became and was necessary to cut off and amputate (same)"—whereby said child is now and ever will be permanently maimed and disabled during his natural life.

That his " son George, was also thrown with great force and violence upon the ground, and his body cut, torn and bruised."

That he and his sons " suffered great pain and anguish, physically and mentaily," and that they " became and were sick and sore for a long time, to-wit.: forty days; and that it became and was necessary for him to pay and expend large sums of money * * * in the healing and curing his and his son's bodily injuries, etc."

The defendant first tendered a plea of no cause of action; and, simultaneously, it filed an answer, first pleading the general issue, and in the alternative, contributory fault and negligence on the part of the plaintiff, thus exonerating the company from all responsibility for the accident.

The exception was fixed for trial, submitted and overruled; and upon the statements we have extracted from the petition, we are of opinion same was correctly overruled.

As usual and necessary in this class of cases, the witnesses inter-

rogated were numerous, and their interrogation took a wide range; but the salient point, and most important question to be ascertained from the evidence adduced is, whether, from the distance of the car which caused the injury from the intersection of Canal street with Carrollton avenue where plaintiff's wagon was standing, the interval of time was sufficiently great to have justified his attempt to drive it across the track of the defendant, immediately in front and in full open view of it, rapidly approaching—the accident having occurred at about the hour of 3 o'clock in the afternoon.

The plaintiff's counsel recognized the fact that the obligation was legally imposed upon his client to look and listen for approaching trains or cars upon this highway of the city, when arriving at or near the intersection thereof with another street and before making an attempt to cross over same; and hence he was careful to make the statement in his petition that he stopped his horse and wagon near the street crossing so that one of the defendant's steam trains might pass by, and one of its electric cars likewise. That, having thus stopped, he did look, and saw another one of the defendant's electric street cars approaching him from the rear and apparently about seven hundred feet distant, and supposing that he had ample time to drive his wagon over the track with safety he attempted to do, and was overtaken and run down by said electric car—the servants and agents of the defendant operating and in charge of the car having ample opportunity to see him and his wagon, and ample time to have slacked the speed of the car so as to have avoided the collision, but they negligently failed to do so.

It is quite true that the public streets of a city are free and of equal access to all persons desiring to use them for either the purposes of business or pleasure, but neither has the right in making use of them to disregard the rights of others or to needlessly and causelessly imperil his own safety.

Between the parties there existed no contractual relations, and hence the defendant, in using and operating its electric cars, had imposed upon it only the duty with regard to strangers of observing *ordinary* care and caution. But that obligation rested equally upon the plaintiff.

A conspicuous fact in this case is admitted in the petition, and that is that plaintiff had brought his horse and wagon to a complete standstil, so as to permit one of the defendant's steam trains to pass

by, and also one of its electric cars; and that it was only after same had passed by that he attempted to drive across the track, in full view of the approaching car that caused the collision.

To accomplish this, the plaintiff had to put his horse and wagon in motion, after he had waited for the train to pass.

At this juncture it is well to make a brief synopsis of the testimony, and procure the aid of the witnesses in determining the question of doubt.

The plaintiff's witness, William Sundimaker—a boy of sixteen years of age, the driver of a milk cart—was immediately present at the place where the collision occurred, and saw the accident. He states that he was driving a two-wheeled milk cart, and had halted to pick up a boy and give him a ride. That he was standing on the Canal street bridge, at the intersection of Canal street and Carrollton avenue—the crossing next to the cemeteries. That, while standing there, he saw the steam train pass by, and then saw a green car pass by. That he saw the plaintiff standing there; and he waited for the dummy and the green car to pass by—both coming from the direction of the city. That he, also, saw a yellow car coming from the same direction; and when he first saw the green car it was over a block distant.

Being repeatedly interrogated on the subject, he said it was "over a block" distant from the crossing.

"Q. Now can you tell—give any general idea as to how far the yellow car was away, or located anywhere. If so, do so; tell the court.

"A. *When Mr. Hemmingway wanted to go across?*

"Q. *No; I mean when you first saw it?*

"A. *It was over a block.*

"Q. It was over a block?

"A. Yes, sir.

"Q. Now, tell the court, after you saw this dummy pass, how far was the green car, about, behind?

"A. About a half a block.

"Q. The dummy train when it passed? About how much did you say?

"A. About half a block, or three-quarters.

"Q. That is the block toward the city?

"A. Yes, sir.

"Q. How far away at that time was the yellow car?

"A. Well, it was about three-quarters of a block behind *the* green car.

"Q. When the dummy with its cars passed, had you or not seen Hemmingway in his wagon, or did you see him after?

"A. I saw him after the dummy passed.

* * * * * * * * *

"Q. Did you see him before the green car got up?

"A. Yes, sir.

"Q. When you saw Hemmingway where was his horse and wagon?

"A. His horse and wagon were standing on this side of Canal street.

"Q. On the lower side?

"A. Yes, sir.

"Q. Was it moving when you first saw it, or was it standing still?

"A. Standing still.

"Q. Did Mr. Hemmingway attempt to cross *before* the green car got up in front of him or *after?*

"A. Afterward.

"Q. How soon after the green car passed did he commence to cross?

"A. About fifteen feet.

"Q. Now, when Mr. Hemmingway—you saw him moving across—tell the court where the yellow car was then; about where it was?"

To this question the witness states that it was just opposite the iron gate of a green cottage in the adjacent block.

The witness describes the collision thus:

"Well, when I stopped there was the dummy going past; and the dummy passed; and I saw Mr. Hemmingway stop then. He was standing still there when the dummy passed, and then came the green car, and Mr. Hemmingway waited for that to pass. I then saw the yellow car coming, and Mr. Hemmingway goes to go across, and the car came and hit him."

The witness says Hemmingway with his wagon was about fifteen feet from the car track when he started to cross over the street in the rear of the green car. That his wagon was a spring wagon with four wheels and drawn by one horse. He says the yellow car was about one hundred and seventy-five, or two hundred feet distant at that time.

He says "I looked around at the car. I saw the car coming first, and I turned around and looked at Mr. Hemmingway."

He says another green car came up from the directiou of the cemeteries just after the accident, and its motorman gave some assistance.

He says at the time Mr. Hemmingway was attempting to drive across the track his wagon was moving slowly and he was looking at the track.

The following occurred on cross-examination, viz.:

"Q. Then according to your idea, Mr. Hemmingway didn't know that the car was coming?

"A. No, sir.

"Q. If he had looked in the direction in which it was coming he could have seen it, couldn't he?

"A. Yes, sir; but he would have been too late to see it.

"Q. Why do you say that?

"A. It was too close on him.

"Q. You mean too close to be stopped?

"A. Yes, sir.

"Q. When Mr. Hemmingway reached the track the car was too near to avoid striking him?

"A. When Mr. Hemmingway started off the car was about the iron gate.

"Q. Now you say it was too close to Mr. Hemmingway to help Mr. Hemmingway if he had seen it?

"A. Yes, sir.

"Q. You mean it was too close for the car to be stopped?

"A. Yes, sir.

"Q. So when Mr. Hemmingway got on the track the car was too near him to be stopped?

"A. Yes, sir.

* * * * * * * * *

"Q. And the car was coming along rapidly while Mr. Hemmingway was going on the track?

"A. Yes, sir.

"Q. And Mr. Hemmingway had not looked in the direction of the car?

"A. No, sir.

"Q. And if he had looked in the direction of the car he could have seen it?

"A. He would have been too late to see it."

Another eye-witness of the accident disclosed in the course of his interrogation the following, viz.:

"Q. Now, will you be kind enough to tell the court what you saw; what is within your recollection?

"A. We (the witness and Mr. Dugue) were standing there talking (when) I saw this gentleman (the plaintiff) trying to go across. The dummy had passed. He looked like he was jerking his horse to cross; he was hurrying up; and the car that run into him was coming in such full speed Mr. Dugue said 'I don't think that he can make it. * * * and as he went to walk across the car ran into him."

This witness states that he was about one hundred and fifty feet from the place of the accident, on the down-town side of Canal street, on the side of the crossing toward the cemeteries. He said that the car which came into collision with the wagon "looked to him as though it ought to have been about one hundred and fifty (feet distant) or somewhere along there" when he saw the plaintiff crossing the track in his wagon.

He states that as the steam train passed going toward the cemeteries the plaintiff was slowing up his wagon.

"A. Yes, sir; he was slowing up a little as that (train) passed; and then, as the other car was coming on, he tried to get across. He was jerking his horse up."

"Q. Then, as I understand, the steam train passed just before he got to the corner; and then, after it had passed, he urged up his horse to go across?

"A. Yes, sir; that's my idea.

"Q. He didn't stop, did he?

"A. I didn't notice that; I wasn't paying much attention to him. He was hurrying up to get across when I saw him.

"Q. Just after the steam train passed?

"A. Yes, sir."

Another witness, who was standing near by on the up-town side of Canal street, gives a more complete description of the accident than the one whose testimony has just been detailed.

"Q. Tell the court what you know about it.

"A. I was standing on the up-town side of Canal street and I saw the dummy train going toward the cemeteries. After the dummy train passed I looked and saw Mr. Hemmingway on the down-town side of Canal street, on Carrollton avenue, and then came a green car. * * *

"Q. Then came a green car from which direction?

"A. Following the dummy; the same way the dummy was going. After that came a yellow car; but between the time the green car passed and the yellow car came, Mr. Hemmingway made an attempt, by jerking his lines, to cross the track. Then the yellow car, it seemed to me, was like at the middle of the block, coming the same way the dummy and the green car did. Before Mr. Hemmingway could cross the track, the car had got about the middle of the block only before he got his cart across," etc.; that he saw the car when it struck the hind wheel of his wagon."

Again:

"Q. I understand you to say that you saw the dummy train pass?

"A. Yes, sir.

"Q. And after it passed, then you saw Mr. Hemmingway's cart?

"A. Yes, sir; after the dummy passed I saw his wagon.

"Q. Now, let us understand: on which side of Canal street were the horse and wagon?

"A. On the down-town side.

"Q. Now, was it moving or at rest?

"A. When the dummy was passing?

"Q. Yes.

"A. *The wagon was standing still when the dummy was passing; and, also, stood still until the green car passed.*

"Q. How soon after the green car passed, can you tell the court, did Mr. Hemmingway commence to drive his horse?

"A. As soon as the green car passed, he began to take his lines in his hands this way, as a driver will do, to try to cross the track.

"Q. Now, can you tell the court, if you know, * * * where the yellow car was when Hemmingway took his lines and commenced to start?

"A. He was about the end of the block—just about coming into the block, like he was at the crossing."

He said the green car was about one hundred yards behind the

dummy when the latter passed over the crossing, and the yellow car was about one block behind the green car.

The witness, Dugue, gives a more concise description of the accident than either of the preceding witnesses, as will appear from the following, viz.:

"Q. Now, will you be kind enough to tell the court what you saw and when you saw it? * * *

"A. Yes, sir. I was on Carrollton avenue, on the woods side. between Customhouse and Canal, and I saw the car coming up; it was a yellow car. When I first saw the car it was *about two hundred feet off;* it was on the river side of Carrollton avenue. I saw a wagon going out Carrollton avenue, crossing the track. About that time—about the time he got on the track—the car struck him and dragged him about thirty-five feet."

This witness says he was about two hundred feet from the place of the accident; and after it had happened, assisted in carrying Mr. Hemmingway to the sidewalk.

Again:

"Q. When was your attention first attracted to Mr. Hemmingway's wagon?

"A. When the car was *about two hundred feet* off.

"Q. And where was Mr. Hemmingway's wagon when your attention was first attracted to it?

"A. Mr. Hemmingway ought to have been about *ten feet from the track.*

"Q. Was about ten feet?

"A. About that."

He says Mr. Hemmingway "was coming from the up-town side of Canal street to the down-town side of Canal street," immediatelyin front of him.

"He was on Carrollton avenue crossing Canal street," and the car struck his wagon about the middle and on the right side.

Again:

"Q. Well, when he was at a greater distance than ten feet from the crossing in which direction was he coming then?

"A. Well, he was in the position to cross the street to go to the lower side of Canal street. His horse was looking that way. Whether his horse was stopped or was just about to start I couldn't say."

Again:

"Q. On which side of Canal street was the wagon—up-town or down-town side?

"A. Down-town side.

"Q. Down-town side?

"A. Yes, sir.

"Q. Where was the horse's head directed?

"A. Toward Customhouse street. The wagon was toward Canal street and the horse's head was toward Customhouse street. He was either coming that way or he had stopped in that position—I couldn't say which.

Another witness, who resides on Carrollton avenue on the up-town side of Canal street, and within one hundred and fifty feet therefrom, states that he witnessed the accident from his dining room window and his statement is as follows, viz.:

"I could see two blocks away on Canal street from the window toward the city, or from the city toward the woods; and I was watching the cars, and I saw Mr. Hemmingway come along with a little spring wagon with two little children. And there was a dummy coming aloug, and he stopped at the corner of Carrollton avenue and Canal street, facing toward Carrollton avenue, to go out Carrollton avenue. And as the dummy passed there was a green car came by; and as the green car came by he started to cross the track. * * * *And I saw a yellow car coming rapidly on him when he started to cross.* And I said 'Will' to a friend of mine who was there with me—I said just 'Will, look!' and no sooner than I said that, the car struck the wagon."

The statement of the plaintiff is that he entered Canal street at Galvez street and "went out on the down-town side of Canal street to Carrollton avenue and came to a stop, as the steam train was about to pass. He waited until the train had passed; and he noticed a green car behind the train, * * * about one hundred and fifty or two hundred feet distant.

"Q. Did you observe another car?

"A. I did.

"Q. What kind of a car was that?

"A. It was a yellow car.

"Q. Well, now, give us your best judgment as to the distance at that time that the yellow car was behind the green car?

"A. Well, as the green car passed, or was passing, me I noticed that the yellow car hadn't got into the block behind me.

* * * * * * * * *

"Q. When you came to Carrollton avenue what did you do?

"A. I came to a stop.

"Q. And when you came to a stop where were the passenger cars?

"A. *The train was passing me as I stopped.*

"Q. When did you move your horse forward?

"A. Immediately after the green car had passed."

He states that when he halted his horse and wagon his horse's head was directed toward Carrollton, and was *within six feet* from the down-town rail of the track of the railroad company—that is to say, that the distance from the horse's head was equal to one-half of the length of the horse and wagon, which he places at fifteen feet.

That he resumed motion "immediately after the green car passed" him.

He further says that "when he called bis horse up his attention was directed to his horse to call him up. *As he called him up and got him in motion* (though he had seen the car before) the car that struck him had (reached a point) opposite an iron gate that is on Canal street; and that he has since measured the distance (and found it to be) just two hundred and twenty-five feet from the crossing. When he got his horse in motion he noticed that the car was that far away from him and coming rapidly," etc.

He states that the block in question is, by actual measurement, four hundred and eighty feet front on Canal street.

On cross-examination the following occurred, viz.:

"Q. Well, Mr. Hemmingway, the real cause of this accident, as I understand it, is that you attempted to go across this track while the car was rapidly approaching, and it got there before you crossed over?

"A. Yes, sir."

One of the defendant's witnesses, who was driving into the city from the cemeteries in company with his sister, stated that he was at the intersection of Canal street and Carrollton avenue, on the up-town side, and witnessed the accident.

That he noticed a man "evidently urging his horse to get ahead of an approaching car, and saw that a collision was inevitable from

the fact that he couldn't succeed in making the distance across. That he halted immediately abreast of it."

"Q. Where was he when you first saw him?

"A. He was at right angles with the road, crossing the intersection, urging his horse to go across before the approaching car. * * *

"Q. How far was he from the intersection when you first saw him?

"A. Well, he was, I suppose, * * * It was too sudden to figure on. Of course, he was right on the track, otherwise his horse could not have gotten across. He had gotten his horse across.

"Q. Have you any idea about how far from the track he was when you first saw him?

"A. Well, I should judge about a distance of fifteen or twenty feet.

"Q. A distance of about twenty feet?

"A. Yes, sir; driving up—hurrying up.

* * * * * * * *

"Q. How far was the car which collided with the wagon from the crossing where the wagon was struck, when you first saw it?

"A. I should judge one hundred, or one hundred and fifty feet—over one hundred and fifty feet approaching—approaching rapidly."

Again:

"Q. Now did you notice the motorman at all before the accident occurred?

"A. Yes, sir; I saw him braking his car.

"Q. You saw him put the brakes on the car?

"A. Yes, sir; braking his car—making every effort to stop it.

"Q. Before the accident occurred?

"A. Yes, sir.

"Q. You are certain of that?

"A. Yes, sir; I will swear it.

"Q. About how far off was he then?

"A. He was almost on to the wagon. He was using his efforts to stop it; of course he was trying to stop it."

He states that Mr. Hemmingway "was crossing from the lower side, going to the upper side, and the car was running toward the cemetery on the down-town side."

One witness testifies that he took Mr. Hemmingway's horse and wagon and placed them in the exact position in which his testimony assigns them—that is to say with the horse's head just six feet from

the down-town rail of defendant's track, and that on putting the horse in motion, he cleared the track with both horse and wagon in *nine seconds;* and in the course of several experiments he cleared the track once in *eight seconds.*

The same witness states that he has measured the distance from the iron gate, which is spoken of by the witnesses as being the position of the yellow car at the moment of time when Hemmingway started his horse, and ascertained the distance to the position the wagon was in to be two hundred and twenty-five feet. He also states that he has frequently since the accident timed the defendant's electric cars over the intervening space and ascertained that they covered same repeatedly in seven seconds.

By this means it is practically demonstrated that the possible difference in the relative time within which these two respective distances can be made by an electric car on the one hand, and the horse and wagon on the other, is only one and a half or two seconds.

The witness' conclusion as the result of this calculation is that the difference in speed is nine to one—that is to say that the horse and wagon would cover the space of twenty-five feet (the length of the horse and wagon) during the time the car would cover two hundred and twenty-five feet; that is to say, the car would cover twenty-five feet nine times to the horse and wagon once.

But the horse was at least six feet from the down-town rail of the track, and that distance should be added, thus making the true distance thirty-one feet—that is to say, a little less than one-fourth the distance the horse and wagon had to travel in order to clear the lower rail of the track, and this would require two additional seconds of time and thus necessitate a collision with the car. Nor is the slackened speed of the yellow car taken into consideration in this calculation.

In addition to the foregoing, the width of the track between the rails has not been taken into the account, and one second more would be required for the horse and wagon to clear the upper rail of the track.

Having gone over the evidence very carefully and made the foregoing copious extracts therefrom, we are constrained to say that the trend of it all is to sustain the judgment appealed from.

There are, of course, some inaccuracies of statement in the testimony of the witnesses: but that is a necessity of a case, the par-

ticulars of which are given by witnesses who profess to detail the circumstances of a collision that happened as quickly as an electric shock—the main point of difference between them being with regard to the distance of the yellow car, which caused the collision, from the horse and wagon at the moment the latter was first set in motion to cross the track.

But taking the estimates of Mr. Hemmingway as correct, that the car was two hundred and twenty-five feet away, and his horse's head only six feet from the down-town rail of defendant's track, the mathematical calculation of the witnesses demonstrates that a collision was inevitable unless the car could be stopped, and that seemed impossible.

The proof shows indisputably that the motorneer tried unavailingly to arrest the speed of the car. Having seen the horse and wagon at rest, there was no occasion for him to have made that attempt until after the horse and wagon was suddenly put in motion; and then the brief space of eight seconds was too short a period to render his efforts available.

The decisions to which the judge *a quo* referred are ample to support his decision.

Judgment affirmed.

Rehearing refused June 29, 1898.

No. 12,761.

THE STATE OF LOUISIANA VS. FRANK M. ROBERTSON.

Where a party accused of crime .having been tried and found guilty, has appealed and succeeded in having the verdict and judgment against him set aside for erroneous instructions given to the jury, it is ordinarily too late for him, on the return of the case to the trial court, to move to quash the indictment against him. He would have to present a very strong exceptional case to warrant a departure from this rule.

Ordinarily, such a motion should be made before pleading to the indictment.

Objections to a *venire* should properly be urged by motion to set it aside instead of by a motion to quash indictments presented by the grand jury selected and empaneled from its members. State vs. Britton, 50 An. 280.

Where defendant in a criminal case, represented by counsel, seeks to justify tardiness in moving to quash the indictment against him on the ground that the facts therein urged were not known before the motion was made, it should be shown that his counsel, as well as himself, was ignorant of the facts.

State vs. Robertson.

APPEAL from the Fourth Judicial District Court for the Parish of Jackson. *M. F. Machen, J.*

M. J. Cunningham, Attorney General, *A. B. Hundley*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellant.

Fred. W. Price and *B. P. Edwards* for Defendant, Appellee.

Submitted on briefs March 26, 1898.
Opinion handed down April 4, 1898.
Rehearing refused June 29, 1898.

A regular term of the District Court for the parish of Jackson was begun on Monday, the 15th of February, 1897, on which day a grand jury was empaneled and sworn, and after being charged by the judge, entered upon the discharge of its duties.

On Wednesday, the 17th of February, the grand jury returned an indictment against Frank M. Robertson for manslaughter.

On February 23, 1898, defendant filed a motion to quash the indictment, alleging that the grand jury which found the bill was not drawn and empaneled according to law, and that the grand jury was not a legal grand jury under the laws of the United States; that all their acts and findings were illegal, null and void.

1. That the commissioners were not duly and legally notified to be present at the drawing of said jury, on December 15, 1896, from which drawing the grand jury which found and presented the bill was drawn and made up, and all the jury commissioners were not present at the said drawing; that W. A. Downs, commissioner did not sign the *proces verbal*, and the *proces verbal* did not state whether he was present, and whether he was ever notified or summoned to be present.

2. That the *proces verbal* of the drawing of the jury failed to state for what term of court the jury was drawn to serve.

3. That the *proces verbal* did not state or recite that the jury commissioners were notified of the time and place for drawing the jury, as required by law.

4. That it did not recite by whom the names of the said jury were drawn from the general *venire* box.

5. That the *proces verbal* had never been filed nor recorded by the clerk of the court as required by law.

6. That it was not written in the handwriting of the clerk of the court, nor any of the jury commissioners.

7. That it failed to state that the *venire* was put into an envelope and sealed as the law directs.

8. That it was not properly authenticated.

9. That the *proces verbal* recited in error, that said drawing was in the clerk's office, when, in fact and in truth, it was drawn at the storehonse, or place of the commercial business of W. R. Carroll, and contrary to law.

10. That it stated in error that the witnesses were freeholders, when, in fact and in truth, they owned no land at the time of the drawing.

11. That in addition to the illegalities above stated to the drawing of the jury—that the grand jury which presented the bill were illegally empaneled; that in empaneling the grand jury, the sheriff drew from a box in which the ballots were, the fifteen names which, with the foreman, constituted the grand jury, which presented the bill, instead of drawing same from the sealed envelope as the law directs.

That all of said facts were unknown to the defendant until some time during the month of January, 1898. That from said facts irreparable injury had resulted to the defendant.

Defendant supported the motion by his affidavit.

On the trial of the motion to quash, defendant offered the *proces verbal* of the proceedings of the jury commission as *rem ipsam*, and placed W. R. Carroll, the clerk of the District Court, and *ex officio* one of the jury commission, upon the stand as a witness.

After having caused the witness to testify to the fact that he was clerk of the District Court for the parish of Jackson, he was asked by defendant's counsel where the *venire* or jury was drawn on the 15th December, 1896, when objection was made by the State that the *proces verbal* of the drawing was the best evidence to prove the time and place of drawing—that it was an official document bearing the official seal and signature of a public officer and could not be disproved or attacked by the officer as a witness upon the

stand. The objection was overruled and the witness answered that the *venire* of jurors was drawn at his store; that the *proces verbal* was not in his handwriting, nor in that of any of the jury commissioners. On cross-examination he was permitted to be asked why it was drawn at that place, and answered that it was done as a matter of convenience. Witness testified that the jury commissioners for the year 1896 were W. A. Down, J. S. Moore, T. E. Ray, W. E. Smith and T. J. Smart. That he had summoned all of the commissioners to be present at the drawing; that the signatures of the commissioners affixed to the *proces verbal* and list were the genuine signatures of the parties named, having been made in his presence. Defendant objected to the clerk of the court being questioned as to whether he had summoned all the jury commissioners to attend the drawing on the ground that if such was the fact it should have so appeared on the face of the *proces verbal*, and that that instrument could not be altered, modified, eked out or explained by parol without an allegation of fraud or error. He also objected to the same witness being asked the reason why the *venire* was drawn at his store instead of at the clerk's office, on the ground that the question simply submitted a matter of opinion to the witness, and the answer would be self-serving. The objections being overruled defendant excepted.

Defendant offered an extract from the tax roll of the parish of Jackson for the year 1896, showing the assessment made as to S. M. Talbot. The district attorney objected to the same for the reason that it was a copy of the original, and not admissible until the loss of the original was shown. The objection was overruled aud a bill of exceptions was reserved.

The District Court sustained defendant's motion and quashed the indictment.

The State appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. This case is before us for the second time. Defendant having been convicted of manslaughter appealed. This court having found error in one of the instructions given to the jury, set aside its verdict and the judgment based upon the same and remanded the cause for further proceedings. The case is reported in 50 An.

The State's contention is that the issues raised by the motion can not be presented for the first time after plea, trial, conviction and sentence. That defendant can not be heard now to raise objections to the manner in which the *venire* was drawn; that they came too late after verdict; *Citing* State vs. Canady and Trimble, 16 An. 141; State vs. Thompson, 28 An. 187; State vs. Watson, 31 An. 379; State vs. Miles, 31 An. 825; State vs. Washington, 33 An. 896; State vs. Wittington, 33 An. 1403; Bishop Criminal Procedure, Secs. 866, 887; Wharton Criminal Pleading and Practice, Secs. 344, 350, 610. That, Mr. Wharton says, "irregularities in selecting and empaneling the grand jury which do not relate to the competency of individual jurors may usually be objected to by challenge to the array or by motion to quash. This must, of course, be before the general issue. Sec. 344." Counsel say: "Besides this the question should have been raised on the first appeal. The judgment thereon is *res judicata* upon every issue involved, whether raised or not. This is the same indictment he was then tried on."

"If the matter be open to inquiry it would be against public policy to permit a public officer to contradict as a witness what he had certified to officially."

Defendant asserts that at the time the motion to quash was filed the plea of not guilty had been withdrawn. That the proceedings of the grand jury were absolutely null, void and without authority of law; that the nullity can be taken advantage of at any time, particularly if it was alleged and shown that he was not before aware of the nullity. That this was not a motion for a new trial, nor in arrest of judgment; it was a motion to quash, after plea to the bill was withdrawn. That there was no issue pending and no issue joined, and the motion was made as early as it was possible to do so at the first term of the court after the discovery. That defendant was deceived by the statement made in the *proces verbal* that the jury was drawn at the court house which statement was clearly put at issue by the motion to quash as error and a fraud on defendant. That he could not be held for laches in not discovering the facts earlier. He cites State vs. Jones, 8 Rob. 617; State vs. Parks, 21 An. 251; State vs. Thompson, 32 An. 879; State vs. Wittington, 33 An. 1403, and State vs. Griffin (not yet reported).

The third section of Act No. 99 of 1896 relative to juries in and for the State of Louisiana, and jury commissioners and their duties,

declares that three of the jury commission, together with the clerk of the District Court, shall be a sufficient number to perform the duties imposed by the act, provided the members shall have been duly notified by the clerk of the District Court of the time and place designated by him for the meeting of said commission, which notification shall appear from the certificate of the clerk in case of the absence of any member thereof. The fourth and fifth sections fix the place of meeting at the office of the District Clerk, and direct that the proceedings shall be conducted in the presence of two or more competent and disinterested witnesses, freeholders and residents of the parish; that a *proces verbal* and record of the proceedings and a list of the parties drawn should be kept of each meeting of the commission, which should be signed by the commissioner present, the witnesses and the clerk of court. That a copy of the *proces verbal* of the meetings of the commission and list of jurors drawn shall, when completed, be delivered to the sheriff, also a copy of the list to be published in the official journal of the parish, if there be one, or in some other newspaper published in the parish. If there be no official journal or other newspaper in said parish he is directed to post a copy of such list on the door of the court house. The eleventh section declares that all objections to the manner of selecting juries, or to any defect or irregularity that can be pleaded against any array or *venire*, must be urged on the first day of the term, or all such objections shall be considered as waived and shall not afterward be urged.

Notwithstanding the generality of the terms used in this statute, cases may arise which from their special character and the circumstances connected with them may have to be necessarily and unavoidably read out of it as not falling within its grasp. The remedy resorted to by the defendant for relief was through a motion to quash the indictment found against him. Bishop, in the third edition of his work on Criminal Procedure, Vol. I, Sec. 762, under the subheading "When Such Motion Is To Be Made," says: "The favored time for this motion, when it is most likely to be granted, is before plea, and some of the cases appear even to hold that after plea, and especially after issue joined, it is too late (citing authority). Hence, by some tribunals, the motion to quash will be heard only on the withdrawing of the plea by leave, or if the hearing is simply by consent of court, it will operate as such withdrawal. The New Jersey court

deems that to make way for this motion leave to withdraw the plea of not guilty should be granted as of course. But the better doctrine we believe to be that in the absence of statutory changes of common law rules the motion has no relation to any plea; that it should be more favored at an early stage of the proceeding than at a later; that whenever presented the court will exercise its discretion whether or not to hear it then; that it may be heard yet will not ordinarily, even during a trial and even after the evidence is in, and, in short, it is in order without any withdrawal of pleas at any time down to the rendition of the verdict. After verdict it can not be received." Citing State vs. Barnes, 29 Maine, 561; State vs. Stuart, 23 Maine, 111; Thomasson vs. The State, 22 Georgia, 499; Rice vs. The State, 3 Kansas, 141; State vs. Jarvis, 63 N. C. 556; State vs. McCarty, 4 R. I. 82.

In order to avoid the effect of this rule of practice and the express provisions of our statute, defendant would have to present a very strong, exceptional case to justify us in granting him relief at this late stage of the proceedings.

He says that he presents such a case, as the law is positive that meetings of the jury commission should be held at the office of the clerk of the District Court; that in State vs. Griffin we declared that a drawing made elsewhere was fatally defective; that he could not be expected to urge an objection of which he had before no knowledge.

The defendant did not, prior to the first trial, make any challenge to the array. He pleaded to the indictment without objection, and was tried by a petty jury of whom he made no complaint. He was found guilty and appealed. The verdict of the jury and the judgment based thereon were set aside on appeal, by reason simply of an erroneous instruction of the court, and the cause was remanded for a new trial. If tried he will go before a jury drawn under new conditions. The particular motion to which defendant has had recourse for relief is leveled exclusively at the legality of the *grand jury* which returned an indictment against him, and to its action in charging him as it did with the crime set out in the indictment. It is not directed against the petty jury which tried him. The special purpose of the motion is to strike at the indictment which was the foundation of the action and force the returning of a new indictment. To permit an accused party to hold such action in reserve until after

verdict and then declare that he was not before advised of the facts upon which such an application rested would have a direct tendency to cause parties to abstain intentionally from making inquiry into matters which vitally affected them, and which inquiry would as well disclose then as later, and enable them after taking the chances of a verdict to set up (should the original indictment be set aside) the intermediate running of the statute of limitation as against a new indictment or information. Such a practice wouid lead to grave injury in the proper administration of justice, and be justified by no counter injury which would result to the accused by permitting the cause to be carried on under the original indictment. The object of the finding of the indictment was to ascertain through responsible parties whether there existed such a condition of facts as would justify the placing of a particular person upon trial upon a charge of the commission of a particular crime. When matters proceed so far as to reach a verdict of guilty after testimony, taken publicly in open court, contradictorily between the parties without objection to the personnel of the petty jury which found the verdict, we think the danger of any injury having been inflicted upon the accused simply by reason of the place where the grand jury which brought the charge was drawn without any attack upon the personnel of the grand jury rests upon a very narrow basis and is more imaginary than real. The setting aside of a verdict on appeal, of course, withdraws from it any vital force for the purpose of a conviction, but we think it leaves behind it an effect sufficient to enable the indictment on which it is based to withstand any attack upon it certainly in the absence of any charge of its having been returned by prejudice or other improper motives, or by improper persons, or as having been returned without a sufficient basis on which to place the subject matter of the indictment before the country for examination and trial.

We note in this particular case, that while the defendant has taken oath to the fact that neither he nor his attorneys were cognizant of the state of facts on which the motion to qua h is based, that counsel themselves have taken no such oath. The granting of a motion to quash is, we think, more or less a matter of discretion. We see no ground in this case for the exercise of this discretion in favor of the accused; on the contrary, we think that were we to do so it would be on no sufficient basis and would lead up to prejudicial

results as a precedent. We do not say that some special case might not be presented which would justify exceptional action in this matter.

This view of the situation dispenses us from passing upon other issues, but we can not permit the occasion to pass without expressing our great disapprobation with the course pursued in this case in making out and signing a *proces verbal* containing the recitals found in that filed in this proceeding. The clerk of the court testified as a witness that the recital made in the *proces verbal*, that "the jury was drawn at the office of the clerk of the District Court," was not true; that it was for convenience drawn at his own store. In matters affecting the honor, the liberty and the lives of their fellow-citizens, parties charged with public duties should feel a heavier sense of responsibility than was felt by the jury commission and clerk of court in this case. We need not now decide whether the clerk would or would not be authorized as a witness to contradict facts certified to by him officially, nor whether he should have been called on to amend or have been permitted to amend the *proces verbal*, for we trust this will be the last occasion where such a question will arise. It is sufficient for us to say that the *proces verbal* directed to be drawn np by Sec. 5 of Act 99 of 1896 is not an authentic act in the sense of Art. 2236 of the Civil Code, and that it can be controverted if erroneous by parties affected by false recitals thereon. The signatures of the parties to the instrument carry with them simply *prima facie* presumption of the truthfulness of the recitals made. Marvel vs. Manouvrier, 14 An. 5; Grant vs. Harris, 16 An. 323; Hennen's Digest, Vol. 1, page 212, No. 3.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the action of the District Court in sustaining defendant's motion to quash the indictment found against him herein be and the same is hereby set aside; the indictment is reinstated and the cause is remanded to the District Court for further proceedings according to law.

Rehearing refused June 29, 1898.

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115 848

No. 12,610.

UNION NATIONAL BANK OF NEW ORLEANS VS. HENRY HYAMS, TRANSFERRED AND CONSOLIDATED WITH FIREMEN'S BUILDING ASSOCIATION VS. HENRY HYAMS.

Garnishment proceedings taken out in a case after and under final judgment therein, in one sense may be said to be incidental to the main suit as they are based thereon, but they are separate and distinct proceedings with new parties, and must be dealt with as such; they are not brought before the Supreme Court through an appeal taken from the judgment in the main suit.

A building association to whom one of its stockholders is indebted for stock subscription, and also on a note secured by mortgage, can not be forced by a junior mortgagee to impute partial payments made by the debtor upon the mortgage debt when under the contract between the parties they were to be imputed to the stock indebtedness. Richard vs. Building and Loan Association, 49 An. 484.

ON APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

Carleton Hunt for Union National Bank, Plaintiff, Appellant.

Dart & Kernan for Firemen's Building Association, Plaintiff, Appellee.

Lazarus, Moore & Luce for Defendant Hyams and for Mrs. Violet Strauss Hyams, Intervenor and Opponent, Appellees.

Argued and submitted January 26, 1898.
Opinion handed down March 7, 1898.
Rehearing refused June 30, 1898.

On the 31st of July, 1890, the Firemen's Building Association sold to Henry Hyams for six thousand dollars certain property described in the act of sale. Hyams was at that time a stockholder in the association, owning thirty of its shares. In representation of the price the purchaser executed his note for six thousand dollars payable to the order of the association six years after date (with privilege of renewal) bearing interest at six per cent. from date, which interest was payable weekly, in accordance

with the charter of the association and the penal clauses stated in the act of sale. In order to secure payment of the note with its interest, Hyams specially mortgaged, in addition to the vendor's privilege retained, the property purchased under the clause *de non alienando*. The act of sale contained the usual clauses as to attorney's fees, insurance, taxes, etc.

It was agreed between the parties that if the purchaser should pay the interest on the note weekly and also the instalments due upon the note punctually, then the principal should not become due until the value of the thirty shares of stock should become equal to the amount of said indebtedness with all interest and costs that might be due upon the same, at the happening of which event the stock and said indebtedness should cancel each other, the stock and indebtedness being alike extinguished, and thereupon the association should cancel the stock, and give the purchaser full receipt and acquittance and surrender the note. In case the purchaser should, for the term of six months, fail to pay the weekly instalments due on the stock, or the instalments of weekly interest, or any portion thereof, or any or all costs and fines that might be due by him, such failure, it was agreed, should at once, without demand, without putting in default and as penalty, make the note, with all back interest, become immediately due and exigible by executory process. It was further agreed that any forfeiture of stock under the provisions of the charter should have a similar effect, these clauses being declared to be penal and imperative, and to obviate the necessity of putting in default. It was further agreed that if at any time before the value of the stock should be equal to his indebtedness the purchaser should desire to pay, settle and cancel the indebtedness he should have the right to transfer to the association his stock, with interest and accumulations thereon, in part payment of such indebtedness, provided he paid in cash the balance of such indebtedness, and on such transfer being made the association should cancel said stock and give to the purchaser a proper receipt and acquittance and surrender to him the evidence of his indebtedness. In the event of the note becoming due and exigible, and the value of the stock not being equal to the amount of the indebtedness, the association bound itself to renew or extend the note, in accordance with the terms of the charter.

On the 2d of October, 1895, the Firemen's Building Association

obtained executory process for the payment of their mortgage note of six thousand dollars. The property went to sale under the seizure on the 27th of November, 1895, one Jessie W. Atkinson becoming the purchaser for the price of six thousand and twenty-five dollars. The return of the sheriff upon the writ showed a balance of five thousand five hundred and sixty-four dollars and fifty cents, after payment of costs, which amount he declared he held in his hands, subject to orders of court, by reasons of third oppositions filed in the proceedings and execution levies upon the funds.

One of these oppositions was filed on January 26, 1896, on behalf of the Union National Bank of New Orleans; another on November 12, 1895, by Mrs. Violet Hyams, wife of Henry Hyams. The bank in its opposition claimed to be a creditor of Hyams by reason of a judgment obtained by it on the 7th of February, 1894 (duly recorded), for five thousand dollars with interest, and by reason of holding as owner through payment with legal subrogation, a judgment which had been obtained by the Rosetta Gravel and Paving Company against Hyams for three hundred and sixty-nine dollars, payment of which judgment, it was alleged, was secured by privilege. The bank claimed to be entitled to be paid out of the proceeds of the property seized over the seizing creditor and all other parties.

Mrs. Hyams, in her opposition, claimed to be the owner of the property through a transfer made to her on the twenty-third day of August, 1893, by way of a "*dation en paiement*" in part payment of paraphernal claims due her by her husband. She averred that by reason of this ownership which she acquired subject to the prior special mortgage rights of the association she was entitled to be paid by preference over all parties other than the plaintiff in executory proceedings, any surplus which might be left after paying the amount called for by the writ of seizure.

Anticipating an attack which might render an alternate or contingent prayer for relief necessary, she averred that she had a claim against her husband which, by virtue of the registry thereof, had become secured in her favor by mortgage. That this claim would become operative and in full force should the rights of ownership which she asserted be not maintained. This mortgage claim she advanced contingently, praying for its payment by preference over all parties other than the association. She denied that the Rosetta Gravel and Paving Company's judgment was secured by privilege.

At the time of this sale the property was standing also under seizure made on the 4th of June, 1894, upon the judgment of the National Bank against Hyams, but its sale under that writ had been stayed by an injunction taken out on the 9th of June, 1894, by Mrs. Hyams, claiming ownership under the *dation en paiement* made to her.

The issues raised in that injunction suit were not passed on therein, for the reason that before they could be taken up the property was sold in the executory proceedings, and the contentions of the parties were discussed under different conditions.

In the intervention and third opposition filed by the bank in the executory proceedings, it alleged that it had been advised that the mortgage upon which the Firemen's Building Association was proceeding, had been satisfied by defendant by credits on the stock subscription and by other payments made by him, and that there was a balance due him by the association, amounting to
which the bank was entitled to have so appear, and which it would establish on the trial of the opposition.

On the 13th of March, 1896, the Union National Bank directed the sheriff to make a seizure under the writ of *fieri facias* which had issued in its suit against Hyams. The sheriff had, on the 4th of June, 1894, under that writ, seized the property which Hyams had mortgaged to the Building Association, and had advertised it for sale, but the sale had been enjoined (as stated) on the 9th of June, 1894, at the instance of Mrs. Hyams. Under this direction of the bank the sheriff seized in the hands of the Firemen's Building Association all goods, rights, credits, etc., which it might have in its possession, and simultaneously served upon it interrogatories (such as are usual in garnishee proceedings), which it had been ordered to answer. It may as well be stated here as well as anywhere else that the association, through some neglect or inadvertence, failed to answer these interrogatories; that, on motion of the bank, they were taken for confessed, and a judgment was rendered in its favor against the garnishees for five thousand dollars, but that on a rule taken before the judgment was signed, it was set aside on the 17th of June, 1897, and the interrogatories were subsequently answered; that the bank contested this action of the court, but that that issue has not yet been definitely disposed of, and that the question whether that action is properly before the Supreme Court for review on this appeal is one of the matters submitted to the court.

At the instance of the bank the case of the Union National Bank vs. Henry Hyams was consolidated with that of the Firemen's Building Association vs. Hyams. While these matters were in progress Mrs. Violet Hyams had brought suit against her husband, claiming a separation of property, and praying judgment on a moneyed demand which she advanced. In this suit of Violet Straus vs. Henry Hyams, she obtained judgment on the seventh day of September, 1894, as prayed for. Under that judgment she caused a *fieri facias* to issue and under that writ the sheriff made a general seizure in the hands of the Firemen's Building Association on the second day of October, 1894. The Sheriff simultaneously served upon it interrogatories as garnishee, which the court had ordered it to answer at the instance of Mrs. Hyams. The association on the fifth day of November, 1894, answered that it held in its possession thirty shares of its own stock, which was standing, however, in the name of Mrs. Violet Hyams, wife of Henry Hyams, and that the stock was pledged to it to secure its loan of six thousand dollars to the husband of Mrs. Hyams.

On the first day of May, 1895, Mrs. Hyams took a rule on the association to show cause why under its answers the stock mentioned should not be sold and applied to the enforcement of her judgment and execution. No action on that rule was taken in that particular proceeding, but in the intervention and third opposition which Mrs. Hyams filed in the suit of the Firemen's Building Association vs. Hyams she recited the fact that a partial payment had been made to her by her husband on the paraphernal claims which she held against him through the *dation* to her of the property under seizure, and of which she claimed to be the owner subject to the mortgage rights of the building association; that she had thereafter obtained a judgment of separation of property from her husband coupled with a money judgment for the balance of her paraphernal claims remaining unpaid; that under a writ of *fieri facias* issued under that judgment the sheriff had seized the stock pledged as collateral to secure the debt of the bank, and that said stock had also been seized through the garnishment proceedings.

That by reason of said seizure and garnishment she had acquired a lien and privilege upon said stock and a right to subject it to the payment of her claims and judgment; that the stock was severable and subject to seizure; that the association had no right to credit said stock upon the debt due for the purchase price of the property and she opposed any such credit.

In addition to her prayer for payment out of the proceeds of the property seized and sold she contingently prayed that her lien and privilege upon the shares of stock resulting from the seizure and garnishment be recognized and enforced, and that the same be sold to satisfy the said lien and judgment.

The bank and Mrs. Hyams each answered the third opposition filed by the other In the suit of the Firemen's Building Association vs. Hyams. The bank attacked the judgment of separation of the wife against the husband as being an absolute nullity by reason of its non-execution promptly according to law, and the privilege claimed by her under her seizure and garnishment on the ground that she had not traversed the answers of the garnishees within the time prescribed by law for her doing so.

Mrs. Hyams pleaded the prescription of one year as against these attacks upon her, and in her answer tc the third opposition filed by the bank denied that it had ever made a legal seizure of the stock under the writ of *fi. fa.* which had issued on the 4th of June, 1894, averring that the seizure and garnishment proceedings taken thereunder were absolutely null and void, as the sheriff had at that time no writ of *fi. fa.* in his hands under which the seizure and garnishment could be made, the writ having expired long before that date.

On the 17th of June, 1897, as has been stated, the court rendered judgment in the matter of the rule taken by the Firemen's Building Association on the bank to set aside the judgment it had obtained *pro confesso* setting aside the judgment.

On the same day (17th June, 1897), it rendered judgment overruling the pleas of prescription filed by Mrs. Hyams, also an exception of no cause of action which had been filed by the Union National Bank.

It further decreed that the intervention and third opposition of the bank be maintained to the extent only of ordering that out of the proceeds of the property sold under executory process there be paid to it by preference the sum of three hundred and sixty-nine dollars and sixty-five cents and costs, but that in all other respects the opposition be dismissed. It further decreed that the balance of the proceeds of sale be applied to the payment of the mortgage claim of the Firemen's Building Association against Henry Hyams, which claim is for six thousand dollars with interest thereon, together with attorney's fees, insurance, premiums, taxes and costs.

It further decreed that the pledge made by the defendant, Hyams, to the association of all instalments paid and to be paid on thirty shares of the capital stock of said association standing on its books in the name of his wife, Mrs. Violet Hyams, represented by certificates Nos. 1301 and 1719, be recognized and enforced, and that the balance of said association's claim against Henry Hyams be paid by preference out of the said pledged instalments on said thirty shares of stock. It was further decreed that the third opposition of Mrs. Violet Hyams be maintained in so far only as to recognize the validity of the seizure and garnishment made by her of the said thirty shares of stock and to order that the same be sold in due course of law to satisfy the judgment obtained by her against her husband, Henry Hyams, for the sum of two thousand eight hundred and thirty-six dollars, with costs, and with privilege and mortgage dating back to August 31, 1893; that in all other respects the said opposition be dismissed.

The following entry appears on the minutes of the court of June 23, 1897:

Civil District Court, Division "E"—Consolidated Cases.

FIREMEN'S BUILDING ASSOCIATION
vs.
HENRY HYAMS. } No. 47,152.

Civil District Court, Division "E."

UNION NATIONAL BANK OF NEW ORLEANS
vs.
HENRY HYAMS. } No. 41,258.

"On motion of Carleton Hunt, attorney for the Union National Bank of New Orleans, and on suggesting to the court that there is error to the prejudice of said bank in the judgment rendered in the above named cases. June 17, 1897, and signed June 23, 1897. It is ordered by the court that the bank be allowed a suspensive appeal from said judgment, returnable in the Supreme Court on the first Monday in November, 1897, and that the amount of the bond of appeal be fixed at six hundred dollars."

The bank furnished, on the same day, an appeal bond, with the same caption as that of the motion for an appeal, the recitals of which bond were, that the bank had that day filed a motion of appeal from a final judgment rendered against said bank in the suits of Firemen's Building Association vs. Henry Hyams, No. 47,152,

Union National Bank of New Orleans vs. Henry Hyams, No. 41,258, consolidated cases, Nos. 47,152, 41,258 of the Civil District Court for the parish of Orleans, on the seventeenth day of June, 1897, and signed on the twenly-third day of June, 1897. Mrs. Violet Hyams moved in the Supreme Court that the judgment be amended as follows:

That the act of *dation en paiement* to her entered into on August 23, 1893, be maintained, and she be declared the owner of the property therein conveyed and entitled to the proceeds thereof.

If the said act of *dation* is not maintained, and her levy upon the stock under the *fieri facias* and garnishment proceedings and under her judgment are not maintained as under the judgment of the lower court, that her privilege resulting from the registry of the act of *dation en paiement* of August 23, 1893, and her tacit mortgage resulting therefrom, be recognized and enforced on the property and its proceeds. That the demand of the bank to be subrogated to the judgment of the Rosetta Gravel Paving and Improvement Company, and to have the paving lien and privilege recognized and enforced on the property and its proceeds, and paid by preference, be rejected.

The opinion of the court was delivered by

NICHOLLS, C. J. The first question we are called on to consider is whether the action of the District Court, setting aside the judgment which the Union National Bank had obtained the Firemen's Building Association *pro confesso* for neglect to answer the interrogatories propounded to it, is before us for review. Appellant contends that it is; the Firemen's Building Association that it is not. Though this action of the court was taken on the 17th of June, 1897, the same day in which the final judgment appealed from was rendered, it was not embodied therein, but was made the subject matter of a separate and distinct ruling. The judgment in the main case was signed by the District Judge—the action taken upon the rule to set aside the *pro confesso* judgment was unsigned. The motion for an appeal, the order of appeal and the bond of appeal all refer to the judgment appealed from as being that rendered on the 17th of Jnne and signed on the 23d of June. We do not think the ruling of the court on the motion to vacate the judgment in favor of the Union National Bank

against the association is before us as part of the final judgment appealed from. Appellant contends that granting this to be so, it comes properly before us as one of the interlocutory orders given in the case of the Bank against Henry Hyams. The final judgment rendered in that particular case is not before us—the association was not a party to that suit—it became connected with it only through proceedings in garnishment originating after the main suit had been finally disposed of. It is true that those proceedings had their origin by reason of the suit of the Bank against Hyams, and in one sense they may be said to be incidental to it, but none the less they are separate and distinct proceedings between new parties and they must be dealt with as such, for the purpose of settling and determining the rights of those parties *inter se* under them, particularly when the judgment rendered therein was *pro confesso* for a neglect to answer interrogatories. We do not think this particular matter is before us on this appeal. The issues really before us are those raised under the executory proceedings of the association directed against the property mortgaged to it, and the proper and legal distribution of the proceeds of the sale of that property under the third oppositions of Mrs. Violet Hyams and the Union National Bank touching those proceeds.

Three distinct actions are referred to in these proceedings: 1. The suit of the Firemen's Building Association vs. Henry Hyams; 2. The Union National Bank of New Orleans vs. Henry Hyams; 3. Mrs. Violet Strauss vs. Henry Hyams. The two former suits were consolidated, bnt the third was not.

The third opposition of the Union National Bank, claiming the proceeds of the sale made in the executory proceedings of the association was filed after the sale of that property had been made under the writ of seizure. The bank, though having a judgment and a judicial mortgage on the property, and though it was holding it under seizure prior thereto under its own writ of *fi. fa.*, did not attempt to enjoin the sale upon the ground that the mortgage upon which the proceedings were being carried on had been extinguished by payment, but permitted the sale to be made and then claimed the proceeds under its judgment, its mortgage and its seizure. Pretermitting any discussion whether under such circumstances the bank could urge that the sale had been made under a mortgage which had no existence and that it could therefore rightfully and legally claim the

proceeds, we proceed to examine the ground upon which this alleged payment is made to rest. We find appellant's contention to be that the bank should be forced to impute and apply the various payments made by Henry Hyams under his contract of the thirty-first day of July, 1890, upon the mortgage note which he executed on that day, and not in manner and form as provided for in that contract and by the terms of the charter of the association of which Hyams was a stockholder. That question was presented and decided in Richard vs. Southern Building and Loan Association, reported in 49 An. 481 adversely to the position taken by the appellant.

The decison in that case controls the decision in this. We think the judgment of the District Court on that branch of the case correct. We think it also correct in decreeing that the Union National Bank of New Orleans be paid by preference the sum of three hundred and sixty-nine dollars and sixty-five cents out of the proceeds of the sale by reason of being owner through payment, with legal subrogation of the judgment with recognition of privilege obtained by the Rosetta Gravel and Paving Company against Henry Hyams. The opposition to that portion oi the judgment has been substantially abandoned. The affirmance of the judgment appealed from in these two respects disposes of the entire fund produced by the sale of the property mortgaged to the association. Notwithstanding that fact the District Court passed upo ı various contentions raised by the bank and Mrs. Hyams concerning matters outside of the application of the proceeds of the sale of the mortgaged property.

No written reasons are assigned for the judgment, and those contentions are not specifically and separately passed on, but the decree itself indicates what the views of the court upon them must have been. The court obviously SUSTAINED the judgment of the wife against her husband, and the seizure made by her thereunder through her seizure and garnishment proceedings directed against the building association, against the attack made upon them by the bank, and HELD that the *Union Bank took nothing* in respect to the seizure of the stock by its own seizure made in 1896, under the writ of *fi. fa.* which had issued in 1894, in execution of its judgment and by the garnishment proceedings taken out in 1896 upon the supposed continued existence and vitality at that time of that writ.

The stock in question has not been sent to sale up to the present time. Both parties claim priority of privilege over the proceeds of

the sale of that stock when it shall have been made, by reason of claims by each of legal seizures thereof. That of Mrs. Hyams, made in the suit of Violet Strauss vs. Henry Hyams, is first in order of date. The record of that suit is not before us. We are not advised that the bank has ever intervened in that suit or taken any direct action against the claims of Mrs. Hyams. The parties have attacked each other collaterally in a suit in which the thing itself over which their respective contentions are now being made was not itself involved in the suit. The shares of stock pledged by Henry Hyams to the association were not seized by it, and they have not been sold. The conclusions reached by us as to the application of the proceeds of the sale of the real estate render it unnecessary, we think, to pass at this time upon the respective pretensions of the parties in relation to the stock. We think the ends of justice will be best subserved by leaving those matters open for future adjustment. That purpose will be attained by affirming the judgment appealed from in so far as it deals with the proceeds of the sale of the property mortgaged, and simply reversing it as to other points. The effect of this simple, partial reversal will be the replacing of the parties in the position which they respectively occupied prior to the rendition of the judgment appealed from, free to take such proceedings and to ask such relief as they may conceive themselves legally entitled to.

We are very free to say that our present impressions are adverse to the right of the bank to make the general seizure it did in 1896, and to take out the garnishment proceedings which it did at that time under the writ of *fi. fa.* which it had caused to issue in 1894, in execution of its judgment against Hyams. The sheriff had made a seizure of specific real estate under that writ and had advertised and was about to sell the same when the sale of that particular property was stayed by an injunction. The injunction was not general, restraining him from executing the writ at all—its effect was limited, and he was free to seize any other property of the debtor which was subject to seizure. We scarcely think a new seizure made in 1896, under a writ of *fi. fa.*, issued in 1894, sustainable, though a seizure made within the seventy days (the date fixed by Art. 642 of the Code of Practice for the return of writs of *fi. fa.*), might remain effective for the purposes of a sale of the property.

For the reasons herein assigned:

It is hereby, ordered, adjudged and decreed, that the judgment

appealed from in so far as it decrees that the proceeds of the sale of the property seized and sold in the matter of the Firemen's Building Association vs. Henry Hyams, be paid by preference to the Union National Bank of New Orleans to the extent of three hundred and sixty-nine dollars and sixty-five cents, and the costs of the third opposition filed in said suit by said bank, and in so far as it decrees that the balance of the proceeds of the sale aforesaid be applied to the pamyent of the mortgage claim of the plaintiff in case No. 47,152, the Firemen's Building Association against Henry Hyams, which claim is for six thousand dollars and interest thereon at the rate of six per cent. per annum, from May 12, 1894, until paid, together with five per cent. attorney's fees on the aggregate of said principal and interest—sixty-nine dollars and sixty cents insurance premium—thirty-seven dollars and sixty cents State tax—four dollars costs of copy of mortgage act, and all costs of suit be and the same is hereby affirmed.

It is further ordered, adjudged and decreed that except to that extent the judgment appealed from be and the same is hereby annulled, avoided and reversed, and the parties replaced in the position which they respectively occupied, just prior to the renditton of the judgment appealed from, free to take such proceedings, and to ask such relief as they may conceive themselves legally entitled to. Costs of appeal to be divided between Mrs. Violet Straus, wife of Henry Hyams, and the Union National Bank of New Orleans.

No. 12,873.

ELIZABETH DAVIS VS. W. S. KENDALL.

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1. Where the true object of a sale with the right of redemption was to secure an existing indebtedness, the court called upon to interpret and give effect to the agreement, properly held the parties to their intention by decreeing the title asserted not one from which ownership resulted, but as a kind of security for the debt due.
2. But to effectuate this security the sale was, for this purpose, a ceding away—a transfer, a conveyance—of the fee of the estate by the vendor to the vendee to that extent that, after the appropriate registry thereof, the vendor could neither sell nor mortgage to another the same property, to the prejudice of his vendee. And, if this be so, it follows that neither could rights attach there on by operation of law, like a legal or judicial mortgage, to his prejudice.

CERTIFIED from the Court of Appeals, First Circuit, by the Judges thereof applying for instructions.

Submitted June 28, 1898.

Opinion handed down November 21, 1898.

The opinion of the court was delivered by

BLANCHARD, J. This was an appeal from the District Court, Parish of Lincoln, to the Court of Appeals, First Circuit.

On consideration by the latter Court the judgment appealed from was reversed, and a decree handed down in favor of defendant and appellant.

An application for rehearing by plaintiff followed, and, thereupon, the Judges of the Court of Appeals certified to this Court the following proposition of law, arising in said cause, concerning which they ask instruction for its proper decision:—

"Whether a sale with the right of redemption *intended* and *declared* by the Court to be one merely as security for debt, duly recorded in the Conveyance records, *ranks* a legal mortgage *subsequently* recorded in the mortgage records, in a contest over the proceeds of the sale of the property."

The judgment of the District Court had decreed priority of payment to the legal mortgagee.

The Court of Appeals reversed this judgment, holding the vendee in the nominal *vente à réméré* to be entitled to recover by preference the amount due him, sustaining its view in an exhaustive and forceful opinion by Pugh, J., transmitted with the question certified.

The facts as gathered from this opinion are as follows:—

S. C. Davis executed in favor of W. S. Kendall an act of sale purporting to convey certain real property, with reservation of the right of redemption.

The time for redemption having elapsed without its exercise, Kendall brought an action to be declared the owner of the property. After contest the court of the first instance rejected his demand of ownership, but reserved to him his right, as against the property, to enforce his contract as one of security.

On appeal to the Court of Appeals this judgment was affirmed.

Whereupon Kendall instituted suit against Davis, praying that his contract be recognized and enforced as security against the property, and that the same be seized and sold to satisfy his claim. Judgment followed in accordance with this prayer, execution issued thereon

and the property was seized and sold, Kendall becoming the purchaser thereof for an amount less than his judgment.

Davis' wife (present plaintiff), some nine months *after* the redemption sale to Kendall, appeared before the clerk of court and made affidavit of certain indebtedness due her by her husband on account of paraphernal funds received by him, and caused this affidavit to be inscribed in the mortgage records as evidence of her legal mortgage against the property of her husband.

A year later she, with her husband, appeared before a notary and a document was executed by the husband, accepted by her, wherein he made to her a *dation en paiement* of the property embraced in the sale to Kendall, in satisfaction of the amount claimed by her in the affidavit aforesaid.

This was the situation at the time the property was sold under the Kendall judgment.

It appears that Mrs. Davis made an effort to stay by injunction the Kendall proceedings, but failed to obtain the writ. Why—it is not stated.

Later she instituted suit, asserting ownership of the property, reciting the proceedings by which she acquired its title, its seizure and sale illegally under Kendall's judgment, etc., and concluded with the prayer that "she be declared the owner of said land, and, if not, that her mortgage be recognized and enforced."

In the decree that followed trial, Kendall's title, not hers, to the property was recognized, but she was adjudged to hold a legal mortgage for part of what she claimed from her husband, and the same was made executory against the property in the hands of defendant, Kendall.

The latter's appeal to the Circuit Court was sustained and plaintiff's demands rejected on the ground that the registry in the conveyance records of defendant's title, decreed to be a security, *primed* the legal mortgage of the wife recorded *posterior* thereto in the mortgage records.

Then followed the application for rehearing, and, pending disposition thereof, the certification aforesaid here.

If the true object of the sale with the right of redemption was to secure an indebtedness antecedently or presently contracted, it was proper and right for the court, called upon to interpret and give effect to the agreement, to hold the parties to their intention, and

decree the title held not one from which ownership results, but as a kind of security for the debt due.

But to effectuate this security it was, for this purpose, a ceding away—a transfer, a conveyance—of the fee of the estate by the vendor to the vendee to that extent that, after the appropriate registry thereof, the vendor could neither sell nor mortgage to another the same property to the prejudice of the first party.

And, if this be so, it follows that neither could rights attach thereon by operation of law, like a legal or judicial mortgage, to his prejudice.

The contract between these parties was a legal one—a sale with the right of redemption being recognized by the law. C. C. 2567, *et seq.*

It was entered into for a lawful purpose, and while the intention was not the indefeasible divestiture of the ownership of the vendor and its absolute investiture in the vendee it was the present and temporary, though actual, assignment of the fee in the land to the vendee, to be held by him as security for the sum representing the purchase price of the sale. This assignment of the title took the property off the conveyance and tax-assessment records as that of the vendor and placed the same on those records as that of the vendee, as well as defeated, so long as the fee remained in the vendee, the attaching of subsequent rights of sale or hypothecation, to his prejudice, in favor of any third person, emanating from the vendor.

It may well be, however, that rights in favor of such third person might accrue thereon, taking rank after those of the vendee.

When the legal mortgage of the plaintiff herein was inscribed in the mortgage records, it could not and did not attach to the land in question, for the conditions existing did not admit of it then nor subsequently. Neither the legal title nor the fee were at that time or subsequently in the husband who owed the debt from which the wife's legal mortgage resulted. And the legal title and fee remained in the husband's vendee until he was repaid the sum representing his purchase price. He could not be divested of the same, directly or indirectly, until this money was returned to him.

It follows, therefore, that when he, first having sued in vain to be declared owner of the land, is awarded a judgment for the amount due him, with recognition of his security rights, and an order to sell

in satisfaction thereof, and a contest arises over the proceeds of this sale between himself and the wife claiming the legal mortgage, his rights must be adjudged superior to hers.

Or, the property having gone to sale under his judgment, at which sale he buys the sheriff's title (as was the case here), the wife can not succeed in a subsequent petitory action, seeking to be declared its owner on the strength of the *dation* made to her by her husband as hereinbefore set forth. His title, first from the husband and then from the sheriff, must be adjudged superior to hers.

See Wolf vs. Wolf, 12 La. An. 529.
Farmer vs. Mangham, 31 La. An. 348.
Carter vs. Williams, Adms., 33 La. An. 261.
Leblanc vs. Bouchereau, 16 La. An. 12.
Williams vs. St. Stephen, 2 N. S. 22.
Collins vs. Pellerin, 5 La. An. 99.
Ware & Son vs. Morris, 23 La. An. 663.
Calderwood vs. Calderwood, 29 La. An. 658.
Thibodaux vs. Anderson, 34 La. An. 797.
Bailey & McKie vs. Chase, 18 La. An. 732.
Crozier vs. Ragan, 38 La. An. 154.
Howe, Executor, vs. Powell, 40 La. An. 307.
Zacharie vs. Buckman, 8 La. Rep. 308.

For the reasons assigned, this court is of the opinion that the question certified by the Court of Appeals must be answered in the affirmative, and that Kendall's rights under the case as presented must be held superior to those of the plaintiff, Elizabeth Davis.

And it is ordered that this ruling be certified to the Honorable Court of Appeals, First Circuit, for its guidance.

No. 12,932.

STATE OF LOUISIANA EX REL. NICK RAMSAY VS. JUDGE THIRD DISTRICT OF LOUISIANA.

50 1125
106 201

Application for *mandamus* to compel signing of bill of exceptions.

A rule of court requiring bills to be signed the next day after the taking of same is a proper and reasonable one, but its strict observance should not have been insisted on under the circumstances of this case.

It is no ground for declining to sign a bill that opposing counsel disputes the statement of facts embodied in the same, it being within the power of the judge and his province to himself embody a true and controlling statement of the facts in the bill in his reasons for making the ruling excepted to.

ON APPLICATION for a Writ of *Mandamus*.

J. W. Holbert and *John A. Richardson* for Relator.

Respondent Judge *pro se*.

Submitted October 31, 1898.
Opinion handed down November 21, 1898.

The opinion of the court was delivered by

BLANCHARD, J. The writ is sought to compel the respondent Judge to sign a bill of exceptions.

The relator was recently on trial in the Parish of Claiborne under an indictment for murder, was convicted of manslaughter, and from a sentence at hard labor has taken an appeal to this court.

The bill of exceptions was taken to a ruling of the judge in the course of the trial, and the averment is that it is necessary to his defence in this court and to the completion of the record sent here.

One J. M. H. Taylor being called as a juror was sworn on his *voir dire*, and examined touching his fitness to serve in the case. The questions propounded and the answers thereto were taken down in short-hand. At the conclusion of the examination and cross-examination, the State announcd its acceptance of the juror, whereupon the accused challenged him for cause. This challenge being overruled, an exception on part of the accused was noted and a bill reserved. This occurred late in the evening of the day of trial, October 10th. On the morning of October 12th, at motion hour of the court, the accused through counsel presented his bill of exception for the signature of the Judge. To this the Judge replied that the rules of court required bills of exception to be presented the morning after the taking of same, and, accordingly, the bill in question had not been seasonably presented, it being one day late. To this counsel for accused replied that it was through no fault or laches of the accused or his counsel the bill had not been presented earlier, that the stenographer had been so busy with other court matters it had been impossible for him to transcribe the examination of the juror Taylor on his *voir dire* from the stenographer's notes, that this was necessary as the examination was an essential

part of the bill annexed thereto, and that the bill had been prepared and presented at the first opportunity after the transcribed notes had come into possession of counsel for accused.

The Judge, thereupon, announced he would consider the question of its signature, and took possession of the bill with others reserved in the case.

These are the avermeńts under oath of the relator, who goes on further to say that he remained thereafter under the impression the Judge had, later, signed the bill in question, along with the other bills in the case, and that he and his counsel did not ascertain otherwise until the transcript of the case for appeal was being made out, when the bill, being missed, was searched for and found unsigned in the back of the Judge's docket. He states this was after the court had adjourned for the term.

To the rule to show cause why the *mandamus* should not issue the Judge replies that the facts of the case are not correctly given by the relator, and proceeds to give his version of the occurrence.

In substance he says that Taylor was called as a juror late in the *afternoon* (five o'clock) of the 10th of October, not "late in the evening," and that shortly afterward court adjourned for the day; that when the bill was presented on the morning of the 12th, counsel for the State objected to its being signed as presented because the statement of facts in the bill embodied only the questions propounded to Taylor by counsel for the accused and his answers thereto, and did not contain the questions and his answers thereto propounded on part of the State; that the bill, with this objection, was handed to him (the Judge) and on examining the bill he called the attention of accused's counsel to the fact that the bill was presented too late under the rules of court; that counsel replied the bill had been prepared as soon as the short-hand notes had been transcribed and he had been furnished with a copy thereof to be annexed to the bill; that he (the Judge) had heard nothing of the stenographer being too busy with other court matters to render it impossible to seasonably transcribe the notes; that he knew the fact to be otherwise and the notes could have been copied in time for the bill to have been presented on October 11th; and that on Octobor 15th, before adjourning the sitting of the court, he announced his ruling on the objection to the bill sustaining same, and he supposed relator's counsel had heard him as he was present. He annexes a copy of the rule of his

court relating to the time for presenting bills of exception for signature, stating, in that connection, that frequently attorneys, for reasons assigned, obtained extensions of time, and that he (the Judge) sometimes signed bills presented after time if there was no disagreement between counsel as to the facts, and if the facts were stated as he recollected them, but that he had always declined to sign bills when there was a dispute as to facts.

We think the bill should have been signed. All the doubts should have been resolved in favor of the accused in this as in other respects. When the bill was presented on the morning of the 12th the objection of counsel for the State was leveled at the bill *as drawn*, not at *the time* of its presentation. If the bill, to make it fair and perfect, should have embodied, or had attached to it, a fuller reproduction of the examination of the juror Taylor on the *voir dire*, it was within the power of the judge to require it to be done, or he could have embodied same in his reasons, written in the bill, for making the ruling he did as to the competency of the juror, and thus have obviated the objection of the State. Nor does it appear that the statement of counsel for the accused, made when the bill was presented, that he had not been able seasonably to procure a copy of the examination, was controverted at the time. If it had been, he might have verified the same by a statement then and there from the stenographer, and the opportunity should, at least, have been given him so to do, by the then raising of the issue of fact.

To afterward deny the bill on the ground that he might have procured Taylor's statement sooner, when his averment in this respect was unchallenged at the time he made it, was a ruling erroneous under the circumstances. And to deny the bill because it was not full enough in its recitals of Taylor's examination, when it was in the power of the judge to order the whole examination on the *voir dire* into the bill, was also erroneous.

If the transcription of the notes could not have been had sooner, it furnished good ground for not holding the accused or his counsel to the strict observance of the rule of court, and the judge's reply to the relator's application for the writ shows that while the rule existed, and is no doubt a proper one, its enforcement had not always been insisted on. Besides, it was clearly within his discretion, in a proper case, to depart from it, and we think the facts here make out a case where he could reasonably have done so.

For the reasons assigned it is ordered that the *mandamus* applied for be made peremptory, and that respondent judge sign the bill of exceptions annexed to relator's petition, with full reservation of the right on his part to add to it the whole of the examination of the juror Taylor on his *voir dire*, and such statement of facts and reasons as he may chose to give for his ruling holding the juror to be competent.

It is further ordered that when thus executed the bill of exceptions be filed in the record of the case of the State vs. Nick Ramsey, No. , on the docket of the District Court in and for the parish of Claiborne, and be copied as part of the transcript of appeal in that case, the filing to be of date October 15, 1898, *nunc pro tunc*.

And that costs herein incurred be borne by respondent.

The CHIEF JUSTICE and MR. JUSTICE BREAUX dissent.

DISSENTING OPINION.

NICHOLLS, C. J. The relator seeks to obtain from this court, under its supervisory jurisdiction, a writ of *mandamus* to compel the District Judge in and for the parish of Claiborne to sign a bill of exception accompanying his petition, and to which is annexed certain questions propounded to and answered by one J. M. H. Taylor, who was tendered as a juryman in the case of the State vs. Nick Ramsey, recentiy decided, in which case relator was the defendant, and in which he stood charged with murder. Relator's claim is that Taylor, being called as a juryman, was sworn on his *voir dire*. That relator's counsel cross-examined him, and caused the shorthand reporter to take down the questions asked and answers made by him under cross-examination. That after this was done, the State accepted Taylor as a juryman and defendant challenged him for cause. That the court overruled the challenge for cause, to which ruling defendant excepted—this occurring late in the evening of October 10. That on the morning of October 12, at motion hour, defendant, through counsel, presented his bill of exception for signature, but the court, after looking over the bill, stated that the rules of his court required that bills of exception should be presented the next morning after taking the same at motion hour, and that this bill was not so presented, it being the second morning. That defendant's counsel stated that it was no fault of defendant or his counsel that the shorthand reporter was so busy with other court matters that

it had been impossible for him to write out the evidence from his notes, and that the bill had been prepared and presented at the first opportunity after the evidence was given them to be annexed to the bill. That the judge stated he would consider whether or not he would sign it, and he took possession of the same with others. That relator thought the judge had signed the bill and had signed it with the others, and that he and his counsel did not detect, or find out otherwise, and that it had not been filed as a part of the record until the transcript was being made up for appeal, when on examination it was found on the back of the judge's docket unsigned; that this was after the court had adjourned for the term; that by these facts is shown a refusal of the judge to sign the bill. Relator avers that it was the duty of the judge to have signed the bill, or given his reasons for refusing to do so; that it is his right to have the same signed and receive the benefit thereof; that the court can make no rule which would deprive an accused person of a fair and impartial trial, when non-compliance with same is not to be attributed to any fault or laches of defendant or his counsel. In answer to a rule served upon the judge to show cause why the *mandamus* asked for should not be issued, the District Judge states that the relator does not give the facts of the case correctly, and gives them as follows:

Taylor was called on the afternoon of Monday, October 10, about 5 o'clock, and not "late in the evening," as stated by relator, and shortly after court adjourned until next morning. When the bill was presented at motion hour, on October 12, Mr. E. H. McClendon, an attorney for the State, objected to its being signed as presented, because the statement of facts in the bill contained only the questions propounded by defendant's counsel to Taylor and answers thereto, and did not contain any statement of Taylor's answers to questions propounded by the attorneys for the State. The bill of exceptions and this objection were handed to me at the same time, and on looking at the bill I called the attention of defendant's counsel to the fact that the bill was presented too late—a rule of court requiring that bills of exception be presented the morning after being reserved. To this counsel stated that the bill had been prepared and presented as soon as the shorthand reporter had furnished the typewritten copy of Taylor's examination to attach to the bill. That he (the judge) heard nothing of the shorthand reporter's being so busy with other court matters it had been

impossible for him to write the evidence from his notes; that it was to his, the judge's, personal knowledge that the shorthand reporter could have furnished the typewritten copy by 8 o'clock P. M. October 10, and in ample time for counsel to have prepared his bill for presentation at morning hour, October 11. That on the 15th of October, before adjourning the sitting of the court, he announced from the bench that he had not signed and ordered this bill to be filed; that relator's counsel was present, and he (the judge) supposed he heard what was said, and he knew of no reason why relator or his counsel should suppose the bill had been signed and filed. That the rule of court on the subject was as follows:

"Bills of exception to the ruling of the court must be presented at or before motion hour on the day after they are reserved, except those reserved on the last day of the term, and those must be presented on said last day."

The judge states that this rule was adopted in 1888; had been printed with other rules of the court, which had been furnished to members of the bar, who had never before complained of the same. That it was adopted so that bills should be presented while matters were fresh in the minds of all parties, though attorneys had frequently, for reasons assigned, obtained an extension of time. That he had sometimes signed bills presented to him after time if there was no disagreement between counsel as to the facts, and if the facts were stated as he recollected them, but that he had always declined to sign bills where there was a dispute as to facts.

That relator's counsel had full knowledge of this rule; had ample time to prepare and present their brief in accordance with the rule, or for cause shown, might have had time extended, and in not doing so were guilty of laches and a total disregard of the rule of court.

That relator had not been deprived of any right whatever by any act of the judge; that, on the contrary, his counsel's not presenting the bill in time, and not stating all the facts in said bill, was the reason why the bill of exceptions was not signed and made a part of the record. That he declined to sign the bill for the reasons set forth. That it was necessary that he should compel an observance of the rules of his court. That he had a right to adopt rules, not contrary to law, and he knew of no law which this particular rule violated. He referred the court to Art. C. P. 145; Green vs. Dakin & Dakin, 15 La. 152; State *ex rel.* Gervais Leche vs. Waggner, 42 An. 54. Just

before closing his answer the judge declared: "Should the court make the *mandamus* peremptory I hereto annex my reasons for overruling the challenge of the juror, Taylor, for cause, and in that event ask that it be considered just as though filed in the bill of exceptions attached to relator's petition. I do this so that if the rule in contest be declared void, and it can not be enforced, the trial of the case of State vs. Ramsey may not be delayed."

The reasons so assigned were as follows: "In his answers to questions propounded by counsel for the State Mr. Taylor very emphatically declared that he had no interest either for or against the defendant; that he had no feeling in the case whatever; that he was not related to the defendant or the deceased, and that while he had a fixed opinion he stated emphatically that he could lay that opinion aside and try the case fairly and impartially on the law and the evidence adduced on the trial. The court has known J. H. M. Taylor for twenty years, knows that for the last two or three years he has been engaged in a business which carried him away from the town of Homer a large proportion of his time and had that confidence in him as a man which satisfied the court that he could try the case fairly and impartially.

"The challenge was made by counsel for defendant for cause without stating what the basis of the cause was and I ruled on it solely on the question of the juror's ability to lay that opinion aside and try the case impartially on the law and the evidence adduced on the trial."

The unsigned bill of exceptions annexed to relator's petition recites that in trying the case the name of J. H. M. Taylor was drawn from the box in selecting the jury and he was called. That on his *voir dire* he made the answers to the questions propounded to him which were annexed to and made part of the bill. That he was accepted by the State, and on being submitted to the defendant he was challenged "for cause." That the court overruled the cause and forced the defendant to exercise one of his peremptory challenges. To which ruling the defendant excepted and tendered his bill of exception after submitting same to the counsel of the State, praying that it be signed and made part of the record.

To this bill were annexed questions propounded to and answered by Taylor as follows:

"J. H. M. Taylor sworn:

"Q. You live in the town where the homicide occurred?

"A. Yes, sir.

"Q. You were here on the night of the homicide?

"A. Yes, sir.

"Q. You came down to where the homicide occurred that night?

"A. Yes, sir.

"Q. You were present at the coroner's inquest?

"A. No, sir.

"Q. You were present at the commitment trial?

"A. I heard Mr. Kelley's evidence and I read his statement in the paper.

"Q. You heard a good deal of talk around town on the night of the homicide?

"A. Yes, sir.

"Q. You assisted in laying out the deceased and burying him?

"A. Yes, sir.

"Q. This trial has been had three or four times now, which trial was it that you heard Mr. Kelley's evidence.

"A. Well, I think it was the last trial.

"Q. You knew Mr. Kelly to be a witness to the transaction.

"A. Yes, I heard him say so.

"Q. Have you any bias or prejudice for or against the accused.

"A. No, sir, I have none.

"Q. You say you heard Mr. Kelly's evidence, did you hear the testimony of any other witness?

"A. Yes, sir; I heard I think a part of Mr. Ledbetter's; maybe I just walked in the court room two or three times while the trial was going on. I heard part of the argument of the two trials.

"Q. From all this you have formed an opinion?

"A. Yes, sir.

"Q. At this time is that a fixed opinion?

"A. Well, of course it is a fixed opinion now. Yes, sir.

"Q. If you are sworn as a juror, Kelley's evidence being the same, your opinion would remain the same?

"A. Well, of course, if the evidence was the same that opinion would be unchanged.

"Q. Well, Mr. Kelley's evidence would have to be different from what you have heard on the former trial to change your opinion?

"A. Yes, sir, and some others.

"Q. Are you satisfied that you can disregard the opinion you have now and the evidence you have formerly heard, and try this man fairly and impartially on the evidence here?

"A. I think so.

"Q. The question is, do you know that you can do it?

"A. Yes, sir.

"Q. The evidence of Kelly being the same?

"A. Yes, sir."

The only question before us upon this application is whether the District Judge improperly refused to sign the bill of exceptions reserved and tendered by defendant's counsel. In justification of his course the judge calls our attention to a rule of his court which he informs us was not complied with, requiring that all bills of exceptions reserved during a trial should be tendered during motion hours of the day. Relator claims that it was impossible for him to have complied with the rule, inasmuch as the court's stenographer was unable, by reason of other business, to make out from his notes the answers made by the juror to the questions propounded to him. The judge denies the correctness of that statement. Be the fact as it may, the judge informs us that the rule in question is not an absolutely fixed and arbitrary rule enforced by him on all occasions, independently of all attendant circumstances, but simply a general rule adopted in the interest of exact and prompt administration of justice, requiring the tendering of the bill in the time stated, but subject to be relaxed on application for extension of time. The judge states that no extension was asked for and no explanation made to him, as should have been done. He furthermore states that when the bill was in fact presented to him objection was made on the part of the prosecution to its being signed, on the ground that the stenographer's notes covered only the questions propounded and answers made on cross-examination of the juror on his *voir dire*, and not those on the main or original examination by the State.

The rule of the District Court referred to, as explained by the judge as to its enforcement, is not an unreasonable one. I think relator's counsel should have asked for an extension of time if there were facts calling for the same. If the judge refused, counsel could then have made issues of fact and brought them up under bill of exception. I do not think it was essentially necessary for relator to have awaited the

writing out of the stenographer's notes to have prepared and tendered a bill. He could have made out a detailed statement of facts by way of recitals in the bill, declaring that the same would be verified by stenographer's notes, to be thereto attached, and he could have attached the notes afterward (identified and verified with the bill). The bill as drawn up and forwarded with relator's petition contains no recitals as to what the questions asked and the answers thereto were, but leaves that to be shown by stenographer's notes to be attached. These notes when attached were objected to, on the ground that they were partial, covering only the questions and answers upon the cross-examination. It is quite possible that they covered what was in reality the important part of the examination, but that is mere conjecture on our part. I think the whole of the examination of the juror on the *voir dire* should have been taken down and preserved, and not a fragment. The judge had the right, but was not under the legal obligation to modify the bill. I can not say that the judge failed to perform his duty in declining to sign the bill under the circumstances disclosed. It would, however, have been better for him to have in writing, at the foot of the bill, refused to sign the same and given his reasons therefor.

For these reasons, I think relator's application for a *mandamus* should be refused.

BREAUX, J. concurred in the dissent.

No. 12,911.

MRS. EMMA HENKLE VS. MRS. FLORENCE BUSSEY, WIFE, AND C. A. MCGOWAN, HUSBAND. IN RE C. A. MCGOWAN APPLYING FOR CERTIORARI, OR WRIT OF REVIEW, TO THE COURT OF APPEALS, THIRD DISTRICT, STATE OF LOUISIANA.

Certiorari, under Constitution, Art. 101, will not issue to review decisions of Court of Appeals as to questions of fact. (*In re* Ingersoll, 50 An., recently decided; *In re* McLain, 50 An., recently decided; *In re* Murff, 50 An., recently decided).

Applicants to Supreme Court for *certiorari* under Art. 101 of the Constitution from decisions of Courts of Appeal, should assign their particular grounds of complaint, and specify wherein, in their view, the decisions sought to be reviewed depart from the jurisprudence of the State.

Foster & Broussard for Petitioner.

W. F. Blackman and *Julian Mouton*, Respondent Judges, for themselves.

Submitted on briefs November 7, 1898.
Opinion handed down November 21, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. *In re* McLain *et al.*, No. 12,903 of the docket of this court, it was held (affirming *In re* Ingersoll, recently decided, and *In re* Murff, No. 12,996, recently decided), that the writ of *certiorari* authorized to issue under Art. 101 of the Constitution, was not intended to enable parties to review in the Supreme Court decisions of the Courts of Appeals on mere questions of fact.

The decision which relators seek in this proceeding to have reviewed is a decision of the Court of Appeals of the Third Circuit in a petitory action based upon the evidence adduced.

In the brief filed on behalf of the relators counsel say:

"We have quoted at length (the evidence) from the record only for the purpose of showing that the judges of the Circuit Court have drawn wrongful conclusions from the same, and only for the purpose of showing that they, in coming to their conclusions, have never referred to the salient parts of the evidence, but to only disconnected parts thereof apparently justifying their conclusions. We admit the propositions they lay down to be correct ones of law."

Under such conditions we must decline to review the judgment of the Court of Appeals. In the Murff case this court said:

"This writ of *certiorari* was not given to clothe the court with appellate jurisdiction, but to issue only in exceptional cases, mainly to secure uniformity of jurisprudence."

In matters of this character we expect not only that the legal principles upon which the case sought to be reviewed was decided should not be admitted to be correct, but that generally they should be specially attacked, and the claimed departure of the Court of Appeals in their decisions from the jurisprudence of the State should be specifically pointed out to us.

For the reasons herein assigned it is hereby ordered, adjudged

and decreed that relator's application for a review of the judgment of the Court of Appeals of the Third Circuit, referred to in his petition herein, be and the same is hereby dismissed.

No. 12,865.

STATE OF LOUISIANA VS. THELESMAR MARCEAUX ET AL.

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d124 675
124 941

The overruling by the District Court of a challenge for cause of a juror tendered to the accused for acceptance does not furnish ground for reversal of verdict and sentence, when the accused has not, at the time when the jury has been completed, exhausted his peremptory challenges.

A witness, Benoit, was permitted by the court, over defendant's objection, to testify that he was engaged by the accused to assist him in driving cattle, and started with him under such employment; that while so engaged, the latter made a proposition to him that they should steal a drove; that on witness declaring he could not do so, accused replied that that was nothing; that they could buy a few head and pick up some along the road; that he (the accused) had been carrying on that business for the last six years; that he had once cleared four thousand dollars in four months in that way; that witness at once left the service of the accused, and both returned to witness' house, where the two parted; that on parting with witness, accused said, he would go and meet one Bell, and they would gather a drove. Defendant's ground of objection was that the conversation in question was not made at the time of the taking of the cattle for which he stood charged with larceny, and for which he was then on trial, and it did not form part of the *res gestæ* having been made prior to the date of the alleged offence, and that said satements attributed to him were not admissions on his part of guilt of the offence with which he was charged. The court admitted the testimony, not to show a distinct crime, but to show intent, knowledge and system, and to show the admissions and statements made by accused as to the character of the business in which he was engaged. The court declared that the evidence showed a great similarity in the way the cattle alleged to have been stolen were taken, with that detailed in Benoit's testimony.

The ruling of the District Conrt was correct.

The testimony detailed a proposition made by the accused to the witness, then in his employ driving cattle, to join him in stealing cattle in a certain way, which proposition was followed very shortly afterward by accused being charged with having stolen cattle in his possession taken in the way which the proposition suggested they should be taken. The evidence was pertinent, relevant and admissible to show intent, and to give character to the nature of the defendant's possession of the cattle held by him. It showed an admitted premeditated plan to steal cattle generally, followed almost immediately by his having stolen cattle in his possession.

The sheriff who arrested the accused testified, that the accused when arrested "looked like a man who had been up all night as if he had no sleep; his leggings were all wet and muddy."

Defendant objected to the answer, but the court permitted it to stand. The court

stated the answer was elicited by the defence in the cross-examination of the sheriff, and was not in reply to a question of the District Attorney,

That it was pertinent for the State to show as a corroborative link in the State's evidence the condition and general appearance of the accused on that morning. Defendant objected that "the witness was submitting his opinion, not facts to the jury." The general rule is, that witnesses must state facts and not opinion, but the rule is subject to many exceptions, and under the facts of this particular case the answer was properly permitted to stand.

A District Attorney is not justified in his argument to the jury in calling attention to the fact that the accused had not testified in his own behalf. His doing so is reversible error, which is not cured by the court's telling the jury "that the right of an accused to testify was a privilege accorded to him which he had a right to exercise or not, as he saw fit; and that if he testified, he subjected himself to all the rules which applied to other witnesses, and that his failure not to testify if he choose not to do so, was not to be construed for or against him;" and by the District Attorney's stating to the jury, that the instruction given them by the court was the law.

ON APPEAL from the Seventeenth Judicial District Court for the Parish of Vermilion. *De Baillon, J.*

M. J. Cunningham, Attorney General, and *Minos T. Gordy*, District Attorney, for Plaintiff, Appellee.

Edwards & Green, J. A. Chargois, L. L. Bourges, A. & Chas. Fontelieu (*Sigur, Milling & Sanders*, of Counsel), for Defendant, Appellant.

Argued and submitted June 18, 1898.
Opinion handed down June 25, 1898.
Rehearing refused December 5, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant, indicted for larceny, was convicted and sentenced to hard labor in the penitentiary for two years. He urges, in reversal of the verdict and judgment, that having been indicted prior to the going into operation of the Constitution of 1898 he was, over his protest, tried and convicted by a petit jury of five.

His counsel contends that Art. 116 of the Constitution of 1898 required legislative action fo put it into operation; that it was not self-operative.

This identical question has just been decided by us adversely to

appellants' position. See State vs. Caldwell *et al.*, 50 An., recently decided. He urges that the court illegally sustained the State's challenge for cause of the juror Senac, who, on his *voir dire*, had stated that his father and the mother of the accused were first cousins. It is contended the relationship between the parties did not fall within the prohibited degrees.

The court, in its *addendum* to appellant's bill on this point, stated that Act No. 99 of 1896 did not fix the degree of relationship that the law provides; that the judges of the District Court shall have discretion to decide upon the competency of jurors in particular cases when, from physical infirmity, or from relationship, or other causes, the person may be, in the opinion of the judge, incompetent to sit upon the trial of the particular cause. That defendant had then eight peremptory challenges left, having challenged only four jurors peremptorily. That the right of peremptory challenging was a right to reject and not to select. Citing State vs. Shields, 33 An. 1410; State vs. Farrer, 35 An. 315; State vs. Creech, 38 An. 480; State vs. Durr, 39 An. 752; State vs. Carries, 39 An. 931; State vs. Lewis, 41 An. 590; State vs. Covington, 45 An. 979; State vs. Nash & Barnett, 45 An. 1143; State vs. Porter, 45 An. 661; State vs. Tibbs, 48 An. 1281.

It is not claimed that at a later stage of the proceedings defendant exhausted his peremptory challenges.

The authorities cited sustain the position taken by the State, that appellant's complaint touching the sustaining of the challenge to this juror is not well grounded.

Appellant further complained that a witness (Benoit) was illegally permitted to testify to certain conversations between himself and the accused prior to the alleged commission of the offence on the 20th of December, 1897. Benoit's testimony was taken outside of the hearing of the jury, and subsequently he testified as a witness. The testimony was substantially "that in November or December, 1897, accused stayed all night at witness' house; that the next morning he told witness that he had come there to gather a drove; that he had before this proposed to witness that he should buy a drove, and on his saying he did not have the money, he said he would buy it and they could send it to New Orleans. The witness, without stating that accused then asked him to accompany him on his trip to buy or gather cattle, and that he had consented to do so,

and that they started upon their trip for that purpose, leaves it clear that he intended to convey that such was the fact, for he went on at once to say that "when they (accused and himself) got on the other side of Bayou Plaquemine there was a fine forest about a mile wide where they found a drove of cattle, and they stopped to examine the quality of the cattle; that accused then and there made a proposition to him to steal a drove. That on witness telling him he could not do it, he said that that was nothing; that they could buy a few head and pick up some along the road as they went. That he said he had been carrying on that business for the last six years. On his making this statement witness proposed that they should turn and go back to his house; that they did so, getting there at night: that upon arriving they unsaddled their horses; that they took supper together, and after supper they parted, accused saying 'he would go and meet Joe Bell, and they would gather a drove.' That accused told him that in four months he had cleared one thousand dollars in that way."

Defendant objected to the giving of this testimony on the ground that "it was not made at the time of the taking of the property for which he was charged and for which he was on trial—for the further reason that it did not form part of the *res gestæ*, having been made prior to the date of the alleged offence for which defendant was not on trial, and that the said statements attributed to defendant were not admission of guilt on his part of the offence charged and for which he was on trial."

The court assigned the following reasons for overruling the objections: "The defendant was seen driving a herd of cattle early in the morning of December 14, 1897, between Perry's Bridge and Abbeville. It turned out that the cattle belonged to five different persons. After the discovery of the larceny accused left the parish and remained absent until arrested by the sheriff, near Obelin, in Calcasion parish. The evidence was admitted, not to show a distinct crime, but to show intent, knowledge and system, and to show the admissions and statements made by the accused as to the character of the business in which he was engaged. It was admitted for no other purpose. The evidence showed a great similarity in the way the cattle alleged to have been stolen were taken and as detailed in the testimony of Benoit."

Accused did not object to particular specified portions of the tes-

timony, but to the whole. We think the testimony was properly introduced for the purpose stated. It detailed a proposition made to the witness by the accused to join him in stealing cattle in a certain way, which was followed very shortly afterward by accused being charged with having stolen cattle in his possession, taken in the way it was suggested they should be taken. It might well happen that a person driving a herd of cattle belonging to himself on the highway, should by accident, take into the drove cattle belonging to other persons, and the question of intent would be the all-controlling factor in the case touching guilty possession. We think that a statement by accused of proposed future action on his part to steal cattle—to "buy some" and "gather in others," was pertinent, relevant and admissible testimony to show intent and to characterize the subsequent possession of the cattle which we assume he had been shown to have had in his possession not belonging to himself and "gathered in" in that way. The object was not to show that these particular cattle were stolen, but to show a premeditated plan thereafter to steal them generally.

Appellant complains that the sheriff of the parish being on the stand, the District Attorney asked him: "What was the appearance of the defendant, Marceaux, that morning? Could he look you in the face?" and that, although defendant objected thereto, on the ground that the answer would be the opinion of the witness, the question was permitted to be asked by the court, the answer being that "he looked like he had not slept any the night before; it was plain to see that he was guilty."

The court says "the sheriff did not make the answer attributed to him in the bill to the question objected to; that he answered the question as follows: 'He looked like a man who had been up all night; as if he had had no sleep; his leggins were all wet and muddy.' The court says the cattle alleged to have been stolen were seen in the possession of the accused early that morning, between Perry's bridge and Abbeville, and, after putting the cattle in a wooded pasture, the accused came to Abbeville, where he was met by the sheriff, and the question was directed to the condition or general appearance of the accused at that time. It was pertinent for the State to show, as a corroborative link in the State's evidence, the condition and general appearance of the accused on that morning. The answer objected to in the bill was elicited by the defence in the

cross-examination of the sheriff, and the answer was not in reply to the question propounded by the District Attorney."

The correctness of the court's statement "that it was [in the case at bar] pertinent for the State to show, as a corroborative link in the State's evidence, the condition and general appearance of the accused on that morning" is not called in question. We have, therefore, to assume that the question was relevant to the issue, and to ascertain (such being the case) whether the particular objection raised that the State was illegally seeking through it to have submitted to the jury, not facts, but a mere opinion of the witness, was well grounded.

It needs no special citation of authorities to support the general proposition that witnesses must state facts and not opinions. A number of decisions of our own court on this subject can be found in Hennen's Digest, *verbo* Evidence, subdivision XVI, page 559. The *rule*, however, is subject to very numerous recognized exceptions. Jones on the Law of Evidence, Vol. 2, Sec. 362, refers to the subject *in this* manner: "We shall first call attention to a class of exceptions where the opinions of ordinary witnesses are received. It often happens that it is impossible for a witness to detail all the pertinent facts in such a manner as to enable the jury to form a conclusion without the opinion of the witness. Indeed, the witness may not be able to separate the facts and indications from which he has formed a conclusion from the conclusion itself. From many of the illustrations given below it will appear from the necessity of the case the opinions of ordinary witnesses must often be received. For example, the opinions of those not experts may be received as to the disposition or temper of animals, as to matters of color, weight, quantity, light, darkness, the state of the weather and similar facts, the state of feeling existing between different individuals, the appearance of individuals, the age of persons, the reputation of parties or witnesses, when under other rules of evidence such reputation becomes material. * * * So ordinary witnesses have been allowed to express opinions as to whether another person seemed to be suffering pain, or whether he seemed nervous or sad, or in pain or good health, or whether a person's mind seemed to be clear or had failed or whether he needed medical attendance, or in what manner a person had acted, or whether a child was fully developed. Although some of the illustrations just given approached very closely to the

border line, it is not to be inferred that the opinion of ordinary witnesses are competent as to those subjects which require special study and skill—for example, to distinguish between different forms of disease, or to state the causes and consequence of cases. A common illustration of the same principle is the admission of the opinion of witnesses as to the state of intoxication or sobriety of others. The witness is allowed to describe the words, acts and gestures, or he may omit such particulars and state his conclusions."

A question of this character was disposed of, with many citations of authorities and full assignment of reasons, by the Supreme Court of Alabama in Thornton vs. State, 21 Southern Reporter, 356.

In that case the court held that where the sheriff had testified that he met the defendant after the homicide he could state that "defendant looked frightened when he saw him." If the fact of the "defendant's appearing frightened" was a pertinent and relevant qustion in that case it was obviously out of the power of the witness to have conveyed to the jury any circumstance which would have enabled them to have determined themselves whether, in point of fact, he looked frightened or not. The only way in which that fact could be proved was by the conclusion reached by the sheriff, conveyed to them under his oath. We are of the opinion that the testimony was properly admitted.

Appellant charges and complains that the District Attorney in his closing argument to the jury said to them: "Why did not Marceaux [defendant] go on the stand and testify on his own behalf if he was not guilty; he had the right to do so. He did not do it because he knew better," etc. That counsel interrupted him, objecting to such statement on the ground that he had no right to make such a statement to the jury, as it tended to prejudice it against the accused, and that under the law it could not be inferred that accused was guilty because he did not testify in his own behalf; that the objection was overruled and the District Attorney was permitted to proceed with his argument. The court says it made no such ruling as was charged; that when interrupted the District Attorney had not finished his statement. In his opening (not his closing argument) the District Attorney made the following statement: Why did not Telesmar Marceaux go on the stand and testify in his own behalf; he had the right to do so; he did— and at this point counsel for defendant interrupted the District Attorney and

objected to the statement. The court informed counsel for defendant that it would instruct the jury fully on this point, and then and there told the jury that the right of an accused to testify was a privilege accorded to him, and which he had a right to exercise or not as he saw fit. If he testified he subjected himself to all the rules which applied to other witnesses, but that his failure to testify, if he chose not to do so, was not to be construed for or against him. That the District Attorney did not persist in his argument on this point and did not finish the sentence, but told the jury the instruction given them by the court was the law. The court stated that in ts charges to the jury it instructed them fully upon this point in the following language: "The court instructs the jury that while the law provides that a person charged with a crime may testify in his own behalf, yet he is under no obligation to do so, and the law expressly declares that his failure to testify shall not be construed for or against him."

The complaint made by the accused that the District Attorney improperly commented upon his failure to testify is based upon the provisions of Act No. 29 of 1886, which, while granting a party accused the privilege of testifying in his own behalf, provides that his failure to testify should not be construed for or against him."

He contends that the object, purpose and spirit of the law is to prohibit the District Attorney from calling the attention of the jury to the subject, as otherwise a statute intended for the benefit of the accused would be converted into a positive injury to him; that prior to the statute an accused person not having the power to testify, his silence was a protection to him, but that now it would forcedly prejudice the jury against him.

The State urges that the District Attorney merely started to hold accused responsible for not establishing a certain fact that fell under the principle, that when a fact is particularly within the knowledge of a party who fails to establish that fact, he is responsible whether his ability to establish it depended on his own or any other evidence under his control; that when defendant's counsel objected the District Attorney desisted—the judge instructed the jury that failure to take the stand was not to be construed against him; that the District Attorney endorsed the soundness of that instruction and withdrew the remark. That as shown by the statement of the judge this occurred in the opening argument and not in the closing argument as claimed

by counsel for appellant. That the action in the matter was in accord with that endorsed in State vs. Chevis, 48 An. 575, and appellant has no cause for complaint. Reference is made to State vs. Johnson & Butler, 48 An. 87; State vs. Anderson & Blackstone, 45 An. 654; State vs. Mack, 45 An. 1157, and State vs. Duck, 35 An. 764.

The facts in State vs. Chevis, 48 An. 577, are not similar to those of the case at bar. The District Attorney in the Chevis case made no allusion to the failure of the defendant to take the stand as a witness; he simply argued to the jury that the burden of proof, as to a certain point was upon defendant, and it being a matter peculiarly within his knowledge, and the defence not having met the burden, the fact involved was to be taken adversely to defendant. In the present case the District Attorney, according to the bill of exceptions (the recitals of which are not denied) when he was stopped from saying more had already said to the jury: "Why did not Marceaux go on the stand and testify in his own behalf—he had the right to do so—he did—" The failure of the defendant to go upon the stand to testify (not his failure to place other parties on the stand, or his failure to introduce evidence to establish a certain fact) was the subject of direct comment, and the jury's attention was specially called to the fact that no obstacle stood in the way, "as he had the right to do so." There is no doubt of the existence of the fact that the jury's attention was called by the District Attorney to appellant's not having taken the stand in his own behalf.

If the remarks were illegal, they certainly had been made when the District Attorney was stopped from further comment by objection from defendant's counsel. Two questions arise—*first*, whether the remarks were illegal and wrong; and, *second*, whether if illegal and wrong, the subsequent action of the court in its charge to the jury and the admissions of the District Attorney to that body, cured the illegality, and did away with the wrong and prejudice which may have resulted from the same. In Reddick vs. The State, 21 Southern Reporter, 490, the Supreme Court of Mississippi held, that under the article of the Code of the State forbidding the prosecuting attorney to comment on the failure of accused to testify in his own behalf, such comment thereon was ground for reversal of a conviction, though the court directed the jury to disregard it. It said: "It is true, that immediately on the prisoner's counsel excepting to the language of the counsel for the State, the court instructed the jury

that the District Attorney was prohibited by law from commenting on the defendant's failure to take the stand in his own behalf, and that the jury must not consider any such comment. But this action of the court could not and did not undo the wrong already done. The statute absolutely forbids any comment on the failure of the accused to testify, and it is the right of every person charged with the crime to insist that he enjoy this statutory immunity from criticism by hostile counsel, and the disregard of this plain statute, and the decision of this court upon it, must reverse the judgment appealed from." The court cited Yarbrough vs. State, 70 Miss. 593, 12 Southern Reporter, 551, as authority to the same effect.

The only difference between the two Mississippi cases from that before us is in the language of the statutes of the two States. The Mississippi law declares that "the failure of the accused in any case to testify shall not operate to his prejudice or be commented on by counsel," while the Louisiana statute is to the effect that the "failure (of the accused) to testify should not be construed for or against him."

In the one case the prohibition is direct and positive; in the other it is inferential and consequential, but strong and clear.

In our opinion, the terms of the law convey with them a mandate from the State to her officers charged with the enforcement of the laws (a direct mandate to the judge and an implied one to the District Attorney), that what was intended by the lawmaker as a privilege should not be permitted to be made to be turned into an instrument of attack upon those for whose benefit, and not for whose injury, the law was enacted.

We are in accord with the Supreme Court of Mississippi when it says that the wrong once done can not be undone by mere admissions of the District Attorney or attempted correction by the court.

Once granted that a simple retraction suffices to replace matters as they were, and the law would become practically a dead letter; the thing prohibited could be accomplished by easy methods without possibility of rectification through the courts. "Comment was made, unfriendly comment, too; and prejudice may have been operated against the accused, and so he has not the trial he was entitled to under the law." (See on this subject Wilson vs. U. S. 149, U. S. 60; Hunt vs. State, 28 Texas, 149 [12 S. W. 737]; Johnson vs. State, Texas Crim. App. [20 S. W. 980]; Braxell vs. State, Texas Crim.

App. [24 S. W. 414]; Richardson vs. State, Tex. Crim. App. (26 S. W. 723); Dawson vs. State [Iowa], 55 N. W. 97.)

For the reasons assigned, the verdict of the jury and the judgment of the court thereon are set aside and the cause remanded for further proceedings according to law.

JUSTICES BREAUX and MILLER dissent.

Rehearing refused December 5, 1898.

No. 12,541.

50 1147
50 1153

ANTONIO MONTELEONE VS. MRS. J. M. HARDING ET ALS.

The wall built by plaintiff was made a common wall by the owners of the lot adjacent, who used it as one of the sides of their building.

The trespass and encroachment charged, in that plaintiff had exceeded by about two inches, the nine inches allowed to one who builds a wall on a dividing line, was not sustained.

The defendants having made use of the wall as a support for their own building are indebted for one-half of the cost of construction.

The intervenors, an insurance company, were subrogated to the right of plaintiff, when it paid plaintiff the value of one-half of the old party wall, which had not been insured.

An amount equal to the value of the old wall was allowed to the intervenor in accordance with decree in Monteleon vs. Insurance Company, 47 An. 156. The remainder due by the defendants to plaintiff is an amount to which plaintiff has a right, it being for costs of construction to which intervenors had not been suborgated, as it was additional cost of the new wall.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

Albert Voorhies for Plaintiff, Appellant.

Dart & Kernan for Defendants, Appellees.

Farrar, Jonas & Kruttschnitt for Royal Insurance Company, Intervenor, Appellee.

Argued and submitted February 24, 1898.

Opinion handed down March 7, 1898.

Rehearing refused June 28, 1898.

The opinion of the court was delivered by

BREAUX, J. This suit was brought by the plaintiff for two thousand three hundred and seventy-six dollars and forty-three cents, alleged proportion due by the defendants of the value of a wall separating the property of plaintiff and defendants.

The answer traverses the allegations of plaintiff's petition and specially pleads that there was no necessity of demolishing the old and substituting a new wall; that plaintiff substituted a wall of greater width and encroached thereby upon their property, some two and a half inches.

The prayer was for a judgment condemning the plaintiff to remove the wall to its former limits, and denying all liability. Alternatively in case of judgment in plaintiff's favor then that respondents have an offset and deduction (from such sum as may be found due) for value of the old wall owned in common.

The Royal Insurance Company intervened and alleged that it had insured plaintiff's building; that it was destroyed by fire within the terms and life of the policy, and that thereafter he brought suit against it and recovered judgment from the company for eight thousand dollars; that one of the elements of loss recovered by him was the value of the whole party wall separating his property from that of the defendants here, and that he got the sum of four thousand one hundred and fifty-seven dollars and fifteen cents as the value of the wall; that the judgment rendered under which this amount was collected included one-half of the value of the party wall which Monteleone was seeking to recover from the defendant in the suit before us for determination; that intervenors, the insurance company, had paid and satisfied the judgment rendered against it, as just stated, and that by the payment it was subrogated by law to the claims of Monteleone against the adjacent proprietors for one-half of the value of the party wall; that the right of subrogation was recognized by the judgment of this court, citing 47 An. 1563. The intervenor claimed an amount alleged as being equal to one-half of the value of the party wall owned by the proprietors of adjacent property, defendants in this suit.

The defendants filed a general denial in answer to the petition of the insurance company, intervenors. The plaintiff, Monteleone, alleged is his answer to the intervention, substantially, that he had not insured the whole party wall, but that he had only insured the

half of which he was the owner, and that he had only recovered its value and not the value of the entire wall; that the reservation of this court in the case cited *supra* was not as extensive as the intervenor alleged. The judgment of the District Court was partly in favor of plaintiff and against the defendants, and partly in favor of the intervenor against defendants.

We conclude from the argument at bar and the brief that defendants no longer contend for a decree to compel plaintiff to remove the party wall to its former limits as prayed for in their answer. The difference between the old limits of the wall and the new is only about two inches; the new wall is on the division line of the adjacent owners, but it extends on the defendants' side of the line about two inches more than the nine inches authorized by law under Art. 667, C. P.

Since the answer was filed in which the defendants claimed by way of reconvention that because of the alleged encroachment the plaintiff should be made to demolish his wall, the defendants rebuilt their houses on the adjacent lots, and used the wall in question, and made it a part of one of their buildings. Having thus utilized this wall the claim for its demolition on the ground of trespass to the extent of two inches of land falls. The defendants grant that they no longer have any claim for its demolition, but they urge that they are none the less entitled to the value of the two inches of ground. We have made a careful examination of the evidence upon which to base damages for the value of the land, in excess of the nine inches allowed, upon which plaintiff's wall rests, and have not found that it made certain the fact that defendant is entitled to anything. The testimony is somewhat conflicting as to the space taken up by plaintiff. The weight of the evidence, in our judgment, sustains the conclusion on this point that the wall is nineteen inches in thickness, of which six and three-quarters inches extends from the centre line of the old wall over plaintiff's place, and twelve and one-quarter inches upon defendant's property, but as to its value there is no evidence to sustain a judgment.

This brings us to the demand made upon defendants for the value of one-half of the party wall. The wall, to the extent of its use by the defendants, is a common wall, owned in indivision by plaintiff and defendants. It was entirely rebuilt by plaintiff.

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The destruction of the old wall made it necessary to rebuild a new

wall. It was built at plaintiff's expense. The day that defendants made use of the wall as a support for their own building, and made it a common wall, they became indebted for one-half of what plaintiff laid out for its construction. C. C. 676.

At the beginning of our work: fixing the amount due by the defendants, the objection is urged on their part that plaintiff had a thicker and more solid wall built than the defendants needed, and that the costs of construction was more than they should have been. The building of defendant was three stories high; that of plaintiff five. The weight bearing on the common wall and its support on either side was not so greatly different.

We conclude from the evidence that the wall was not built stronger than it should have been built. The evidence discloses that the difference in height between plaintiff's and defendants' building is about eitghteen feet. The building of the defendants has a large clear span of about thirty feet and very high stories. The party wall may be stronger than actually necessary to support their building, but the difference, in our view, is not so great between the weight of plaintiff's building and that of defendants as to render it a matter of sufficient moment to make further deductions than was made, when the case was tried in the District Court. With reference to the costs of materials used by plaintiff in building this wall, it appears that plaintiff made use of hard brick that cost more than the ordinary brick with which the defendants built. He also used cement and mortar. For similar construction defendants made use of lime. The difference in the costs was not great.

The party wall, used by defendants was, we are informed, in height fifty-seven feet, and from front to rear one hundred and three feet. An account was in the record of the number of bricks in the wall, and of other materials made use of in the construction; there was also a sketch of the wall clearly indicating the portion of the wall charged to the defendants. The measurements, supported as they are by evidence, and the items charged, all have every appearance of being correct. The bill rendered by plaintiff to defendants amounted to one thousand and sixty-nine dollars and sixty-three cents, actually paid for labor and material in constructing the half of the party wall. This bill, we take it, is binding upon the plaintiff, and a correct basis of his demand.

We pass to another branch of this case growing out of a claim

set up by the intervenors for the value of so much of the wall as was owned by the defendants; adjoining proprietors. The question is not *res nova*. In Monteleone vs. Insurance Company, before cited, this court, in passing upon the suggestion of defendant to have deducted one-half of the party-wall which had been allowed to plaintiff for loss, held against such a deduction, and refused to grant the demand. It follows that this judgment decreed that the defendant was responsible for a constructive total loss of the whole wall, and that no deduction as asked was made. In the application for a rehearing the defendants urged that this was error, and reiterated the argument against the allowance. The proposition in support of the position was argued at some length in the brief. The plaintiff in a brief in reply to defendants' application for a rehearing referred to the reservation contained in the opinion and judgment of the court. We give no importance to the position taken in that suit on this subject, save to the extent that it makes it manifest that it was an issue in the case, and that it was decided after it had been argued. The court heretofore, after having considered the grounds, expressly determined that plaintiff was entitled, under the contract of insurance, as made, to recover for the whole wall, and having reserved to defendant, now intervenor, a right of subrogation, the matter is closed as between these parties. Under the decree the payment made by the insurance company to the plaintiff carried with it a subrogation to his right.

The question resolves itself into this:

The defendant in the first case cited *supra* denied that plaintiff had the right to recover for the whole wall. This court, looking upon the right of subrogation as securing an equivalent to the deduction asked, declined to make the deduction asked. It is manifest, in the face of the subrogation which followed payment, the plaintiff could not retain the whole of the amount paid, and at the same time recover, for his individual account, any part of the sum due by the owners of the adjacent property on the old wall. The amount, that is, the amount due by the defendants based on the value of the old wall, was fixed by the judge of the District Court at a sum which should not, in our view, be less.

From the balance remaining after having deducted this last sum (*i. e.*, sum of allowed to intervenor) from the total shown by the account rendered of one thousand and sixty-nine dollars and sixty-

two cents, there remained three hundred and ninety-four dollars and sixty-two cents. From this amount was deducted one hundred and eighty-four dollars and thirty-two cents, cost of foundation and footings and of old bricks. The foundation of the wall had not been destroyed. It was strong enough to support defendants' wall. It was taken out and another laid to support plaintiff's heavier wall. It was reasonable, in our view, for plaintiff to bear this expense. The other item deducted was for old bricks used and thus leaving a balance of two hundred and ten dollars and sixty-one cents due plaintiff.

It is in evidence that the wall has cost a larger sum than plaintiff recovered from the intervenors under the decree rendered in the first suit. The amounts due to the insurance company were fixed by taking the cost of the old wall as a basis, as it had no concern in matter of the cost of the new wall. The intervenor recovered the value of the old wall and not the cost of construction of the new wall, which was more. It was different between the plaintiff and the defendants; the former had recovered from the insurance company less than the costs of the new wall. The defendants had not objected to the material used in constructing the new wall; when it was being constructed they had openings made in the wall in their interest, and when it was completed they, without protest, made it a wall in common. In our judgment payment of the difference in the costs of the two walls by them is fair, reasonable and just.

It is therefore ordered, adjudged and decreed that the judgment appealed from be and it is affirmed.

Rehearing refused June 28. 1898.

No. 12,572.

ANTONIO MONTELEONE VS. MRS. J. M. HARDING ET ALS.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

Albert Voorhies for Plaintiff, Appellee.

Dart & Kernan for Defendants, Appellants.

Farrar, Jonas, Kruttschnitt & Gurley for Royal Insurance Company, Intervenor, Appellee.

Argued and submitted February 24, 1898.
Opinion handed down March 8, 1898.
Rehearing refused June 28, 1898.

The opinion of the court was delivered by

BREAUX, J. The facts in this case and the issues are the same as in the case of A. Monteleone vs. Mrs. J. M. Harding *et als.*, No. 12,541, handed down yesterday morning.

For the reasons assigned in that case, the judgment of the District Court is affirmed.

No. 12,763.

MRS. FLORENCIA CALDERON VS. AUGUSTINE MARTIN, HER HUSBAND.

Mental infirmities are infinite in degree. The law intervenes in behalf of a person when the malady affecting his intelligence prevents him from governing his person and his property.

These are the tests, and one may be interdicted although he is not always devoid of all power to reason.

The condition in this case makes manifest habitual mental alienation, and the consequent necessity of appointing a curator to safeguard defendant's person and property.

To protect every right of the interdict and soothe his condition as much as possible is the object of the law in authorizing interdiction.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

H. N. Gautier and *L. P. Paquet* for Plaintiff, Appellee.

A. A. Ker, H. E. Upton, Lazarus, Moore & Luce for Defendant, Appellant.

Argued and submitted April 22, 1898.
Opinion handed down May 2, 1898.
Rehearing refused June 28, 1898.

The opinion of the court was delivered by

BREAUX, J. The wife brought this suit for the interdiction of her husband, on the ground of mental unsoundness, rendering him incapable of properly administering his estate and of taking care of his person. The father of the defendant died testate in 1893, leaving his property, valuable at his death, to his widow and his only offspring, the defendant. To the former he bequeathed one-third of his succession, with the usufruct of the remainder, and to the latter two-thirds, subject to the mother's usufruct.

In 1894 plaintiff was married to the defendant. The evidence discloses that his mental faculties were always weak. Of late years he has become quite timid, to a degree that he is unwilling to leave his home alone. When he is away from his home he is afraid to return without having some one with him. At his home he shows by his acts and utterances that he is weak and almost entirely devoid of all will power. He is unable to correctly calculate or to multiply simple numbers. His utterances are difficult and not easily understood. These are the salient facts stated by the witnesses for plaintiff. About an equal number of witnesses for defendant expressed a different view in regard to his mental condition. We infer that all the witnesses agreed in the opinion that the defendant is frequently abnormally nervous, and that he is unable to earn a livelihood, but those for the defendant evidently did not think that his condition was such as to warrant his interdiction. With reference to the property left by the father, which was all he had, it was wasted, save a small amount. His mother had not chosen to adhere closely to the limitation manifestly desired by the father and testator in regard to the disposition of the property bequeathed. The mother and the son together have freely expended amounts inherited, so that at this time a large estate is of little value. The District Judge heard the witnesses. He heard the defendant testify and propounded a number of questions to him. Judgment was rendered holding that the defendant was incapable of performing validly any of the acts which a person of sound mind

could perform and decreeing his interdiction. The questions before us for our determination are brought upon appeal of the defendant from the judgment of interdiction. In our opinion, defendant's sad condition comes within the grasp of the law which authorizes the interdiction of one who, because of mental incapacity, is unable to properly protect himself and manage his estate. The defendant can not, in his present state of mental weakness, transact the customary business of life. He is not, in the strict senee of the word, absolutely insane, but he is none the less, in our view, as much in need of protection as if his case were one strictly of the most pronounced type of insanity.

The expenditure of his patrimony and his total failure, in a satisfactory manner, to account as a witness for the loss, is a direct manifestation of most lamentable mental weakness. By his incoherence in answer to questions he made it evident that he did not really know what had become of his property.

The testimony taken as a whole indicates, in our opinion, a derangement of the mind's functions. We do not assert for an instant that the defendant is a confirmed lunatic. Alienists have asserted, and we think correctly, that those designated as imbeciles in law may ordinarily make use of their senses; may have ideas, memory and some judgment, and conduct themselves more or less properly at times; they may read, articulate words with more or less clearness, even calculate when the calculation is not complicated. Defendant's case falls within the definition. In our judgment, within proper limits a definition of habitual mental infirmity might be given less wide and comprehensive than the foregoing definition that would cover defendant's case.

With reference to the defendant, we will not use the harsh word "imbecile," as there is no actual necessity to use the word. He has no knowledge of numbers, and he is, we think, as incapable of comprehending his interests properly as any person who may come within the definition by alienists of *non compos*.

We must affirm, the evidence shows, that he is mentally infirm and a proper subject to place in charge of a guardian.

Personally, the defendant's condition awakens sympathy. Evidently he is kind and loving to his mother. In his mental blindness he never fails to discern his mother and to call on her in his distress. It appears that he sometimes on the streets near his home is exposed to the scoffs and jeers of mischievous and thoughtless lads.

In these and other troubles of the kind, he, boylike, would endeavor to get his mother's protection; an appeal to which the good mother never fails to respond, however disagreeable the afflicted offspring may be to others.

We do not suppose that any one is to be benefited, or that any one seeks an advantage in having defendant interdicted. The law has established measures of protection for the interdict only. The purpose is the care of his person and the proper gestion of his property. The solicitude of the law is made manifest by the different articles of the Code. These articles look to kindly and proper offices on the part of the law's agents. With studious care it has provided that the income of the person interdicted "shall be employed in mitigating" his sufferings and in accelerating his cure. C. C. 418. It is also made the duty of the judge to visit the person interdicted, and otherwise to inform himself of the state of his health. C. C. 424, 425.

The defendant cited the case of Francke vs. His Wife, 29 An. 302-315. There are, in our view, impressive inferences to be drawn from that decision which are favorable to plaintiff's demand. Mrs. Francke, the person it was sought to have decreed insane, in the cited case, had no property. Here, on the contrary, we are informed that there is a little property, which, under the management of a curator, may be applied to soften the hard lot of the interdict, who manifests no disposition or capacity for labor or employment of any sort.

Different, also, from the cited case, there is here option left to the court in selecting a curator upon whom the duty will devolve of asserting all of defendant's rights, and there is, therefore, no ground for the application of the intimation found in the cited case. The conjugal rights between the defendant and the plaintiff remain, and all rights, without the least reservation, are sacred. It is the curator's duty to uphold them all before the courts, be their nature what they may. The wife is not necessarily the curator of the husband. But the husband, under the law, is the curator of the wife; in consequence, the intimation in the Francke case does not apply. The interdicted person is entitled to every regard and sympathy. The greatest care should be taken to maintain all his claims.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed, at appellant's costs.

Rehearing refused June 28, 1898.

No. 12,926.

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STATE OF LOUISIANA VS. DAVID MARTIN.

ON RULE TO SET ASIDE JUDGMENT OF FORFEITURE.

1. The mere appearance of accused at same term of court, after his appearance bond has been forfeited, does not entitle him to have the judgment of forfeiture set aside, or satisfaction thereof entered.
2. Nor does his arrest under a second *capias* and his being in the custody of the court before its adjournment for the term, or his having given a second bond to secure his further appearance, entitle him or his sureties to this satisfaction.
3. But the final disposition of the case by his subsequent trial and conviction, or acquittal, before collection of the judgment of forfeiture is had, entitles him or his sureties to have satisfaction of the judgment of forfeiture entered on proper proceedings taken therefor.

ON APPEAL from the Sixteenth Judicial District Court, Parish of St. Helena.—*Reid*, J.

Milton A. Strickland for Plaintiffs in Rule, Appellees.

M. J. Cunningham, Attorney General, and *D. S. Kemp*, District Attorney, for State, Defendant in Rule, Appellant.

Submitted on briefs, December 10, 1898.
Opinion handed down December 19, 1898.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

BLANCHARD, J. The State is appellant from a decree making absolute a rule declaring a judgment of forfeiture of an appearance bond satisfied.

The appeal is met by a motion to dismiss on the ground that the case is a criminal proceeding in which no right of appeal exists in the State from the ruling and judgment of the court *a qua*.

That the State has the constitutional right of appeal in certain criminal proceedings, even though there be lacking express legislative enactment on the subject, is not an open question, and the exercise of this right is affirmed by jurisprudence.

See authorities cited in Knoblock's Criminal Digest, p. 18. Also

State vs. Dubois, 39 La. Ann. 676; State vs. Breeden, 47 La. Ann. 874.

Conceding that an appeal by the State will lie where an indictment is quashed, or a judgment is arrested, in felony cases, counsel for appellees denies that such right of appeal by the State ought to, or does, lie from a decision declaring a judgment of forfeiture of a bail bond satisfied.

In State vs. Williams, 37 La. Ann. 200, the sureties of defendant on his appearance bond appealed from a decree refusing to set aside a judgment of forfeiture, and the appeal was maintained.

In State vs. Burns, 38 La. Ann. 363, and State vs. Balize, *Ib.* 542. the bail bonds were forfeited and the sureties appealed. In the former case the appeal was dismissed because sought and returned too late—not because the right of appeal was questioned or denied. In the latter case the appeal was maintained, and the judgment of forfeiture annulled and set aside.

In State vs. Martin, 49 La. An. 752 (the case of this same defendant on a former hearing), the appearance bond of accused having been forfeited and judgment entered up against the principal and sureties, a motion was made to set aside the judgment of forfeiture. From a decree denying the motion defendant appealed. No question of his right to do so was raised, and on the merits the judgment appealed from was affirmed. See also 37 La. Ann. 62; 39 *Ib.* 939; 47 *Ib.* 363.

If persons charged with crime and their sureties on appearance bonds may appeal from final judgments forfeiting such bonds, or from final judgments refusing to set aside the forfeitures when made, surely the State may likewise appeal from adverse final judgments denying forfeiture, or setting aside forfeitures once made, or declaring judgments of forfeiture satisfied. The reasons for the one appeal are as strong and cogent as those for the other.

"But," declares counsel for appellees, "conceding the State an appeal in this case, how can the court say the judgment of the lower court, as presented, is error, without examining into all the facts upon which it is based, and all the circumstances surrounding its rendition? This your Honors will not do in any criminal case. You do not consider or review facts."

True, it is not given this court to consider or review the facts of a criminal prosecution in so far as the same pertain to the question of

the guilt or innocence of the accused. But where an issue arises, like the one here presented, involving a question of law blended with facts, it is subject to our review. State vs. Nelson, 32 La. Ann. 845; State vs. Trivas, 32 La. Ann. 1086; State vs. Hyland, 36 La. Ann. 87; State vs. Seiley, 41 La. Ann. 143.

The appeal is from a ruling of *the judge* on the law as applicable to a certain state of circumstances presented to him involving the right of release from forfeiture, *vel non*, of an appearance bond. No facts are involved on which a jury in a criminal prosecution had sat or could sit. The judgment discharging the sureties from the payment of the forfeited bond, decreeing the former judgment of forfeiture satisfied, can, in no sense, be assimilated to a verdict of a jury discharging an accused.

It is much more to be assimilated to a judgment in a civil proceeding annulling a former judgment for a moneyed demand.

The motion to dismiss is denied.

ON THE MERITS.

Defendant was indicted in 1895 for receiving stolen goods, arrested and gave bond for his appearance. Nothing further was done in his case until the November term, 1896, when he was arraigned, pleaded not guilty and the case assigned for trial on a day fixed. On that day he failed to answer when called and his bond was duly forfeited. Four days later he was rearrested (being then in the court room) on a second *capias* that had issued. He gave a second appearance bond and was released from custody.

The day of his rearrest was the last, save one, of that term of court. The adjournment of court the next day (Saturday) was necessitated by reason of the fact that a regular term of the same court in an adjoining parish would convene the following Monday.

At the time of his appearance in court and rearrest another criminal case was on trial, at the conclusion of which, within two hours thereafter, the jury was discharged for the term. It is shown that the witnesses for the prosecution in defendant's case were then absent and it was not practicable to try his case before the final adjournment of the court. But, based upon his appearance and rearrest, and upon his then being in the custody of the court, he and his sureties filed motions to set aside the judgment of forfeiture of the first bond.

This motion was tried the succeeding day (the last of the term) and overruled. Whereupon an order of appeal was taken to this court. The case was considered here in February, 1897, and a decree handed down affirming the judgment appealed from. 49 La. An. 752. The question there presented was (the appearance bond having been duly and legally forfeited, the accused having been rearrested and in custody and offering for trial, but too late for trial then because the petit jury was about to be discharged, the court was about to adjourn for the term and the State's witnesses were absent, one or more of them in an adjoining parish) whether the appellants were entitled to have the jndgment of forfeiture vacated. It was answered in the negative. It was held that the appearance of the accused, under the coercive power of the court, will not suffice to set aside the judgment of forfeiture, even if the appearance be at the same term when the judgment was rendered, but too late for trial at that term. It will be observed the issue there was, whether, under the circumstances presented, the judgment of forfeiture should be set aside. The issue here is, whether this judgment of forfeiture, there maintained, should now be held satisfied.

What is to be considered is whether what took place afterward warrants the decree of the trial court sustaining the rule to declare satisfied the judgment of forfeiture affirmed by us.

The judgment of this court was rendered February 15, 1897. On February 18, three days later, defendant was tried in the parish of St. Helena on the indictment charging him with receiving stolen goods, and acquitted. On March 1 following, within the legal delay, an application for rehearing was filed, one of the grounds of which was "that since the rendition of the judgment in this Honorable Court, in this cause, David Martin has been tried and acquitted on the charge wherein the bond was forfeited, as shown by a certified copy of the minutes of the District Court hereto annexed and made part hereof." And the certified copy of the minutes of the District Court annexed did show the trial and acquittal of the accused. The rehearing was refused. No opinion thereon was handed down. In State vs. Bass, Man. Unrep. Cas. 250, it was held that where, after an appeal in a forfeited bail bond case had been taken, the principal on the bond was tried and acquitted, and this was made to appear by the proceedings of the trial being added to the transcript, this court could not formally act upon the same.

In June following the denial of the rehearing, the accused and his sureties on the forfeited bond took a rule to have cause shown why the judgment of forfeiture should not be declared satisfied, set aside and annulled. The petition in rule sets out at length the facts and circumstances of the case, all of which were practically covered and involved in the former appeal, except the subsequent trial and acquittal of the accused.

Defendants in rule excepted that the petition disclosed no cause of action and that it was a collateral attack on the judgment of forfeiture. They further pleaded by way of exception, *res judicata*, averring that the same issues were passed upon and decided by the previous judgment of this court. The exceptions were overruled and bill reserved.

Later, in their answer, defendants in rule averred the regularity of the forfeiture of the bond, the appeal from that judgment to this court, and the action here thereon.

They represented that execution had issued, but that no return had been made on the *fi. fa.*, that no money had ever been paid or collected on the judgment, and that none of the conditions of the bond had ever been complied with.

The case was tried and judgment was rendered declaring the judgment of forfeiture satisfied. This appeal followed.

At the conclusion of the record of the testimony taken in the case the trial judge made this note:—"The court has received the testimony offered on the trial hereof for the purpose of having the matter speedily and finally determined by the appellate court, to avoid its being returned in the event the appellate court desires it, but will decline to consider any question raised except that, whether or not the judgment has been satisfied by the final trial and acquittal of the accused." On this issue he thought the case was with the plaintiffs in rule.

While the question, considered originally, is not free from doubt, repeated adjudications of this court sustain the ruling of our learned brother of the District Court. State vs. Schexneider, 45 La. Ann. 1445; Lafleur vs. Mouton, 8 La. Ann. 489; State vs. Hamill, 6 La. Ann. 257; State vs. Langton, 6 La. Ann. 282; State vs. Brown, 13 La. Ann. 267; State vs. Scmidt, 13 La. Ann. 267; State vs. Bass, Manning's Unreported Cases, 250.

The mere appearance of the accused at the same term of the court

after his bond had been forfeited did not entitle him to have the judgment of forfeiture set aside, or satisfaction thereof entered. State vs. Grice, 11 La. Ann. 605.

Nor did his arrest under the second *capias* and his being in the custody of the court before its adjournment for that term, or his having given a second bond to secure his further appearance, entitle him, or his sureties, to this satisfaction. And this is what we decided when the case was before us heretofore. 49 La. Ann. 752. Why? Because the appearance he then made did not finally dispose of the case. He was not finally tried and convicted or acquitted. State vs. Defesse, 18 La. Ann. 104.

But subsequently he was tried and acquitted, and with this final disposition of the case, before collection of the judgment of forfeiture was had, satisfaction of such judgment must, it would seem, under the established jurisprudence, be entered on proper proceedings taken therefor.

Judgment affirmed.

BREAUX, J. Dissents.

NICHOLLS, C. J., takes no part, being absent ill.

No. 12,641.

FRANK G. MAHAN VS. JOHN AND PETER EVERETT AND PLANTERS' MOLASSES COMPANY, LTD.

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Pedestrians are entitled to the right of way on the sidewalks of the city, and to the assurance that they may traverse the same in the confidence of safety.

Ordinary care is to be observed by those using the banquette to avoid danger, but not the same alertness is required of them as is the case when they cross streets where vehicles, cars, etc., have equal rights of way.

While it is permitted to load and unload drays, floats, and other vehicles over the banquettes, the same must be done with due care and precaution for the safety and protection of passers-by, those engaged in the work remembering always that they are temporarily obstructing a thoroughfare over which the general public afoot has the prior servitude or right of passage.

APPEAL from the Civil District Court, Parish of Orleans. *Ellis J.*

Lazarus, Moore & Luce and *Joseph N. Wolfson* for Plaintiff, Appellant.

Bernard McCloskey for J. and P. Everett, Defendants, Appellees; *D. B. H. Chaffe* for Planters' Molasses Company, Ltd., Defendant, Appellee.

Argued and submitted May 5, 1898.
Opinion handed down June 13, 1898.
Rehearing refused June 28, 1898.

The opinion of the court was delivered by

BLANCHARD, J. This is an action sounding in damages for personal injuries alleged to have been sustained. The amount claimed is five thousand dollars.

The averments are that plaintiff was walking along a public street in the city of New Orleans, where he had a right to be; that he was prudent and careful; and that in passing certain premises occupied by the Planters' Molasses Company, Limited, without notice or warning, a barrel of molasses was violently rolled on skids from a vehicle standing near the curbstone in the street, which barrel struck petitioner, beaking his leg and causing him great bodily pain and serious injury, rendering him less able to earn a living for himself and family and making him a cripple for life.

The Molasses Company and the owners of the vehicle are sued *in solido*, on the allegation that the injury to plaintiff was occasioned through their fault, and that of their employees, in failing to exercise due care and diligence to insure the safety of pedestrians along the street from the danger incident to the unloading of barrels of molasses, in the manner mentioned, from drays into the warehouse. It is set forth that the Molasses Company employed John and Peter Everett, who own and operate public drays and floats, to haul the molasses in barrels to their warehouse and they were so engaged at the time of the accident; and it is averred that, besides this contractual relationship, the Molasses Company and the Everetts jointly owned, controlled and managed the drays and floats so engaged in hauling the molasses.

Defendants plead the general issue, and represent that if any damage resulted to plaintiff it was brought about by his own negligence.

It was not a jury trial, and the judgment of the court below was for defendants, from which this appeal is prosecuted.

Plaintiff was an old man, between sixty-nine and seventy years of age. His sight apparently was not good, or he was suffering in some way from his eyes, for the evidence discloses that he was wearing green spectacles, with side glasses. Just why he wore these glasses is not told. He was on the street, engaged in his usual avocation—trading on a small scale, buying small quantities of commodities to sell again without delay at a small profit, a kind of peddling business. Sometimes, he says, he would sell a carload of some stuff or other on commission. He had just bought a box of peaches and was carrying it under his arm intending to sell it. He had been well-to-do in days gone by, but was not at the time of the accident in good circumstances.

He had a right to be on the streets and it was not negligence, or want of prudence, or care, on his part to be there even though he found it necessary to protect his eyes with green glasses. There is no pretence that he could not see, or see well enough to justify his being out alone. He testified his hearing was good and that he could see.

Pedestrians are entitled to the right of way on the side-walks or banquettes of the city. That is what the side-walks are dedicated, constructed and maintained for. Ordinary care is to observed by those using the same to avoid danger, but not the same alertness is required of them as is the case when they cross streets where vehicles, street cars, etc., have equal rights of way.

While it is permitted to load and unload drays, floats and other vehicles over the banquettes, such loading and unloading must be done with care and precaution, having due regard for the safety and protection of passers-by, those engaged in the work remembering always that they are temporarily obstructing, more or less, a thoroughfare over which the general public afoot has the prior servitude or right of passage. It follows, as tersely stated by plaintiff's counsel, that the loading and unloading into and from vehicles over the side-walks must be done in such way that the physically weak as well as the physically strong, the tenderly young as well as the maturely old, men and women, whether young and vigorous, or old and feeble, may traverse the same in the confidence of safety.

Anything short of this constitutes negligence in those engaged in such loading and unloading, and where injury results to a passer-by

a conclusive, certainly a clear, case of contributory negligence on his part must be made out to free the former from liability.

No such conclusion or clear case of contributory negligence on part of plaintiff is made out by the defence herein. We are not able to agree with the conclusions of our learned brother of the lower court in this regard. A careful consideration of the testimony leads to a different result than that announced by him.

The float or wagon from which the barrels of molasses were being discharged into the store of the Planters Molasses Company, Limited, was standing close to the curbstone of the side-walk and a skid was used down which the barrels were rolled. One end of the skid was on the wagon, the other end on the side-walk. The length of the skid was eight or ten feet and the end of it which rested on the side-walk was from two and a half to three feet from the door of the store through which the barrels were to pass into the building. The heighth from the side-walk to the top of the wagon where the skid was placed was about a foot and a half. The skid placed thus formed an incline. One man only was in the wagon. He manipulated the barrels to the point where the skid rested on the float, adjusted them on the skid, then loosened his hold and the barrels rolled down. The weight of the barrels was six hundred and fifty pounds. There can be no doubt that the momentum gained by the heavy barrels in going down this incline was considerable. A sack or bag folded was placed at the inner end of the skid to break the fall or force of the barrel as it reached the paved side-walk. One of defendants, on the stand, admitted the barrels would or may run four or five feet after reaching the lower end of the skid. This would carry them clear into the store, for the door of that building was less than three feet from the end of the skid. For a barrel to roll from the top of the skid to the sidewalk required, we are satisfied, but an instant. The man in the wagon who poised a barrel on the skid at its upper end and then sent it on its downward course was guilty of gross negligence in loosening his hold on it at the instant that a pedestrian was stepping opposite the lower end of the skid. That is exactly what the driver of this float did, and the barrel which he thus loosened ran down upon the plaintiff just as the latter was entering the narrow passage way left on the side-walk between the end of the skid and the door of the building. It was the duty of this driver as he poised the barrel preparatory to its downward flight

to glance at the condition of things at the lower end of the skid and if he saw a passer-by about to enter the space between the skid and the door to hold the barrel until he had passed the danger line, or else call out to him to stand until the barrel had passed down and out of the way. He did neither of these things. He either did not glance down to see if the way was clear, or else he carelessly, with almost criminal negligence, loosened the barrel notwithstanding the dangerous proximity of plaintiff to the lower end of the skid. The plaintiff could not have been over a step away from the narrow passage left on the sidewalk and still in motion toward it when the barrel that injured him left the top of the skid. It was much more the duty and care of the driver of the wagon to take notice of plaintiff nearing the lower end of the skid and regulate his action accordingly, than it was plaintiff's duty and care to notice the driver in the wagon and regulate his movement or conduct by what the driver was doing. The plaintiff was on the public thoroughfare for foot passengers and had a right to the occupancy for the moment of that particular part of the side-walk superior to that of the barrel of molasses. He had a right to expect, even if he noticed the barrel poised on the skid at the wagon end of it, that the driver would recognize his superior right of way and of passage and hold the barrel until he had exercised it. It will not do to say that the plaintiff, seeing the skid and noticing the driver and the barrels, must stop and make inquiry as to the intentions of the driver with respect to sending the barrel down at that particular instant of time. The obligation rested decidedly on the driver to give warning to plaintiff, or else hold the barrel in his grasp an instant longer.

The plaintiff testified he did not see the barrel until it struck him, that no warning was given him, no hand was put upon him or signal made to him to stop. He says he wss noticing in front of him as he walked along and was exercising the ordinary care of a pedestrian. A witness for the plaintiff, who saw the accident, says he had just passed the end of the skid himself; no one was there preventing people from passing, nor stopping the barrels or impeding their force as they came down the skid; nor was any warning or notice given. He testified, too, that the colored man on the float shoved the barrel on the skid without regard to consequences.

A witness for the defence, employed by the defendant company, denies the driver shoved the barrel, and asserts that the barrel had

left the hands of the driver at the time plaintiff attempted to pass. It is immaterial whether the barrel rolled down of its own momentum or its speed was accelerated by a shove at the upper end of the skid. Nor, in our view, is it of consequence that the barrel had been started on its flight downward as plaintiff essayed to pass. It should, we hold, have been held by the driver at the upper end of the skid until the possibility of danger to plaintiff had passed, until the latter had been called to stop and had stopped, or had moved on beyond the danger point.

Another witness for the defence, also an employee of defendant company, says he put his hand on plaintiff to stop him as the barrel was coming down, and that plaintiff would not have been hurt had he stopped when he did this. He admits, however, that when he touched him the barrel was half way down the skid and plaintiff was right at the end of the skid, and it was too late to hold him out of harm's way. As opposed to this plaintiff testifies that no one put his hand on him or tried to stop him, and John Everett, one of the defendants, who was present and in a few feet of the place where the accident occurred, stated on the stand that he knew of no effort made to stop plaintiff, and that he gave plaintiff no warning.

There was conflict of testimony as to the velocity with which the barrel moved down the incline. However this may be, results speak for themselves. It was moving with force enough to break plaintiff's leg. To have done this its velocity must have been great enough to come down the skid in an instant of time—too swift to enable plaintiff to escape it when turned loose above just as he was stepping in front of the skid below. If the force of the barrel was sufficiently great to break plaintiff's leg, it is improbable that he could have stopped it had he made an effort to do so as it approached him. On this point the witness Connors, sworn for the defence, says: "Just as the barrel left the driver's hands I turned, and Mr. Mahan had thrown down his hands as if to prevent the barrel from hitting him." Yet it did strike him and with force enough to break his leg.

We find the case to be with the plaintiff and the judgment appealed from must be reversed.

John and Peter Everett alone are responsible, however. There is no case against the other defendant, the Planters' Molasses Company, Limited.

The driver of the float whose negligence caused the accident was in the employment solely of the Everetts. He had no connection with the Molasses Company, and that corporation are not liable for his fault. While the molasses belonged to the company and was being hauled to their store, the hauling was done under contract with the Everetts, who, as boss draymen, were independent contractors. A contractor is not liable for the negligent or improper execution of the work by the contractor. Woods on Master and Servant, p. 593; Farren, Tutor, vs. Sellers & Co., 39 La. An. 1011.

As to the *quantum* of damages, we think one thousand dollars sufficient compensation for the injuries sustained by plaintiff.

For the reasons assigned, it is ordered, adjudged and decreed that the judgment appealed from, in so far as the Planters' Molasses Company, Limited, is concerned, be affirmed; but in so far as John and Peter Everett are concerned, that said judgment be annulled, avoided and reversed, and it is now ordered and decreed that plaintiff do have and recover of said John and Peter Everett, *in solido*, the sum of one thousand dollars with legal interest from this date, together with costs of both courts, except those incurred in making the Molasses Company, Limited, a party defendant, which must be borne by the plaintiff.

No. 12,917.

STATE OF LOUISIANA EX REL. TOILET SUPPLY CO., LTD., VS. HON. F. A. MONROE, JUDGE, AND ROBERT J. DOUGLAS.

The writ of sequestration which issued in the case covered property the value of which the judge of the District Court, after hearing evidence, fixed at less than two thousand dollars.

All parties interested acquiesced in the value as fixed. An appeal will not lie to this court for want of jurisdiction from an order permitting the defendant to bond property when its value is less than two thousand dollars.

A writ of *certiorari* issued in aid of the application for a writ of *mandamus* does not present other issues than those raised in the application for the *mandamus*.

ON APPLICATION for Writs of *Mandamus* and *Certiorari*.

Robert J. Maloney for Relator.

Respondent Judge *per se*.

J. D. Kiernan for Respondent, Douglas.

Submitted November 7, 1898.
Opinion handed down November 21, 1898.

The opinion of the court was delivered by

BREAUX, J. The relator brought suit claiming that the secretary and treasurer of the company had in his possession, in virtue of his office, all its property.

That its "secretary and treasurer" circulated reports that the company was insolvent, and had gone out of business.

The relator also averred, that the "secretary and treasurer" was conducting relator's business in the name of the "Towel Delivery Company," a fictitious firm, of which its "secretary and treasurer" was the only member, and using the property of the coucern for his individual account, and thereby causing it great and irreparable injury.

Relator, having made the usual averments for a writ of sequestration, obtained it, and had the property sequestered.

Relator prayed, also, for a writ of injunction enjoining and prohibiting its "secretary and treasurer" from injuring relator in its business, and from collecting the revenues of the company; and upon the prayer, the writ of injunction was issued.

The relator alleges that thereupon the civil sheriff took into his possession all its property—*i. e.*, the property of the Toilet Supply Company, Limited, found in the possession of its secretary and treasurer.

On the 29th of June, the defendant secretary and treasurer moved to bond the writ of sequestratiou. The court granted the motion in July, 1898; relator alleging that the property was worth more than two thousand dollars, moved for a suspensive appeal.

The court refused to grant him the appeal for which he applied. The relator alleged various grounds upon which he relies to sustain his appeal, and applied for writ of *mandamus* and *certiorari* to compel the judge of the District Court to grant him a suspensive appeal.

The respondent judge avers, in answer to the rule *nisi* issued by this court, that the property sequestered consisted of toilet stands, towels and similar articles of property, in the hands of some hun-

dreds of subscribers, who were to pay a small sum monthly for the use and for replenishing the supply; that at the time of the institution of the suit by the relator, the Toilet Supply Company, the business appeared to have been farmed out to the defendant "secretary and treasurer," who, with the president of the company, and, it may be, a third person nominally, were the only persons interested.

That relator, who was plaintiff in the suit, by means of the writ of injunction and sequestration, issued *ex parte*, sought to deprive the defendant Douglas, "secretary," of his means of earning a livelihood, and to destroy the business itself.

It appears that the application of the defendant to bond was made within the legal delay, after the sheriff had made the seizures ordered and the court had heard evidence enabling it to fix amount of the bond. It was bonded.

Further, the court *a qua* says, that the question is one relating exclusively to a value in money, and that plaintiff, the president, Begg, can not sustain an injury not to be compensated in money.

Robert J. Douglas, secretary, made one of the respondents, set forth, that the value of the property sequestered is less than two thousand dollars, and that this court is without jurisdiction.

The gravamen of relator's complaint is, that the court *a qua* refused to grant it an order of appeal, authorizing him to take a suspensive appeal from the judgment of the court, which order permitted Robt. J. Douglas, defendant in the sequestration proceedings, to bond the property sequestered in the suit.

After hearing evidence, the District Court fixed the value of all the property at fifteen hundred dollars.

The plaintiff in the suit, who is the relator here, did not enter any objection whatever of record to the value fixed.

On the contrary, some delay having arisen after the defendant's motion to bond had been filed, in order that the court might fix the value of the property, plaintiff assumed that defendant had lost his right to bond, because of that delay, and he, thereupon, moved the court to permit him to bond.

In his application to bond, he alleged the amount at which the court had fixed the value of the property, and asked to be permitted to furnish a bond therefor without making any allegation regarding its insufficiency in amount.

We take it that all parties concerned considered a bond of fifteen

hundred dollars to be enough to protect all of plaintiff's and relator's demands.

This court is without jurisdiction of questions relating to the writ of sequestration. It is manifest, that no suspensive appeal will lie to this court from an order permitting a defendant in sequestration proceeding to bond when the whole property involved in the suit is of value less than two thousand dollars.

With reference to the writ of injunction which was issued in the case. The defendant had made no application to bond it, or to set the writ aside upon bond. No question arises in matter relating to the injunction.

So far as disclosed by the record, it remains in full force and effect before the District Court.

The relator, in the prayer, sets forth that a certified copy of all the proceedings in the case should be sent to the court, to the end that their validity may be ascertained.

We take it, that the prayer and allegation were made in aid of the application for a writ of *mandamus*, to compel the District Judge to grant a suspensive appeal. No other remedy is prayed for.

It is therefore ordered, adjudged and decreed that the application in this case for writs of *mandamus* and *certiorari* be dismissed for want of jurisdiction; that the rule *nisi* which issued in the case be discharged and set aside, at relator's costs.

No. 12,901.

STATE OF LOUISIANA VS. DENNIS HOPKINS.

The only point presented on appeal related to evidence of a fact that did not afford ground to reverse the verdict.

ON APPEAL from the Seventh Judicial District Court for the Parish of Madison. *Montgomery, J.*

M. J. Cunningham, Attorney General, and *Wm. S. Holmes* for Plaintiff, Appellee.

Snyder & Spencer for Defendant, Appellant.

Submitted on briefs November 12, 1898.

Opinion handed down November 21, 1898.

The opinion of the court was delivered by

BREAUX. J. Tee defendant was indicted for murder on the 25th day of January, 1898.

He was arraigned and pleaded not guilty on the 5th day of February following.

In July of 1898 he was tried and a verdict of guilty "without capital punishment" was returned by the jury.

Only one bill of exceptions was taken during the trial, and it sets forth that the court was requested to charge that when a person is engaged in quarreling with another, and some one at a distance informed of the quarrel awaits for the persons quarreling and voluntarily engages in the quarrel, this third person must be held to have provoked the quarrel, and not one or the other of the persons engaged in the quarrel.

The record also contains the following:

"The prisoner, in open court, requested that he be sent to the 'State penitentiary' for safe keeping, which request was granted by the court, and the sheriff was ordered to convey him 'to the State penitentiary at Baton Rouge.'"

There is a receipt of record showing that the defendant is in the penitentiary. The accused is not represented by counsel before this court.

We are not informed of the reason which influenced the accused to seek safety in the penitentiary.

In view of the gravity of the case we gave consideration to the ruling of the trial judge as shown by the bill of exceptions before mentioned, and we do not dismiss the appeal.

ON THE MERITS.

The refusal of the District Judge to instruct the injury as requested was proper in our view. The instruction was not possible without assuming that the facts set forth in the requested charge had been proven on trial. It was a matter of fact, which did not involve any principle of law.

The case of defendant was not prejudiced by the refusal.

The bill of exceptions recites that the court instructed the jury that they were the exclusive judges of the evidence, and if they found from the evidence that the accused provoked the difficulty and "slew the deceased he would not be entitled to use the plea of

self-defence" to obtain an acquittal, but as to whether he "did provoke the difficulty" or not, the "jury must determine from the evidence."

This charge correctly, as we take it, presented the law of the case. The sufficiency of the proof of facts stated was a question for the jury to determine.

An expression of opinion by the court as to what had been proven would have been an instruction regarding the facts of the case.

The issues before us do not justify us in setting aside the verdict and sentence.

The judgment is affirmed.

No. 12,833.

ROSETTA GRAVEL PAVING AND IMPROVEMENT COMPANY VS. CITY OF NEW ORLEANS.

Plaintiff's witnesses sustained his claim, under the contract for services rendered during three months on Washington street. The report of one of defendant's officers, and a certificate issued thereon, showed that all needful repairs had been made up to within a few days prior to the end of those three months.

Held: That this claim was properly allowed by the District Court.

Plaintiff failed to show full compliance with the contract for two of the months claimed, and the preponderance of proof sustain defendant's claim of failure of plaintiff to comply with his contract as to these months.

Held: That plaintiff's claim for these months was properly rejected.

Interest is due, from the time the debt became due and exigible as against a municipal corporation; if it have in its treasury the amount provided for its payment.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

Farrar, Jonas, Kruttschitt & Gurley for Plaintiff and Appellee.

Sam'l L. Gilmore, City Attorney, and *W. B. Sommerville*, Assistant City Attorney, for Defendant and Appellant.

Submitted on briefs November 11, 1898.

Opinion handed down November 21, 1898.

The opinion of the court was delivered by

BREAUX, J. Plaintiff claims two thousand five hundred dollars of defendant as having been earned by it under a contract, whereby it was to keep and maintain in good order Washington street, from Magazine to Carrollton avenue, for a term of five years, at the rate of five hundred dollars a month, to be paid by the defendant. All the payments have boen made except for the last five months—*i. e.*, for April, May, June, July and August, 1896. The judge of the District Court gave judgment in favor of the company for the months of April, May and June, and rejected plaintiff's demand for the months of July and August.

The defendant prosecutes this appeal from the judgment. The plaintiff in the court prayed for a judgment for the whole amount it claims as due.

There were 153 days during the five months for which payment is demanded.

Plaintiff claims that the following is sustained by the testimony of his witnesses:

269 days' laber on the street at $1.50	$403 50
67 days of sprinkling at $2.40	160 80
593 94-100 cubic yards of gravel at $2.50	1,284 85
Total	$1,949 15

(without taking into account the operation of a steam roller for thirteen days.)

And that during this period there were seventy rainy days on which sprinkling to allay the dust would have been useless.

There is, on the other hand, evidence of record on the part of defendant showing that at times there was not sufficient sprinkling of the street. Two witnesses testified that for two of the months, July and August, there was no sprinkling done at all.

With reference to the other months, April, May and June, in addition to plaintiff's evidence, there is the testimony of the City Engineer, who, in compliance with the City Council, examined the street in May, also in the early part of June, and found it in a poor condition.

In his report to the chairman of the committee, after his examination, he states in what respect there was a failure on the part of plaintiff in executing the contract.

But later, in June, another officer of the public works department

made an inspection and reported to the engineer that the street was in proper condition. Whereupon the engineer issued a certificate to the chairman of the finance committee certifying that the plaintiff had "repaired Washington street from Magazine to Carrollton avenue" in accordance with its contract dated June 5, 1898, for the maintenance of the same.

We gather from the testimony that the needful repairs had been made after the first inspection (but prior to the last inspection), just alluded to upon which certificate issued to plaintiff in order that it might collect amount due.

Taking and weighing together the reports and certificates of defendant's officers and the evidence of plaintiff, we think they sustain as correct the judgment from which the appeal was taken.

In our view the testimony as relates to the two last months, would not sustain any change of the decree.

Two of defendant's witnesses testify that sprinkling was entirely neglected during these two months, and that there was an absolute failure to comply with the contract. Others, not as positive in giving their testimony, yet have testified to partial failure in the work of keeping up the street.

Plaintiff's report, taken from its own books, shows that there was no sprinkling done in August, and charges up the work of one man on the street for that month. In July there were twelve or thirteen days of sprinkling and the work of two men. Should we take this report alone, without considering other testimony, there would not have a full compliance with the contract. This failure, and the direct testimony of two witnesses of non-compliance, are sufficient, we think, in sustaining the position that the judgment should not be amended.

We note that the plaintiff claims to have expended more than the amount allowed by the judgment for the five months.

We have no reason to assert that there was less expended than alleged, and that the amount expended was not sufficient for June and preceding months, but the evidence does not give rise to the inference that the expenses should include the last two months as months for which they had been made.

There were due, we have reasons to infer, for months of April, May and June, and months preceding, and are not to be charged to July and August of 1896.

The defendant complains of the interest allowed, which was 5 per cent. from each month as the respective amounts became due.

The defendant contends that as the contract does not call for interest it should not be allowed. It was admitted of record that the city had made provision for the payment of the plaintiff under the contract. This case does not fall within the grasp of Fernandez vs. City, 42 An., p. 1, in which there was no money in the treasury to pay claim.

The amount was due and exigible at the end of each month.

All debts bear 5 per cent. interest from the time they become due, unless it is otherwise stipulated.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed at appellant's costs.

12,796.

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THE STATE VS. CHARLES MARSHALL

The validity *vel non* of the ordinance under which the defendant was fined, gave rise to the issues involved.

The ordinary use of property can not be interfered with by assuming that it is a nuisance *per se*.

ON APPEAL from the Sixth Recorder's Court of New Orleans, *Arnauld, J.*

A. E. Blackmar, amicus curiæ.

Denègre, Blair & Denègre for Defendant Appellant.

Argued and submitted June 13, 1898.

Opinion handed down June 20, 1898.

Rehearing refused (reasons assigned) December 5, 1898.

The opinion of the court was delivered by

BREAUX, J. Defendant complains of an ordinance adopted by the city of New Orleans on the ground that it is unreasonable, arbitrary, oppressive and unconstitutional. It was adopted over the mayor's veto. The ordinance denounces as a nuisance the parking of cars

and trains on the neutral grounds of "Elysian Field Avenue." It seeks to make it unlawful for a "railroad company to permit its engines cars or trains of cars to *remain standing* upon any portion of the ground known as 'Elysian Field Avenue or the 'neutral ground' between the levee and Miro street, except so far as may *be done by trains in motion.*" (Italics ours.)

The remaining section of the ordinance sets forth the penalty for its violation, which shall not exceed twenty-five dollars or imprisonment for more than thirty days, or both, "each day that said engines, cars or trains of cars shall reman so standing constituting a separate offence."

On the trial in the Recorder's Court the defendant offered documentary evidence to prove that the so-called "neutral ground" is the property of the Pontchartrain Railroad Company since more than sixty years.

The evidence consisted of a deed of sale signed by Bernard Marigny as vendor and the railroad company as vendee. Copies of documents were also offered to prove the right of the vendor as owner previous to this sale.

This evidence was ruled out and excluded by the court. To the ruling the defendant excepted, reserved his bill of exceptions and annexed thereto certified copies of the evidence and made them part of the bills of exceptions. But during the trial *parol evidence* of possession of this strip by the railroad company was heard. The record does not show that plaintiff objected to its admissibility.

The evidence discloses that on the twenty-fourth day of February last four box cars remained several hours on the track of the Louisville & Nashville Railroad—*i. e.*, on the so-called neutral ground of the Pontchartrain Railroad Company.

After the case had been submitted the accused was fined ten dollars by the recorder and in default of the payment of the fine to imprisonment in the parish prison for the term of ten days.

From the sentence the accused prosecutes this appeal.

At the outset we desire to have it understood that our jurisdiction is limited on this appeal to a determination of the question of the validity of the ordinance and of the constitutionality or legality of the fine lmpose. We can only reiterate that which our decisions have repeatedly held, and that which the article of the Constitution clearly announces: the issue on appeal in cases such as the one before us for

decision is restricted to the constitutionality or legality of the fine imposed.

In determining the issues before us, the fact (under the Constitution recently adopted "the facts") making clear the illegality or unconstitutionality of the ordinance are reviewable. "The law and the fact" are before court, proving or disproving the illegality charged. The plaintiff contends as relates to the "fact" of ownership of the so-called "neutral ground" that the evidence is not properly before us, having been excluded. It was not, as we read the record, all excluded. There is enough of record to prove that unquestionably the Pontchartrain Railroad Company, as relates to issues here, was the owner of the "strip of land" to which attention of the council was directed when the ordinance was adopted. No attempt was made to have the oral testimony excluded which was offered to prove its title and no offer was made to rebut the testimony showing possession and title. The message of the Mayor informing the council of his veto of the ordinance as illegal (a veto it appears, sent in, with the advice of the City Attorney) refers to the "neutral ground" as the property of the railroad company. There was other evidence regarding its title admitted without objection. We feel justified in considering the ordinance as one applying to the owner of the property, the "neutral ground" to which it (the ordinance), it terms, refers.

We take up the ordinance under which the penalty was imposed.

In our judgment the parking or collecting two, three or more cars at a place on a railroad track is not necessarily a nuisance. Plaintiff proposes, under the terms of the ordinance, to prevent all parking within certain limits. Unless it is shown in what respect the parking is a nuisance, it is not permissible to assume that it is a nuisance. The ordinance of a city can not transform into a nuisance that which is not injuriously discomforting to others. Tiedeman's Limitations, 122a.

"It is true one can not lawfully use his property in such a manner as to injure another, but a particular use, which may or may not result in creating a nuisance according to circumstances, can not be declared such in advance. The question when it may or may not become a nuisance within some provision of law must be settled as one of fact and not of law." Grossman vs. City of Oakland, 41 Pacific Reporter, 5, 6.

There is nothing of record giving rise to the inference that the parking of cars is, of itself, injurious to the public. To suppress parking altogether it would be necessary to make it appear in some way that it is a nuisance. For illustration: The city has the power to regulate the rate of speed railroad cars shall run through its limits, but it has not the power to adopt such regulations as to speed as would needlessly interfere with its business.

Upon the same principle it has the power to regulate the parking of cars, but it has no power to put a stop to it entirely on the hypothesis that it may become a nuisance.

The evidence shows that the parking of cars is a matter of necessity, particularly in transporting freight; that the property of the railroad would be rendered almost valueless if parking cars was entirely stopped. We do not for an instant imagine that it was ever intended by the legislator to permit municipal corporations to destroy a right on mere assumption, without the least showing that the act was in itself a nuisance.

In the case before us there is affirmative evidence of record, proving that it is not a nuisance *per se*.

Furthermore, it appears that it was in contemplation of the Council, in adopting the ordinance, to make it unlawful for the railroad company to permit its "engines, cars or trains of cars to remain standing upon any portion of the ground" designated in the ordinance. See prior quotation from the ordinance.

This prohibition is not, as we appreciate it, directed against the blocking of intersecting streets. It is conceded that all the intersecting streets and crossings are free enough, and that there is not any interference with them by the railroad company. There is an exception to the sweeping restraint of the ordinance, which we copy from the section: "Except in so far as may be done by the train in motion."

The exception or provision is far from being plain. It adds nothing to the meaning of the section. The enactment, as we take it, was intended as a "move on" ordinance, applied to railroads. Well enough in itself if it were not that the transportation of freight and the carrying of passengers require that they shall "remain standing" at one place a reasonable length of time.

We are compelled to decline to give the sanction of this court to an ordinance so needlessly restraining in its character. If enforced

as written it would operate as an interference with commerce and travel.

A road existing under legislative grant can not be interfered with and any of its operations treated as a nuisance unless, upon examination, it appears that it is a nuisance. The action of the municipality declaring that an act is a nuisance may give rise to a *prima facie*, but not to a conclusive, presumption of its being a nuisance. The excessive restraint the ordinance here seeks to impose strips it of even the *prima facie* force and effect ordinances usually have. The injury and annoyance growing out of nuisances can be suppressed only by legal ordinances.

We are informed that there is another suit (an injunction) pending between the same parties, in a court of another jurisdiction. It appears, in that case, special acts of alleged nuisance are averred. We see proper to state here that we have not felt called upon to decide with reference to special acts of alleged nuisance.

We have limited our examination and study to the ordinance, to determine whether it was illegal or legal. For reasons stated it can not be enforced. This conclusion disposes of the case.

It is therefore ordered, adjudged and decreed that the judgment appealed from is annulled, reversed and avoided; the ordinance upon which the judgment of the recorder was based is delared illegal and null, plaintiff's demand is rejected and the action dismissed.

ON APPLICATION FOR A REHEARING.

This court desires to have it well understood, that it does not decide that, as between the city of of New Orleans and any one else, who may claim an interest of any kind, that the city is not the owner of "Elysian Fields avenue;" or, that it is the owner. The question is left entirely open as if no controversy had ever arisen in which the matter was considered at all.

As a matter of fact, the defendant, in our judgment could show under the title claimed by the railroad he represents, the railroad's right of possession, and its right to operate cars over Elysian Field's avenue. The whole question related to the parking of cars on Flysian Field.

We decided that parking of cars was not of itself a nuisance.

Rehearing refused.

No. 12,797.

THE STATE VS. WILLIAM F. OWEN.

There are few uses of proporty that are nuisances *per se*.
A use which is not necessarily a nuisance is not to be treated as a nuisance.
A municipality is without power to suppress that which it may regulate..

ON APPEAL from the Sixth Recorder's Court of New Orleans. *Arnauld, J.*

A. E. Blackmar, amicus curiæ.

Deèngre, Blair & Denègre, for Defendant, Appellant.

Argued and submitted June 13, 1898.
Opinion handed down June 20, 1898.
Rehearing refused (reasons assigned) December 5, 1898.

The opinion of the court was delivered by

BREAUX, J. An affidavit was made against the defendant charging him with having violated an ordinance of the council of the city of New Orleans relative to parking cars on Elysian Fields avenue.

On the trial of the case before the Reoorder's Court it was shown that the roads, of which the defendant is superintendent (the Morgan's Louisiana & Texas Railroad, and the Louisville & Nashville Company), exchange cars. The exchange is made on Elysian Fields avenue, a strip or portion of ground owned by the Pontchartrain Railroad Company, a company intimately related in business with the Louisville & Nashville Railway Company. The grounds on which the exchanges are made are known as the "neutral grounds" on "Elysian Fields."

Different from the "neutral grounds" on "Canal street," these grounds, we are informed, are private property. It sufficiently appears of record for the purpose of this case that the title is in the Ponchartrain Railroad Company, and that these grounds are partly in the possession and use of the Louisville & Nashville Railroad Company, with the written consent of the owner, the Pontchartrain Railroad Company.

It appears that without this interchange of cars, which is daily made on these "neutral grounds," the business of these roads would be considerably impeded.

The evidence also discloses that it is impossible to interchange cars without bringing them to a standstill.

We gather from the evidence: (as relates to the practical working of the exchange), the railroad company that has a car to be hauled some distance further than its *terminus* hauls it to the continuing road on the "neutral grounds" and places the car upon its (the continuing road) at this place, to be taken up and hauled to its place of destination.

To prevent the car from remaining a length of time on these grounds and the consequent alleged nuisance, the city of New Orleans, through its council, ordained that the parking of cars or the collection of cars on the "neutral grounds" of "Elysian Fields" is a nuisance, and that it is unlawful for any railroad company "to permit its engines, cars or trains of cars to *remain standing*" on these grounds "except so far as may be done by *trains in motion*."

The penalty provided by the ordinance was imposed upon the defendant for the alleged violation. From the sentence defendant appealed.

The ordinance assumed that the exchange of cars is a nuisance and therefore seeks to suppress it entirely. It may be that it might be enforced so as to extend to cases of nuisance. We are not dealing with the possibilities of the ordinance, but with the ordinance as it is. Interpreting it as it reads, we do not think that it is legal. It treats as a nuisance *per se* an exchange which manifestly is not a nuisance *per se*.

The offence charged here is the delivery of cars and an exchange of cars.

There is no question here of the improper carrying on the work of exchanging cars and the injury thereby occasioned.

The ordinance seeks to stop the work. In our view the collecting of cars or stopping them on "Elysian Fields," done in a fair and reasonable way, gives no ground of complaint.

Yet, the ordinance in question would absolutely prevent the stop even for a very short time, and render exchange of cars impossible.

The ordinary use of property can not be thus prevented.

For reasons assigned in State vs. Marshall, 50 An. —, the judgment is reversed.

It is therefore ordered, adjudged and decreed that the judgment appealed from is annulled, reversed and avoided; the ordinance is declared illegal and null. Plaintiff's demand is rejected and the action dismissed.

ON APPLICATION FOR A REHEARING.

BREAUX, J. For reasons assigned in refusing the application for a rehearing in case of the State vs. Marshall (this day handed down), the application for a rehearing in this case is refused.

No. 12,984.

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THE STATE OF LOUISIANA VS. ALBERT TATE.

The *proces verbal* of the finding of a coroner's jury is competent evidence to show the fact of a homicide having been committed, but the recitals of fact therein contained can not go to the jury. They are objectionable as hearsay testimony.

APPEAL from the Twentieth Judicial District Court for the Parish of Ascension. *Guion, J.*

M. J. Cunningham, Attorney General, and *G. A. Gondran*, District Attorney, for Plaintiff, Appellee.

John Marks for Defendant, Appellant.

Submitted on briefs December 10, 1898.

Opinion handed down December 19, 1898.

The opinion of the court was delivered by

WATKINS, J. The defendant prosecutes this appeal from a verdict convicting him of the crime of murder, and a sentence to the extreme penalty of the law, relying upon a single bill of exceptions which presents the question of the admissibility of a *proces verbal* of the coroner's inquest for the purpose of establishing the fact of the death of the deceased.

The bill of exceptions relates that the State offered the *proces verbal* of the finding of the coroner's jury for the purpose of proving

the fact of the death of the deceased, whereupon counsel for the defendant objected to its introduction on the ground that it contained an assertion that deceased came to her death by means of the shot fired by the accused, and that same was inadmissible as hearsay evidence.

The trial judge assigns as his reasons for overruling the objection and admitting the evidence that he stated to the jury that the inquest proceedings served no other purpose than to establish the fact of the death of the person alleged to have been slain, and he instructed the jury that they should disregard all other statements that it might contain.

And he further states that, "in point of fact, however, the inquest was not read to the jury at any stage of the trial, and what it contained could not have influenced their verdict."

We are of opinion that the *proces verbal* of the finding of a coroner's jury is competent evidence tending to establish the fact of a homicide, and that other recitals therein contained could not have possibly exercised any influence on the jury prejudicial to the accused, if same was neither exhibited to them nor read in their hearing.

A motion for new trial on the sole ground that the verdict is contrary to law and evidence presents merely a question of fact of which this court can take no cognizance.

Judgment affirmed.

NICHOLLS, C. J., absent.

No. 12,922.

STATE OF LOUISIANA VS. MEANEE BAZILE.

On the trial of an accused upon a charge of hog stealing, testimony tending to show that the hog had been killed by the accused and its carcass secreted, and that he subsequently sent another person to cut it in pieces and carry them to his house, is admissible because it indicates a felonious asportation of the property after the theft had been first begun, by the taking of the *living* hog and the concealment of its carcass after it had been killed.

ON APPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

M. J. Cunningham, Attorney General, and *James Simon*, District Attorney, for Plaintiff and Appellee.

Weeks & Weeks and *Walter J. Burke* for Defendant and Appellant.

Submitted on briefs November 12, 1898.
Opinion handed down November 21, 1898.

The opinion of the court was delivered by

WATKINS, J. The defendant prosecutes this appeal from a verdict convicting him of hog stealing, and a sentence to one year's imprisonment in the penitentiary.

The first bill of exceptions relates to the competency and relevancy of the testimony of a State's witness, the tendency of which was that the defendant had killed the hog during the day, and sent for the dead body in the afternoon of that day; and that counsel for the defendant objected thereto, on the ground that he had been indicted for the larceny of a *living* and not a *dead* hog; not for the killing of a hog with intent to steal the meat. Consequently, the testimony did not respond to the charge of the indictment, and was consequently inadmissible.

The indictment charges, that the defendant "one hog of the value of eight dollars * * * did steal, take, and carry away," etc.

The killing of the hog by defendant, during the day, was certainly an evidence of his intention to subsequently take and carry same away; particularly when said act was coupled with the further fact that he concealed its body and covered it with grass.

But if these circumstances be regarded as doubtful or inconclusive in any respect, the fact of his having afterward sent for the carcass of the hog and had it carried to his house and cut up into quarters would seem to place his felonious asportation beyond a doubt.

The object of this testimony doubtless was to show that the defendant had taken the property away and converted it to his own use.

In our opinion such testimony does not tend to show that the defendant was guilty of the crime of killing a hog with intent to steal the same. Had the testimony merely shown that the defendant had killed the hog and not taken it away, but left it concealed from view, the objection urged would have been more forcible; but it goes further, and shows the subsequent removal of the carcass to the defendant's house, and that it had been cut into

quarters and hung up in his house preparatory to future use, and where it was subsequently identified.

The trial judge assigned no reasons for admitting the testimony, but we think his ruling was clearly correct.

The same question was raised on the defendant's motion for a new trial, and was for like reason correctly overruled.

The second bill of exceptions raises the question of error in the judge's declination and refusal of defendant's motion to have the minutes of the court corrected so as to show that he had assigned his reasons for his conviction in writing, and not orally, as therein recited—the defendant having waived a trial by jury and elected to be tried by the court.

It appears from the bill that the judge, for his own convenience, noted down on slips of paper *memoranda* applicable to the case, and that he simply adverted to them in summing up the case; he, therefore, declined to have the minutes opened and changed, because they were, in his opinion, correct as they stood.

We are of opinion that the preparation of such *data* for his own personal use in delivering his opinion was not the equivalent of assigning his reasons in writing; and that his refusal to so alter the minutes was not error.

But if it were, it is inconceivable that the defendant could have sustained any injury thereby.

The third bill of exceptions relates to the judge's refusal to permit defendant's counsel to have the clerk open a note of evidence on the trial of his motion for a new trial. As we understand the motion, it was exclusively based upon the ground that the judge had admitted illegal testimony, which supposed error had been dealt with during the progress of the trial, and had been made the subject of a prior bill of exceptions; consequently it necessarily rested on the same foundation, and puts at issue the question of the verdict being contrary to law and evidence, and we have repeatedly and uniformly held that such an issue is one of *fact* exclusively, of which this court possesses no jurisdiction.

On this hypothesis no useful purpose could have possibly been accomplished by granting the counsel's request; and had it been granted, and the testimony taken and annexed to his bill, it could have received no consideration at our hands.

We have no hesitancy in approving the ruling of the judge.

Judgment affirmed.

No. 12,921.

THE STATE OF LOUISIANA VS. AGRICOLE THERIOT.

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An oath lawfully taken is the essential thing to be charged in an indictment for perjury; and in case perjury is assigned on a non-judicial oath it is insufficient to maintain a prosecution if the person who administered the oath was not legally authorized to administer that particular oath.

ON APPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

***M. J. Cunningham*, Attorney General, and *James Simon*, District Attorney, for Plaintiff and Appellant.**

***David Todd* for Defendant and Appellee.**

Submitted on briefs November 12, 1898.
Opinion handed down November 21, 1898.

The opinion of the court was delivered by

WATKINS, J. The State is appellant from a judgment and decree of the trial judge sustaining the defendant's motion to quash the indictment.

The indictment charges perjury, and the motion alleges that the indictment contains no averment which will support a conviction of perjury; and "that the oath alleged to have been falsely taken, appears by the very allegations in the indictment, not to have been made in any judicial proceedings; and (that) the oath set out in the indictment is one authorized by law, and not required to be made by any law or statute whatever; and is one the false taking of which violates no law, and on same no indictment for perjury can be predicated."

We make the following extract from the brief of the Attorney General as a succinct statement of the case of the State, viz.:

"The defendant in this case was indicted for the crime of wilful and corrupt perjury committed by making a false oath before the clerk of the Nineteenth Judicial District Court in and for the parish of Iberia, for the purpose of obtaining a marriage license. See indictment and oath.

"The accused filed a motion to quash the indictment, which was

sustained, and it is from the ruling of the trial judge sustaining the motion that the State appeals.

"The sole and only questions here presented are, whether a false oath made before the clerk of court in order to obtain a marriage license to marry a minor constitutes perjury; and whether the said clerk has the power and authority to administer said oath when he believes the applicant has not the consent of the parents and is falsely representing matters. If he has the power to administer the oath, is it not made pursuant to the laws of the State, and the false oath therefore perjury?

"Then, if our position is correct, the motion to quash should have been overruled."

The trial judge in sustaining the motion to quash says:

"The only question is, whether the clerk of court, under the law, had authority to administer the oath, the assigned basis of the perjury in this case. If he was not authorized to do so, then, the indictment can not be supported.

"Under Article 101, C. C., the only authority given to clerks in the matter of marriage licenses is to require of the intending husband a bond with surety in a sum proportioned to his means, with condition that there exists no legal impediment to the marriage. ——— vs. ———, 15 An. 410; State vs. Dole & Ball, 20 An. 378.

"There is no doubt that to constitute the crime of perjury the oath must not only be a lawful oath, but it must be taken in due course of justice and by a court or magistrate having competent jurisdiction.

"Thus, in all cases when the law provides that an oath shall be administered, it is then administered in due course of justice. In a case of this kind, nothing is requiredbut a bond, and the court is unable to see where the clerk of court derived his authority to administer the oath which this perjury has assigned." Flower vs. Swift, 8 N. S. 451; State vs. Wimberly, 4 So. Rep. 161; 8 Rob. 650.

In State vs. Dreifus, 38 An. 877, it was held that an "oath lawfully taken is an essential to the indictment and consequent conviction of perjury;" and that "in case perjury is assigned on a non-judicial oath, it is insufficient to maintain a conviction, if the person administering the oath was not legally authorized to administer *that particular oath.*" And such authority does not appear in this instance.

The ruling of the trial judge is correct.

Judgment affirmed.

No. 12,780.

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THE STATE VS. CANAL & CLAIBORNE RAILROAD COMPANY, THROUGH JOSEPH H. DEGRANGE, PRESIDENT.

An ordinance of the City Council of the city of New Orleans which requires corporations operating street electric cars within the limits of the city, upon tracks laid down in the public streets thereof, to water their tracks so as to effectually lay the dust within its tracks, is a legal exercise of the police power of the city. Such an ordinance tends to promote the comfort and convenience of passengers, and the health and comfort of the inhabitants of the city.

It is neither indefinite nor unreasonable.

ON APPEAL from the Sixth Recorder's Court of New Orleans. *Arnauld, J.*

James J. McLoughlin, Assistant City Attorney, and *Samuel L. Gilmore*, City Attorney, for City of New Orleans, Plaintiff and Appellee.

Clegy & Quintero for Defendant, Appellant.

Argued and submitted May 20, 1898.
Opinion handed down June 21, 1898.
Rehearing refused December 5, 1898.

Taken to Supreme Court of the United States by Writ of Error.

The opinion of the court was delivered by

WATKINS, J. The defendant, through the instrumentality of its president, is prosecuted upon the charge of having wilfully and unlawfully violated City Ordinance No. 13,835, C. S., by failing to water its tracks on Claiborne and Elysian Fields avenues and other streets of the city which are traversed by its tracks, as required by said ordinance.

On the trial the defendant was found guilty and sentenced to pay a fine of twenty-five dollars, and in default of payment of the fine he was to suffer imprisonment for a period of twenty days in the parish prison, and from that sentence it prosecutes the present appeal to this court.

In the recorder's court the defendant, through counsel, filed the following demurrer to the legality of the ordinance, viz.:

1. Because the City Council was without power or right to enact such an ordinance.

2. Because the provisions of Sec. 1 of same are so indefinite and unreasonable that no person or corporation therein described is able to know what is commanded to be done in pursuance thereof.

2. Because the same is an attempt on the part of the municipal authorities to exert an unreasonable exercise of the police power, and if same be enforced it would be unequal and not uniform in its operation, "in that it compels, or would compel one class of persons using the public streets to perform a duty or service not required of other persons making a like use of the same streets."

4. Because it is unlawful and unreasonable "for the municipal authorities to transfer, or attempt to transfer a public burden to private persons or corporations; and that the aforesaid ordinance is an offer or an attempt to make certain persons or corporations perform a service or duty, which service or duty should be performed by the municipal authorities, or under their direction.

"And said ordinance does not require, or pretend to require the performance of such service or duty by all private persons or corporations in like situation."

5. Because said ordinance attempts to compel the performance of a service without adequate compensation; and if it is enforced, it will take the property and labor of a person or corporation for the benefit of the city without compensation, and without due process of law.

6. This assignment is about the same as last. The demurrer further assigns, that said ordinance is beyond the power of the City Council, and is violative of the provisions of the Constitution of the United States and of this State in this, viz.:

That the defendant railroad company "acquired by purchase the right to run its cars on certain streets in the city of New Orleans * * * and the right to maintain and operate its lines of cars upon certain specified and agreed conditions in the contract fully expressed, and the duty or obligation to water their tracks, as provided in Sec. 1 (said ordinance), No. 13,835, C. S., * * * forms no part thereof;" and that said ordinance is an attempted impairment of their aforesaid contract rights, and if enforced it will seriously impair the same.

It further assigns, that the necessity of effectually keeping the

dust laid on lines of street car tracks, if such need there be, is one that "arises in the course of nature and is not a state or condition created or brought about by the operation of said street cars;" and consequently it is unlawful and unreasonable to impose upon a corporation operating street cars the duty of keeping the dust laid—it having no relation to the operation of the street cars under its contract.

That if it be in the interest of the public that the dust on the street car tracks be kept down, it is unlawful and unreasonable, on the part of the City Council, to require the company to perform this public service.

This extended statement of the defendant's demurrer may be abbreviated and given more concisely in the following synopsis, thus:

1. That the ordinance is indefinite and unreasonable in terms; and an unreasonable exercise of the police power of the city is thereby contemplated.

2. That it is unequal and not uniform.

3. That it transfers a public burden to private persons.

4. That it requires the performance of a service without adequate consideration, and takes private property without due process of law.

5. That it is an impairment of its contract rights, in violation of the contract clause of the Federal Constitution.

6. That dust arises in the course of nature, and is not caused or created by the operation of its cars, and, consequently, the ordinance unwarrantably and unreasonably imposes that duty upon it.

On the other hand, it is the contention of the city attorney that the City Council, in the exercise of the police power which is vested in the city of New Orleans, has the right to enact ordinances so regulating the use of streets by electric railways as to compel them to keep their tracks in such condition as to prevent a nuisance, and to protect the health, convenience and comfort of its inhabitants.

That an ordinance which requires street car corporations to water their tracks so as to effectually keep down the dust thereon is definite and reasonable, and as such it is a valid and proper exercise of the police power.

His further contention is, that the police power of a city can not be alienated or bartered away by any contract, and, consequently,

the city always retains the right to impose upon citizens and corporations—particularly upon those exercising and operating public franchises—the duty and burden of so conducting their operation and use as to promote the convenience and to protect the health and the comfort of the public; and it forms a necessary incident of the contract which is read into it.

That all persons, natural or artificial, are subject to the police regulations of the municipality in which they live.

Two things are conspicuous upon casual inspection of the ordinance, (1) that its provisions exclusively deal with corporations operating lines of street cars within the city of New Orleans, under franchises acquired from the City Council; (2) and does not deal with any contract right as such corporations have acquired from the city under their franchises.

The ordinance under consideration, confessedly and in terms, proposes an exercise of the police power under municipal regulation, and that alone.

The questions which arise are the following, viz.:

1. Is the ordinance indefinite, unreasonable, or lacking in uniformity?

2. Does it transfer a public burden to private individuals or persons; or take property without due procecs of law, or adequate compensation?

The ordinance is couched in the simplest form of words, viz.:

"*Be it enacted, etc.* That each and every company or corporation operating street car lines within the limits of the city of New Orleans *shall water their tracks so as to effectually keep the dust on same laid*"—providing a penalty for its violation.

It is certainly neither indefinite or wanting in uniformity. It does not propose to take the private property of the corporation without due process of law.

After making the foregoing careful synopsis of the ordinance and the defendant's demurrer, our conclusion is, that the two questions for consideration are (1) whether the ordinance is unreasonable; and (2) whether it was an attempt to place a public burden on private persons.

We may well premise the discussion by referring to the provisions of a prior ordinance on the same subject matter bearing the number 12,911, C. S., which was examined by this court in State vs. New

Orleans City & Lake Railroad Company, *49 An. 1571*, as that ordinance and decision will serve to illustrate the one under consideration.

It is as follows, viz.:

"*Be it enacted* that hereafter it shall be unlawful for any person, firm, or corporation to operate any electric, trolley or other cars or trains on the streets of this city without providing in some reasonable manner for the sprinkling of the streets through which their cars run."

That ordinance contained a penal clause which is as follows, viz.:

"That any person, firm or corporation violating this ordinance shall be guilty of a misdemeanor and shall be subject to a fine of twenty-five dollars, or thirty days in the parish jail, or both, at the discretion of the Recorder," etc.

Ordinance No. 13,835, C. S., is an attempted reformation of Ordinance No. 12,911, C. S., so as to meet the interpretation which this court had placed upon it in the case cited. The difference between the two is radical in several respects:

1. The later ordinance does not provide, as the prior ordinance did, that it shall be *unlawful* for any company or corporation to operate an electric car on a street of the city without providing for "*the sprinkling of the streets* through which their cars run."

2. The later ordinance does not provide, as the prior ordinance did, that any firm or corporation violating its provisions should "be guilty of a misdemeanor."

3. The later ordinance simply requires that each and every corporation "shall water their *tracks* so as to keep the dust on same laid."

After paraphrasing the prior ordinance, our opinion speaks of its operation in this wise, viz.:

"The facts as developed by the testimony * * * are, that by reason of the velocity of the car and its weight and its rapidly revolving wheels, volumes of dust are raised and wafted by the winds to the streets adjacent to the tracks; that the clouds of dust are counter to the health and comfort of the inhabitants."

From the large number of defences and pleas which the defendant had urged in that case, as it has in this, our opinion selected that of *unreasonableness* and *indefiniteness*, resting the conclusions of the

court mainly upon the authority of Yick Wo vs. Hopkins, 118 U. S. 371.

Our opinion then says:

"There is indefiniteness in the ordinance. It does not set forth with the least particularity what shall be done, or the extent of the service required in order to escape the penalty it ordained should be inflicted for not sprinkling the streets. The failure or performance may vary each day, and in each locality where sprinkling may be requ'red. No attempt was made to indicate how the work shall be done; the days the streets should be sprinkled; the capacity for sprinkling the sprinklers should have, and the number of sprinklings that should be applied each day, or at such time as may have been intended.

"Without a matured plan covered by the terms of an ordinance in regard to sprinkling streets nothing good or useful can be accomplished. It will give rise only to confusion and failure.

"Authority must issue its orders with such clearness and definiteness that it may be understood, and the work required should be so specified that performance can be required in every locality and from every one under some defined rule.

"There should be some similarity in the work in each district; there can not be under this ordinance. There should be a measure of duty imposed, and those upon whom it is imposed should not be left to conjecture how much or how little they should do."

The opinion then deals with the question of the equality and uniformity of the operation of the ordinance and it thus proceeds:

"This brings us to the objection that the ordinance is not equal and uniform in its operations, and imposes an unjust and oppressive burden upon a particular class of persons or corporations.

"In so far as relates to the work of 'sprinkling' the streets from curb to curb less that portion over which defendant has a franchise, in our judgment, the requirement of the ordinance is not equal and uniform.

"*Those streets are used by the public.* The work necessary to maintain their cleanliness, or to insure freedom from excessive dust, is a burden which the municipality can not impose upou particular persons and corporations, *only because they own a franchise over an adjacent way.* * * * The defendant can not be compelled to clear and sprinkle streets not covered by its contract and

over which it has no franchise. The dust raised by defendant's cars, it may be, is carried by winds to the streets near. The evidence does not disclose that such is a fact. Presumbably however it is; but defendant's cars are not the only vehicles which raise the dust, and it would scarcely be desirable equality to make it sprinkle all the dust." (Our italics.)

As well illustrating the scope of that ordinance, the following extract from our opinion may be cited, viz.:

"The question may be propounded: Can they not be made to sprinkle their own tracks and relieve their own road, as well as the adjacent streets, or the dust raised by their cars?

"To this the answer immediately suggests itself: The ordinance being indefinite and uncertain, it would serve no purpose to decide in this case the issue raised by the question,"

The conclusion reached was, that the ordinance was both indefinite and unreasonable, and consequently illegal, and that the penalty it provided could not be enforced.

This extended quotation from our opinion was considered necessary for the purposes of showing (1) that the ordinance was considered indefinite and unreasonable, principally upon the ground that it should be unlawful for a corporation "to operate any electric, trolley or other cars or trains on the streets of the city without first providing, in some reasonable manner, for the *sprinkling of the streets* through which *their cars run*"—that is to say, from curb to curb.

That provision required of street car companies to provide "in some reasonable manner for the sprinkling of the streets through which their cars run," notwithstanding they were at the same time used and employed for the general uses and traffic of the city.

Simply because they exercised a franchise upon certain streets of the city, the ordinance singled out these corporations, and imposed upon them, solely and alone, to bear a public burden which should have been discharged by the city, or shared by the general public.

Besides that, the terms of the ordinance which required of street car companies that they should provide "in some reasonable manner for the *sprinkling* of the streets" were most indefinite and indefinable, as to time, manner, amount and extent.

The ordinance under present consideration is free of many of those complications; and it was doubtless the intention of the City Council that it should be entirely disembarrassed by them.

Recurring to its phraseology we find "that each and every company or corporation operating street car lines within the limits of the city of New Orleans *shall water their tracks*," but not only so, but to water them "so as to effectually *keep the dust on same laid.*"

It is obvious that the duty imposed is specific; that is, "to water their tracks." It does not require them to "*sprinkle* the streets," nor to sprinkle their tracks, but to *water* them. Water them where, and to what extent? "So as to effectually keep the *dust laid on same.*"

To water that part of the streets which is occupied and used by their tracks, and immediately covered by their franchises, is an altogether different thing from sprinkling the streets from curb to curb; and, to a very great extent at least, relieves the ordinance of the onerous and oppressive feature that was properly attributed to the former ordinance—the imposition upon private individuals and corporations of a public burden.

We are thus brought to the discussion of the sole remaining question in this case, and that is whether or not this ordinance evidences and authorizes a proper and legitimate exercise of the police power; for it must be admitted—and it is a question which is free from doubt—that if it trenches, in any particular, upon the defendant's contract rights, it is inimical to the contract clause of the Federal Constitution.

Among the powers which are expressly conferred upon the City Council are the following, viz.:

"That the Council shall have power, and it shall be their duty to pass such ordinances, and see to their faithful execution, as may be necessary and proper; * * * to regulate * * * all places of business likely to be or become detrimental to health; and to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health and to prevent the spread of disease; and to maintain a good sanitary condition in the streets, public places and buildings," etc. Section 14 "C," Act 45 of 1896, the city charter.

It specially provides that it is the duty of the City Council to preserve the good order of the city and "to maintain its cleanliness and health." *Id.*

They are specially required "to suppress all nuisances." *Id.*

That "the Council shall have the power to authorize the use of the streets for railroads operated by horse, electric, steam, or other motive power, and to *regulate* the same," etc. *Ibid.*, Sec. 15, paragraph 13.

The evident purpose and object of these and other provisions of the city charter was, in express terms, to subordinate the uses and franchises the city should have granted to street railroad companies to its right to *regulate* the same and keep them subject to its police dominion and control; for it can not be reasonably contended that because a corporation or private person has acquired the franchise of operating lines of electric cars in the streets of the city, that such franchise carries with it the right to so use and operate their cars as to become detrimental to the public health of the city, and hence a public nuisance, and that the City Council has not the power to regulate the same by means of reasonable and appropriate ordinances.

It is the right of *use* and not of *abuse* that the franchise confers.

It is evident that the city can not barter away her police powers; nor can she, by her contracts, estop herself from exercising the power of suppressing nuisances, or preserving the public health, and the comfort and cleanliness of the inhabitants of the city.

It is equally evident that an ordinance which requires that a public business should be so conducted, or a public franchise so operated, as not to be detrimental to the public health, or the cleanliness and comfort of the people of a city, does not deprive the owner of such a franchise of its property without due process of law or adequate compensation.

That in the latitude in which the city of New Orleans is located, and in its physical situation, of which this court will take judicial cognizance, the operation of electric cars during a protracted summer season, where thousands of persons—particularly ladies and children—are constantly traveling in them, will produce a sufficient quantity of dust, in their operation, to constitute a nuisance to passengers, and become detrimental to public health, needs no demonstration.

Of course it is idle for the council to attempt to coerce those corporations to so operate their cars as to create no dust. That would be a physical impossibility.

Hence the City Council has attempted to do the only thing which, in our opinion, it was possible for them to have done—that is, to pass an ordinance requiring them "to water their tracks so as to effectually keep the dust laid on same."

Following the rule which we have constantly adhered to in this

class of cases, we have looked into the evidence for the purpose of ascertaining whether the *dust* is produced by the defendant's cars or sensibly contributed thereto by them upon their tracks; for upon such evidence must depend the right of the City Council to attempt to regulate the defendant's *use* of its franchise so as to preserve the health, comfort and cleanliness of the people using its cars.

In the first place the record contains an agreement to the effect "that all the testimony and evidence offered on the part of the New Orleans City & Lake Railroad Company and the city of New Orleans in the original suit, No. 15,559"—the case from which we have made extracts *supra*—be considered and received as offered "in the instant case without being copied into this transcript," etc.

The testimony of one of the defendant's witnesses in this case, as shown by the following interrogation, fairly illustrates the situation:

"Q. How is the dust brought upon the car track?

"A. The dust is brought, or rather the wind is brought on the car tracks by vehicles coming from unpaved streets principally. There are also large quantities of manure, etc., dropped on the streets.

"Q. None of which is dropped by the electric cars?

"A. No, sir.

"Q. After a rain, and the streets become muddy, and the vehicles, as you say, by the mud being attached to their wheels, carry it and deposit it on the tracks? What becomes of it?

"A. The mud is dried first, of course, and the vehicles grind that mud into dust.

"Q. The vehicles grind the mud into dust?

"A. Yes, sir; other vehicles.

"Q. Vehicles alone?

"A. Vehicles and animals.

"Q. In what respect do the cars contribute toward grinding this mud into dust?

"A. To a very small extent—only on the surface of the rails.

"Q. Is that appreciable?

"A. Well, it is only a matter of opinion. I don't think it does amount to anything.

"Q. After this mud is dry and becomes ground into dust by vehicles, and by the tramping of horses and mules, what becomes of it?

"A. Well, it stays on the street; *to a very large extent the cars have a tendency to brush it off the tracks.*" (Our italics.)

The witness thus describes the situation after the cars have been operated on the streets for several days, and the drying process of fair weather has had its effect upon the mud which has been thus brought upon the railroad tracks.

"Well, on a paved street there is a section between the rails—between the rails and the gutter which is comparatively clean; *the dirtiest portion of the street is nearest the rails inside and out; principally out, where the dirt is dropped from the wheels of the vehicles.*"

Again:

"Q. With the exception of the few narrow streets to which you have referred I understand you to say *that the effect of a car passing over the roadbed after the mud has been ground and dried is to sweep by its passage the dust away from the car track?*

"A. The effect is to clean the track."

Obviously, the trend of this statement and of other witnesses to the same effect is to establish the fact that the cars of the street electric railway companies are an important factor in raising the dust which is complained of as a nuisance and a discomfort. This proof is consonant with common knowledge and experience on the subject.

That the movements of the electric cars produce a great deal of dust is substantiated by the witnesses who testified in suit 12,559, to which we have referred.

The following interrogation of a witness in that case will illustrate that proposition, viz.:

"Q. Have you ever seen a street car run through the Third District?

"A. I think I have.

"Q Well, I have you, I say?

"A. Yes, sir, I have certainly.

"Q. What line?

"A. Dauphine line—Dauphine and Barracks.

"Q. What effect did the passage of these cars have upon the dust of the streets?

"A. It has a great deal of effect.

"Q. Please state what the effect is?

"A. It creates a great deal of dust.

"Q. Is that dust uncomfortable?

"A. Very much, sir.

"Q. Do they create any more than any other vehicles passing the street?

"A. Yes, sir."

He says "there is a greater quantity of dust where the cars are running, and you can follow up behind every car in my street and see rafters of dust after every car."

Another witness says that through the streets that are ordinarily traversed by these cars "more dust is raised by them than by any other vehicle that I have seen traveling on the streets."

This witness was a practising physician in the city of New Orleans of thirteen years' experience.

"Q. What is the effect of these clouds of dust on the health of the inhabitants of those streets and the passengers in the cars?

"A. (Substantially that) 'inhaling of dust raised by those cars is irritating to the organs of respiration,'" etc.

This witness confirms the statement of the former witness with regard to the greater volume of dust which is produced by the electric cars than any other vehicles which use the streets of the city.

The following is quoted from the interrogation of the president of the State Board of Health, viz.:

"Q. Your Board of Health has requested the authorities to enforce this ordinance which the accused is charged with violating?

"A. No, sir; we attempted to enforce it ourselves, believing that we were capable of enforcing all ordinances connected with sanitation.

"Q. Now, you have noticed these cars going through the streets—these electric cars?

"A. Yes, sir.

"Q. Do they create any dust—more than any other vehicle?

"A. I think they are the cause of the dust arising.

"Q. Now, in the operation of those cars without sprinkling the streets, does that constitute a nuisance?

"A. I think it has an injurious effect upon the health.

"Q. Has the Board of Health ever declared this operation of the cars, without sprinkling the streets, a nuisance.

"A. I could not say that the specific action of the board stated that it was a nuisance, but the board did, by specific action, determine to enforce the law as a sanitary measure.

"Q. Now, when you say as a sanitary measure, is the operation of

the cars, without sprinkling, injurious to the health of the inhabitants?

"A. Well, the dust we conceive to be injurious.

" Q. It is?

" A. Yes, sir.

" Q. And is it more injurious, or is more injury caused by the dust from the street cars, than from the dust from any other vehicle?

" A. By reason of the greater amount of dust."

Again:

" Q. Doctor, you have ridden around the city in street cars during dusty weather?

" A. Yes, sir.

" Q. Have you ever been inconvenienced by the dust in those cars?

"A. Yes, sir; frequently."

Another witness, a member of the Board of Health, and a physician of thirty years' experience, said:

"Q. You have often traveled in street cars oi New Orleans City & Lake Railroad Company?

"A. Yes, sir; very often all over the city?.

" Q. Do they create any dust?

"A. Yes, sir; they do.

"Q. Do they create any more dust than any other vehicle passing through those streets?

" A. I think so; by reason of the velocity of the car which gives a kind of draught or vacuum which causes large volumes of dust to surround the car."

So much of the evidence is sufficient for all the necessary purposes of this case; and whether same be put to the practical test of the judgment of the layman and casual observer, or that of scientific analysis and sanitation, we think it reasonably clear that the operation of the street electrlc cars is the principal cause of the dust which is complained of, and that it is shown to be a nuisance, injurious to the public health and that of persons who use them for purposes of travel, and detrimental to the comfort and convenience of the public.

We regard the foregoing evidence as a complete answer to the following proposition which we have extracted from the brief of defendant's counsel, viz.:

"The defendant further shows that the need to keep the dust laid on the lines of track, if any such need there be, was a necessity that arose in the course of nature and is not a state or condition brought about by the operation of the said street car lines; and that it is unlawful and unreasonable to impose upon corporations operating said lines, the duty to keep the dust laid when the said duty has no relation to the operation of the said street car lines, and arises from no condition created or brought about by the operation of said lines; and when said service is not required by the contract with the city and the duty of service is outside and beyond the contract, and a duty which is owed by the municipal authorities to the inhabitants."

Again:

"The Canal & Claiborne Railroad Company, the licensee of the city of New Orleans, has purchased and paid for the right to use certain streets for the carrying of passengers. It pays a license tax, as well as property tax, and is performing a *quasi*-public function, carrying passengers for hire in the streets. The fact that it is *quasi*-public, and has purchased and paid for this right to use the streets, does not destroy the character of its business, or make it subject to other and different rules of law than any other citizen who uses the street for profit. It would be unreasonable to require the dray owner to attach a sprinkling apparatus to his dray, or to require his dray to be followed by a water cart; and it would be unreasonable to require the omnibus lines to run sprinkling carts; it would be unreasonable to require of the procession of furniture vans, sugar wagons, cotton floats and pleasure vehicles to be equipped with sprinkling apparatus, or to be preceded or followed by water carts, simply because they use the streets of the city. And so we say that there is no reason to require the street car companies to perform this service at great expense when the service is not required of other persons or firms, or corporations making a like use of such public highways. And when it is seen that the dust is not produced by the railway company, is not brought upon the street by them, but its appearance and the annoyance of the dust is not related to the operation of the railroad lines, to require them 'to lay' the dust would be no more reasonable than to require them to remove the garbage, sweep the streets, clean the gutters and light or pave the streets, or maintain the police along their route."

The examples counsel gives of the right which the proprietor of a

dray, the water-cart, the omnibus, furniture van, sugar wagon, cotton float and pleasure vehicle has to the free use of the street for the purposes of his business are inappropriate, because neither exercises a franchise on the public streets of the city; but their use of the streets is just the ssme as that of any other private citizen.

Whilst each of said proprietors are licensed by the city to pursue his respective calling, his use of the streets is merely incidental thereto; but the street-car company purchases from the city a public franchise or right to lay its tracks of steel fixedly and permanently in the centre of the public highways of the city, and to maintain same therein for a period of years, and to operate their cars thereon for the purpose of carrying passengers for hire.

And it is disclosed by the evidence thst the dust which occasions the inconvenience and discomfort of the passengers, and the detriment to public health, is directly and immediately referable to its use of that franchise, and it is that injurious use and enjoyment of its franchise which the aforesaid ordinance is intended to regulate.

The question arises upon the foregoing state of facts, whether the watering of the tracks of the street railroad companies so as to effectually keep down the dust, as proposed in the ordinance, is an exercise of the police power; if so, is it reasonable, definite, and equal and just in its operation.

The ordinance is merely a municipal regulation, and in no sense a criminal statute. Corporation of Amite City vs. Holly, 50 An. —.

The persons with whom it exclusively deals are public corporations who are operating public franchises to be operated as carriers of passengers for hire, and the evident object of the City Council in enacting it was to improve the comfort and convenience of the passengers who were transported upon it and incidentally to suppress a *quasi*-nuisance and preserve the public health.

It is further argued by defendant's counsel that the large expense of watering their tracks will render this ordinance so burdensome as to seriously impair its franchise and render its revenues non-remunerative.

To this proposition there are two sufficient answers: (1) that this exigency of defendant's franchise must be reasonably supposed to have been within the contemplation of the contracting parties when the franchise was secured, and consequently an incident thereof; (2) that the greatly increased convenience and comfort of travel

which the suppression of the dust would occasion would entirely compensate the increased cost by a corresponding increase of travel.

The principles of law appertaining to the exercise of the police power of a State or municipal government have been so frequently enunciated by the courts of this State as well as by those of other States, and of the Supreme Court, that the chief difficulty presented to the judicial mind consists in the selection to be made therefrom of those most suitable to the question under discussion.

It wil therefore be useful to jurisprudence to quote from some of the most conspicuous decisions and apply their precepts to the instant case.

In Chaffe & Sons vs. Trezevant, 38 An. 746, this court said:

"What the police power of a State is, it is difficult to determine with precision. It is generally said to extend to the protection of the lives, health and property of the citizens and the preservation of good order and good morals; to the promotion of domestic tranquillity and the comfort and quiet of all persons.

"By the general police power of a State, persons and property are subject to all kinds of burdens and restraints in order to secure the general comfort, health and prosperity of the people."

In Bass vs. State, 34 An. 494, it was well said that "it is a settled principle, growing out of well ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his *use* of it shall not be *injurious* to the equal enjoyment of others having an equal right to the enjoyment of their own property, nor injurious to the rights of the community."

That opinion was very largely predicated upon the leading case of Commonwealth vs. Alger, 7 Cushing, 53, which is cited in the brief of defendant's counsel.

In the conspicuous case of Stone vs. Mississippi, 101 U. S. 814, the Supreme Court said:

"All agree that the Legislature can not bargain away the police power of a State.

* * * * * * *

"Many attempts have been made in this court to define the police power, but never with entire success.

"It is always easier to determine whether a particular case comes

within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate.

"No one denies, however, that it extends to all matters affecting the public health or the public morals." (See also Beer Company vs. Massachusetts, 97 U. S. 25; Patterson vs. Kentucky, 97 U. S. 501; Boyd vs. Alabama. 94 U. S. 645; Fertilizing Co. vs. Hyde Park, 97 U. S. 659; Munn vs. Illinois, 94 U. S. 124; Metropolitan Board, etc., vs. Barrie, 34 N. Y. 657.

The court then added this strong statement, viz.:

"No Legislature can bargain away the public health or the public morals. The people themselves can not do it, much less their servants. The supervision of both these subjects of governmenta[1] power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and can not divest itself of the power to provide for them.

"For this purpose the largest legislative discretion is allowed and the discretion can not be parted with any more than the power itself."

In Trustees of Dartmouth College vs. Woodward, 4 Wharton, 518, Chief Justice Marshall employed this forcible language, viz.:

"The peoplein their sovereign capacity have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority while in power; but they can not give away nor sell the discretion of those that are to come after them, in respect to matters, the government of which from the very nature of things must vary with varying circumstances.

"They may create corporations and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges or otherwise, *these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.*

"*The contracts which the Constitution protects are those that relate to property rights, not governmental.*" (Our italics.)

The foregoing authorities, particularly the last, seem especially appropriate to this case.

In making an application of these principles, one of the text writers

says that the correct doctrine is "that while the State may not prohibit a business, innocent in itself, when it is pursued in a lawful way not injurious to the community; and while the police regulation of pursuits, and of the employment and uses of property must be limited to such restrictions as are reasonably necessary to protect legitimate public interests, and to secure, as far as possible, the largest freedom and the greatest good of all members of the community, it is not within the authority of judicial tribunals, to set aside laws enacted ostensibly to promote the public welfare, unless it is *perfectly clear upon the face of the statutes*, or from their terms, that they have no real or substantial relation to the objects to which they purport to be directed, or that they infringe upon and impair fundamental rights secured by constitutional guarantees."

Parker and Worthington's Public Health and Safety, Sec. 9; Tiedeman's Police Power, Sec. 2; Cooley's Con. Limitations, pp. 177, 201; Davis vs. State, 68 Ala. 58; State vs. Wheeler, 25 Conn. 290; Boston vs. Cummings, 16 Ga. 102; State vs. Clatter, 33 Ind. 409; Humes vs. Railroad Co., 82 Mo. 221; Berthoff vs. O'Reilly, 74 N. Y. 509;

"In other words," says the writer, "the right to exercise the police power can not be alienated, surrendered or abridged by a State Legislature by any act, grant, charter, contract or delegation whatsoever, because, it is said, it is a governmental function without which the Legislature would be powerless to protect those rights which it was especially designed to secure. So that the Legislature can not, even by charter granted to a corporation, confer any *irrepealable right to continue the exercise of franchises in a way that may have become injurious to the public*," citing Stone vs. Mississippi, *supra, ibid.*

In treating of the police control of corporations, Mr. Tiedeman says:

"It has been supposed that because it is the settled law of this country that the Legislature of a State can not repeal or amend the charter of a private corporation unless the power is expressly reserved, these perpetual corporations are placed beyond the reach of the ordinary police power of the State; that while the rights of the natural person are subject to the exercise of the police power in the interest of the public, those corporations are free from this burden because the slightest police regulation operates as a *restric-*

tion of the enjoyment of the corporate franchise, and hence impairs the obligation of the contract.

"Such a construction of the operation of this constitutional provision is not only scientifically absurd, but it is in violation of the ordinary rules of constitutional construction, which provide for a strict construction of all grants by the State to the individual.

"Apart from the question whether the State can barter away its police power, the intention of the Legislature to place a private corporation beyond the reach of the police power of the State; to grant to a corporation the right to do what it pleases in the exercise of its corporate powers, it matters not how much injury is inflicted upon the public, and yet be subject to no control or restraint which is not provided by the laws in force when the charter was granted, is so manifestly unreasonable that we can not suppose that the Legislature so intended, unless this extraordinary privilege is expressly granted. * * *

"The subjection of *existing corporations to new regulations does not involve a repeal or amendment of the charters, for an act of incorporation simply guarantees the right* to act and do business as a corporate body, *subject, of course, to the laws of the land, and the legitimate control of the government*" (our italics). Tiedeman's Lim. of Police Power, Sec. 189, 1890.

These two sections of that excellent treatise are largely drawn from the conspicuous Louisiana case, Butchers' Union Slaughter-house Company vs. Crescent City Live Stock Company, 111 U. S. 746.

In that case the court broadly and emphatically said, that the Legislature of a State "can not, by any contract, limit the exercise of its police powers to the prejudice of the general welfare. These are the public health and the public morals. The preservation of these is so necessary to the best interests of the social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of the health and the repression of crime."

The author again says:

"But the corporation is no more subject to arbitrary regulations than is the individual. In order that the regulation of a corporation may be within the constitutional limitations of police power it must have reference to the welfare of society by the prevention or control of those actions which are calculated to inflict injury upon the

public or the individual. As in all other cases of the exercise of the police power, the police regulations of corporations must be confined to the enforcement of the maxim *sic utere tuo ut alienum non lædas*, subject to the observance of which every corporate charter must be supposed to have been granted." Section 191, *Id.*

The foregoing principles were sanctioned by this court in State vs. Heidenhain, 42 An. 483, in which it was said by the court:

"The police power delegated to the city of New Orleans in its charter, gives ample authority to the city to maintain its cleanliness and health, and to maintain good sanitary conditions in the streets, public places and buildings, to suppress all nuisances and to impose a fine and imprisonment for the violation of such ordinances," etc.

Again:

"The authority to abate nuisances is a part of the police power vested in all large and populous cities. To determine what is a nuisance is a question of fact."

In that case this court maintained as a valid and reasonable exercise of the police power of the city of New Orleans, an ordinance prohibiting smoking in the street cars of the city.

In State vs. Lochte, 45 An. 1405, this court maintained the legality of an ordinance of the city of New Orleans which prohibited private individuals from obstructing the streets and banquettes of the city, as an exercise of the police power of the city.

But in addition to the foregoing authorities on the general principles of law applicable to this kind of a case, we have been referred to a case in point, The City & Suburban Railway Co. of Savannah vs. The Mayor, etc., 77 Georgia, 732; and from the statement in the opinion it appears that the appellant was fined by a city police court on the charge of "neglecting to water the track on which it ran through the streets of the city."

The court said:

"Surely to keep down the dust from the railways' own tracks by watering them within the city limits and on its streets is a very requisite and necessary thing for the welfare and convenience of the inhabitants on the streets over which the road is constructed, to say nothing of its health-preserving effect. The cars constantly run; almost every minute they pass each house on the street, and if the track be left unwatered the dust becomes very inconvenient to those who lodge in the house, and in warm weather sit on the stoops or open the windows."

The court sustained the ordinance as legal and rested their conclusions mainly upon Railroad Company vs. Richmond, 96 U. S. 521, in which the court held that "the appropriate regulation of the *use* of property is not 'taking' it within the meaning of the constitutional prohibition."

Judge Dillon, in a recent edition of his work, approves the decision of the Georgia court and says:

"Under its police powers and authority over streets a city may require street railway companies *to keep their streets watered* so as to be free from dust." 2 Dillon's Munic. Corps., Sec. 720 (Fourth Edition).

McDonald vs. Toledo Consolidated Street Railway Co., 74 Federal Reporter, 104, announce a similar doctrine.

A similar ordinance was sustained by the Pennsylvania Court recently in Chester vs. Chester Traction Company; American Digest, 1897, p. 4928.

On reason and authority we are of opinion the ordinance of the City Council of the city of New Orleans must be sustained as a legal exercise of the police power, and as neither indefinite nor unreasonable.

Judgement affirmed.

No. 12,863.

SUCCESSION OF ROYAL A. BRAY.

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The heir accepting the succession unconditionally may be compelled to give security for the debts of the succession, or submit to an administration of the property of the deceased. Civil Code, Arts. 1004, 1005 *et seq.*

Nor is the creditor's right, in this respect, defeated by the *ex parte* order, recognizing the widow and heirs of the deceased, and putting them in possession of the succession property.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Lazarus & Luce for James A. Andrews, Plaintiff in Rule, Appellant.

Dart & Kernan for Widow and Heirs of Bray, Defendants in Rule, Appellees.

Argued and submitted November 23, 1898.

Opinion handed down December 19, 1898.

The opinion of the court was delivered by

MILLER, J. The appellant, a creditor of the succession of Royal A. Bray, takes this appeal from the judgment dismissing the rule of the creditor to compel the widow and heirs of the deceased to make an inventory of the effects of the succession, and give security for its debts, or submit to an administration of the succession property.

The deceased died on December 22, 1897. A few days after, *i. e.*, January 5, 1898, his widow and heirs presented their petition to be recognized and put in possession of the property of the succession, and the order was then made in accordance with the prayer of the petition. In February, 1898, the appellant, as a creditor of the succession, took the rule on the widow and heirs, and was met by the exceptions that his rule came too late, and of no cause of action. The case is before us on the creditor's appeal from the judgment of the lower court maintaining the exceptions.

The argument of the defendants in rule, in effect, is that the order putting the widow and heirs of the deceased in possession of the property of the succession closed it, precluded all further proceedings in it, and left the appellant no remedy to obtain an administration of the property of the succession, with a view to the payment of its debts, and equally precludes him from any demand of security for his debt. If this contention is sustained the appellant is confined to an action of separation of patrimony, given by the Code, to guard against the mingling of the succession property with that of the heir (Civil Code, Art. 1441 *et seq.*); or to the personal action against the widow and heirs, liable for the debts of the deceased. If under our law the creditor has the right to demand the inventory and administration of the property of his deceased debtor, with the view of securing the application of the property to pay the debts of the debtor, the right the appellant asserts by his rule, that right has been lost, not by any act of the creditor, but by the *ex parte* order of the widow and heirs.

The heir called to the succession may accept under benefit of inventory, administer, sell the property, apply proceeds to pay the succession, and take the residue, thus limiting his liability to that which he receives; or the heir may accept unconditionally and go into possession, but subject to the right of the creditors to insist on an inventory, security for succession debts, or an administration under the appointment by the court. In either case, acceptance with

benefit of inventory or simple acceptance, there is preserved to the creditors the recourse they should have on the debtor's property, by securing to them, if they demand it, an administration to subject that property to their debts. The creditor's right in this regard was, perhaps, abundantly secured under the articles of the Code as it originally stood. Code of 1825, Arts. 1004, 1005. In the same line of protection to creditors the Legislature, in 1828, incorporated in the mass of amendments to the Code of that year the enactment since known as Art. 1012 of the Code, to the effect that no heir should be allowed to receive possession of the effects of the succession if there were creditors with suits pending, unless the heirs gave security if required by the plaintiffs in such suits. The question before us is whether the *ex parte* action of the widow and heirs of the deceased debtor has deprived the appellant of the right conferred by the article of the Code, originally Art. 1004 of the Code of 1825, reproduced as Art. 1011 of the Code of 1870.

Our jurisprudence is quite familiar that distinguish the remedies of creditors, when the succession of their debtor is under administration, from the remedies of creditors to procure payment of the debts of the deceased when the administration is ended. It is of ready acceptance that when the administration is closed the creditors must exert their rights against the person who succeeds to the liabilities as well as the property of the deceased. Thus, where the heirs with no opposition from the creditors go into possession and partition the property of the succession, or hold without partition, or where the administration is completed and the administrator or executor discharged; or where, before the administration is closed the heirs end the seizin of the executors by providing for the payment of the legacies; in these and other cases where no administration exists and none is requisite, our courts have held the succession ceases—that is, creditors of the deceased can neither demand the continuance of administration or the appointment of another administrator or executor, but must resort to suits against the heirs in the courts of ordinary jurisdiction. Boguille vs. Faille, 1 An. 205; Soye vs. Price, 30 An. 93; Fowler vs. Succession of Gordon, 24 An. 22, 270; Succession of Lampton, 35 An. 418. This line of authority cited by the defendants, in our opinion, has no tendency to exclude the demand of the creditor who calls on the beneficiary heir for security, or an administration, given by the

Code when there has been no administration. It can not be claimed that this right of the creditor is defeated by an *ex parte* order of recognition the heirs and widow of the deceased obtained within a few days after the death of the deceased. If the creditor is clothed with the right he asserts, the right would be nugatory if the heir could defeat it by his *ex parte* application made with the promptitude exhibited in this case. We can conceive of an acquiescence by the creditor in such an order deduced from the lapse of time with no opposition from creditors, but we have no such element of long possession of the heir and of assent on the part of creditors. There is another right given to creditors for payment of the debts of the deceased that is suggestive in this controversy. Within three months the creditor may demand the separation of the property the heir inherits, so that the rights of the creditor on the property of his deceased debtor may be preserved. Within this period of three months the heir can not alienate or encumber the succession property. C. C., Art. 1441 *et seq.* If the law allows three months for the institution of the suit for separation of patrimony, it may well be deemed that the demand of the creditor for security and an administration is not to be denied as too late made almost within a month after the death of the deceased. In our view the *ex parte* order did not preclude plaintiff's demand, nor can we perceive any bar in the lapse of time.

It is urged that plaintiff is estopped from the relief he seeks, because, subsequent to the order recognizing the heirs, he dealt with them as liable for the debt of the succession. They incurred that liability by their simple acceptance. We can not perceive that because the creditor received a payment from the heirs on account of his debt that he lost the right to demand an administration of the succession property.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, the exceptions be and they are hereby overruled, the rule of plaintiff be remanded for trial and that defendants pay costs.

Absent: NICHOLLS, C. J.

No. 12,964.

STATE OF LOUISIANA VS. HENRY HARPER.

With no bill of exceptions, assignment of errors or error on the face of the record this court has no power to review the sentence for crime.

ON APPEAL from the Third Judicial District Court for the Parish of Lincoln. *Barksdale, J.*

M. J. Cunningham, Attorney General, and *Chas. B. Roberts*, District Attorney, for Plaintiff and Appellee.

W. A. Vanhook and *J. D. Barksdale* for Defendant and Appellant.

Submitted on briefs November 26, 1898.

Opinion handed down December 5, 1898.

The opinion of the court was delivered by

MILLER, J. The accused appeals from the sentence for manslaughter.

The record contains no bill of exceptions nor assignment of errors. It shows a rule for a new trial substantially on the grounds of testimony alleged to have been discovered since the trial. If we could entertain this rule without any bill of exceptions to the refusal of the lower court to grant a new trial, we would be confronted with the fact that no diligence had been exhibited to obtain the testimony at the trial. This court will give consideration to the refusal of the lower court to give a new trial when presented on a bill of exception exhibiting the grounds on which the lower court acted, but we have no such basis in this case.

There is an earnest appeal by counsel for the accused based on the poverty of the accused in jail for a length of time before his trial, with neither money or friends to aid him, and in that condition called up for trial with no adequate preparation to meet the issue. The counsel who appear for him in this court were assigned to the accused by the lower court. They came to his defence with all the disadvantages arising from possessing no knowledge of the facts of

the case, except that they could acquire when appointed. No witness was put on the stand by the defence. After the trial and conviction, counsel learned for the first time of facts put before us in affidavits attached to the rule for the new trial. We have gone over these affidavits in view of the peculiar circumstances of the case and the insistence of counsel that we can act on the refusal of the lower court of the new trial, though the ruling was not the subject of any bill of exceptions. There is the frank avowal by counsel that it was their inadvertence that no bill of exceptions was taken, and it is urged that the poor and friendless accused should not suffer for the oversight. We can not depart from the law that utterly excludes this court from taking cognizance of questions of guilt or innocence of parties charged with crime. But in parting with the case we are prompted to express our appreciation that the appeal to us would deserve the serious attention of the Board of Pardons, if the affidavits attached to the rule for new trial exhibit the true state of the case never presented to the jury for reasons assigned by counsel who prosecute this appeal in the sincere desire to secure relief for one accused of the most serious offence known to the law, but unfortunately not afforded that full defence the law enforces.

It it ordered, adjudged and decreed that this appeal be dismissed.

No. 12,771.

J. H. HINRICHS VS. THE CITY OF NEW ORLEANS.

While the taking of part of the property leased for a purpose of public utility gives the lessee no action in damages against the lessor, he not being in fault, the lessee is entitled to a diminution of rent. Civil Code, Art. 2697.

When the city of New Orleans becomes a lessor, it is subjected to the same obligations imposed by law on those who enter into contracts of lease, hence the lessee from the city of the revenues of the public markets deprived of part of the revenues, because a portion of the space on which the stalls in the market are erected is taken for a public necessity—*i. e.*, the widening of a street, the city must allow the lessee a diminution of rent.

The lessee entitled to a diminution of rent does not lose his right, because under the menace of dispossession under the extra-judicial power claimed by the lessor under the contract, the lessee pays under protest rent becoming due after the right to the diminution accrues.

The lessee can urge his demand for diminution of rent in a separate suit, or by reconvention, if sued on the rent notes. C. P., Arts. 374, 377.

APPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Farrar, Jonas, Kruttschnitt & Gurley and *J. V. Guillotte* for Plaintiff and Appellant.

Samuel L. Gilmore, City Attorney, and *W. B. Sommerville*, Assistant City Attorney, for Defendant and Appellee.

Argued and submitted May 20, 1898.
Opinion handed down June 30, 1898.
Rehearing refused December 5, 1898.

The opinion of the court was delivered by

MILLER, J. This is an appeal from the judgment against the plaintiff on his demand for a diminution of the rent stipulated by him to be paid for the lease of the public markets of this city and for the deduction of amount claimed by him from the amount of the rent note last maturing and in the hands of the city when plaintiff sued.

In April, 1893, the city leased to the plaintiff for three years the public markets, or rather the revenues of the markets, for the price of one hundred and ninety thousand two hundred dollars, one thirty-sixth part paid on the signing of the contract and the remainder in thirty-five equal instalments, represented by that number of the lessee's promissory notes, payable on the 15th of each month of the three years term of the lease. The lessee entered into possession, made the cash payment, furnished the notes, and paid all except that last maturing, in April, 1896. The city in November, 1893, found it necessary to widen one of the adjoining streets; in doing this it encroached on the space occupied by three of the markets, plaintiff alleges, thereby depriving him for the unexpired term of his lease of sixty-four stalls then rented by the vendors of commodities brought to the market for sale and from which stalls the plaintiff derived, under his contract, the customary market dues. The petition claims that this taking of a part of the market for a public purpose, thereby causing the loss to plaintiff of the revenues of sixty-four of the stalls, entitles him to a diminution of the rent stipulated to be paid under his lease of the market revenues, and for that diminution, fixed by the petition at ten thousand seven hundred and thirty-six dollars and thirty-four cents, he claims judgment and the

further decree that this sum be deducted from the amount of the last rent furnished by him and maturing in March, 1896.

The city excepted that the petition disclosed no cause of action, on the grounds that no act of the lessor gives rise to an action for diminution of rent, nor can such action be maintained after rent is paid; that the contract made part of plaintiff's petition prohibits stalls on the sidewalks, and the petition shows that the sixty-four stalls were on the sidewalk; that in the contract the plaintiff surrendered and waived any right of set-off or compensation based on any claims or demands he might have or thereafter might accrue to him against the city, this stipulation referring to his rent notes; and that the injury arising from the widening of a street was *damnum absque injuria*.

Our law provides that if the thing leased be destroyed by a fortuitous event or is taken for a purpose of public utility, the lessee may demand either a diminution of the rent or the revocation of the lease, but in either case the lessee is denied any claim for damages. Civil Code, Art. 2697. The article withdraws the contract of lease from the operation of any rule that might be supposed to extend the responsibility of the lessor for damages, when the failure of the lessor to fulfil his contract is due to to the expropriation of the thing leased or fortuitous event. But the Code distinguishes between damages and diminution of the price. It refuses the one, but gives the other, *i. e.*, the diminution of the price. It would be contrary to reason that the lessee should continue liable for rent when the thing leased has perished by a fortuitous event, or the equivalent result is produced by the taking of the thing leased for the public necessity, subject to which all property is held. We understand in this case that, recognizing the law, the plaintiff makes no claim for damages, but claims the diminution of the rent. This Art. 2697 of our Code does not seem to need any aid from the French authorities. We have given attention to those cited by the defendant. They affirm that damages are not allowed the lessee against the lessor, when he is not in fault and the thing leased has perished, or in whole or in part is taken for the public necessity; and the authorities equally affirm that diminution of the rent is due the lessee when the fortuitous event or expropriation has deprived him of the possession of the leased premises. The defendant's exception is on the theory that the suit is for damages when the law gives none, unless the lessee is in fault, or if the

suit is viewed as one for diminution of rent the law gives no such remedy for any act of the lessor. In determining the character of the plaintiff's suit we must look to the substance of his demand, and not the mere form of expression in the petition. The allegation that the city was in fault for destroying the stalls in the market is accompanied with the averment substantially that the street was widened because of the public necessity—*i. e.*, the taking of the thing leased for the purpose of public utility. We view the suit as one for diminution of rent for the cause specified in the Code.

In our opinion another ground of defence that these stalls were prohibited on the sidewalk can not be maintained. The stalls were under the roof of the market, had stood there for years, and were deemed a part of the markets. In the contemplation of both parties it is our conclusion the revenues to be derived from stalls under the roof passed to the lessee.

In our appreciation the stipulation that the lessee waived the right to urge offsets or demands in compensation against the rent notes must be restricted to demands reasonably to be presumed intended by the parties. The expropriation of the markets was surely not anticipated. If the stipulation under consideration could be deemed to waive the lessee's demand for relief in a case like this, the consequence would be to deny him when sued the right to urge as a defence that the thing leased, for the enjoyment of which he gave the notes, had perished, or had been expropriated, the day after, it might be, the lease was signed. The argument that gives that effect to the stipulation as to the demands or offsets waived, it seems to us, must be deemed fallacious. We can not hold that because plaintiff waived the right to urge offsets or demands or compensation against the notes, that therefore he can not claim the diminution of rent the law accords him when the thing leased in part has been taken for a purpose of public utility.

Again the exception affirms that the plaintiff has lost all claim to the diminution for the eviction from the stalls by continuing after that event to pay rent. Under the contract any failure to pay the rent at the stipulated periods, whatever the cause, subjected the lessee to the extra-judicial dispossession of the leased premises by the city. It is in proof the plaintiff sought an injunction to protect himself from the encroachment on the stalls by the widening of the street, but pending the preliminary rule for the issue of the writ the

city removed the stalls. If after this resistance to that which he conceived to be the invasion of his rights, the plaintiff continued to pay always under protest, at least it can not be said he acquired in that invasion by voluntary payments. In this connection our attention has been directed to the line of authority that distinguishes the voluntary payment from that brought about by compulsion about to be applied with serious injury to the party who pays to avoid such consequences. If the plaintiff had a just cause for a diminution of his rent, the insistence of the city of full payment is to be viewed as an illegal demand accompanied by the menace implied or express of that coercion given the city by the contract. The general proposition that payment under coercion from illegal demand will not prevent recovery of the money so paid, is, we think, too well settled to need discussion. In other phases involving that principle our courts have affirmed that acts done under coercion do not involve the surrender of rights supposed to be affected by such acts, and in the text-books and decisions the principle is affirmed. Verges vs. Gonzales, 33 An. 412; Jackson vs. Michie & Murdock, 33 An. 723; Factors and Traders Insurance Company vs. Harbor Protection Company, 37 An. 233; Cuny vs. Dudley, 6 Rob. 77; Taylor vs. Bowker, 111 U. S. 28. We do not think that any acquiescence in the removal of the stalls can be imputed to plaintiff on the ground of voluntary payment of the rent.

The argument for the defendant insists that when the defendant was deprived of the stalls he was required to choose between the revocation of the lease or diminution of the rent, and by continuing to pay rent he waived all right to diminution. We infer by this this is meant that he should at once have sued for the diminution. If the plaintiff became entitled to a diminution, it seems to us he might well urge it as a defence when sued upon the notes. In a case in which the lessee resisted payment on the rent notes on the ground of the tortious act of the lessor in dispossessing the defendant of the premises, the court held he could use that as a shield that he might have employed as a weapon. The Orleans Theatre Insurance Company vs. Lafferanderie, 12 Rob. 472. In that case, it is true, there had been no payment of rent after the tenant's dispossession, but unless constrained by authority, we do not perceive the basis on which we can hold the right to the diminution was lost, because the defendant did not once sue for the diminution. The French

authorities to which defendant refers affirm the lessee must claim the diminution. "Si la chose loué ne périt qu'en partie, le preneur peut réclamer une diminution de prix," 3 Moulon, p. 294. To the same effect, we think, are the authorities from other authors cited in defendant's brief. That the lessee should make his election to claim the diminution when he proposes to remain, and not demand the revocation of the lease, we can appreciate. That requirement was fulfilled. The lessee made the election, claimed the diminution and renewed it in effect on every maturity of the rent notes. The defendant refused to allow the diminution and thus each party stood on his legal rights. If the removal of the sheds entitled the plaintiff to the diminution of the rent, it seems to us he did not lose his right merely because he did not at once make it the basis of an action against the lessor. The plaintiff owed when the eviction occurred a far greater amount than the diminution he claims. He defers his demand until the last rent is about maturing. He might have asserted his demand by way of reconvention if suit had been brought on his rent notes. But if no such suit is brought, or if brought the defendant does not choose to reconvene, he may bring his independent suit. C. P., Arts. 374, 375, 376. In our opinion, plaintiff is not precluded from his present demand either by paying the rent, or by acquiescence in the removal of the stalls, and that he can avail by this suit of the defence he could have urged if sued on the note he had reconvened. If entitled to the diminution, the adequate relief is to diminish to the extent of his demand the rent claimed on his last note. That is the relief he seeks.

The defendant urges that the stalls having been removed because of the widening of the street, a public necessity, the plaintiff's loss, if any, is *damnum absque injuria*. In our view, when the city enters into a contract of lease it incurs precisely the obligations that would be imposed on an individual. On a line somewhat similar, the United States, with respect to its contracts, is held to derive no advantage from its sovereignty when the courts are called on to construe or enforce rights arising out of such contracts. The law when this lease was made gave the lessee the right to a diminution of the rent, if the thing was taken for a purpose of public utility, and to that obligation the defendant, as any other lessor, is subjected.

We are not enabled to adjust the diminution to which the plaintiff is entitled on any basis the record exhibits. The rents which plain-

tiff contends he would have realized, if not dispossessed of the stalls, does not, in our view, fix the diminution of the rent to which the law entitles him. Our judgment is limited to affirming his right of action.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be reversed and avoided, and it is now ordered, adjudged and decreed that, affirming plaintiff's right of action and that the defendant's exception be overruled, it is ordered, adjudged and decreed that this cause be remanded to the lower court to fix the diminution of rent to which plaintiff is entitled, to be deducted from the last maturing rent note furnished for the rent, and that defendant pay costs.

NICHOLLS, C. J., and WATKINS, J., dissent.

No. 12,539.

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SUCCESSION OF MRS. C. M. ROGGE, BY PREVIOUS MARRIAGE WIDOW OF FRANCOIS AMARE.

WM. ROGGE VS. P. F. NOUVET, EXECUTOR, ET AL.

1. A claim long pending against an alleged debtor, not presented nor prosecuted during her lifetime and only sought to be enforced after her death, is looked upon as stale, not regarded with favor, and the evidence in support thereof must be entirely conclusive and satisfactory.
2. The presumption that property purchased during marriage in the name of the wife pertains to the community may be rebutted by proof of the origin, existence and investment of paraphernal funds administered by her.
3. The spouse dying rich, possessed of wealth which had been the common enjoyment of the conjugal pair, must leave the other in necessitous circumstances to entitle the latter to the marital portion. Long separation of the husband from the wife, under the facts of this case, preclude his recovery.

ON APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

Dart & Kernan and *Benjamin Rice Forman* for Plaintiff, Appellant.

J. L. Peytavin, W. J. Waguespack, Chas. J. Théard and *J. Numa Augustin* for Defendants, Appellees.

Succession of Rogge.

Argued and submitted February 21, 1898.

Opinion handed down June 13, 1898.

Rehearing refused June 29, 1898.

The opinion of the court was delivered by

BLANCHARD, J. William Rogge and Christina Amare were married in New Orleans in September 1886.

He was a widower and resided in Louisiana; she a widow residing in Mississippi.

He owned some property at the time of the marriage, but was hopelessly involved in debt and subsequently lost everything.

She was well-to-do, in fact rich for one in her station in life.

Her property consisted of real estate, stock, securities and money. It was under her exclusive administration and continued to be after her marriage to Rogge.

She had no children at the time of her last marriage and none as the result of that marriage.

Rogge had two daughters by his first marriage, one of whom was herself married when the father wedded the second time, and the other was well grown.

Mr. and Mrs. Rogge, immediately following their marriage, went to reside at Biloxi, Miss., where the wife had a home in which she had lived for many years. Subsequently the younger daughter of Mr. Rogge by his former marriage was brought to Biloxi by the father to the home of the step-mother.

The marriage was an ill-assorted one. The couple did not get along well together. Disagreements arose and discord developed.

The husband, on one of his trips back to Louisiana, met with an accident from a railway train by which he lost an arm. This, with the increasing embarrassment of his affairs, seems to have intensified the situation.

Matters grew worse in the conjugal home in Mississippi, until after awhile, the husband returned to Louisiana for good.

There was a virtual separation. The parties ceased to live together.

In January 1889, the wife brought suit for divorce, charging cruel treatment, violence and failure to support. This action was filed in the Chancery Court of Harrison County, Mississippi, where she resided. She averred the husband to be a non-resident of Missis-

sippi. He was cited by publication under the Mississippi statute in such cases. In August 1889, he filed an answer to this proceeding, contesting the same and praying for judgment for an annual allowance out of the wife's estate for his support and maintenance, averring his poor circumstances and his incapacity for physical labor on account of the loss of his right arm.

The wife failed in this suit. Her bill was dismissed August 16, 1889, because of failure to establish the allegations thereof. Nothing was allowed the husband.

In June 1892, three years later, the wife brought a second action for divorce in the Chancery Court of Mississippi. She averred her continued residence in Mississippi and her husband's non-residence. The grounds set up were substantially the same as those alleged in the first bill, and, in addition, she charged wilful desertion and assault and battery. The citation was by publication—the wife deposing that her husband was a resident of Louisiana, but that his postoffice address was unknown to her.

The husband did not appear and no answer was filed on his behalf.

In August 1893, more than a year after the filing of the bill, a decree of divorce in favor of the wife was handed down.

In July 1895, Mrs. Rogge died at her home in Mississippi.

Her succession was opened in the Chancery Court of Harrison County, Mississippi, a paper was presented as her last will and testament, it was admitted to probate, and P. F. Nouvet qualified thereunder as testamentary executor, he having been named as such in the will.

This will was dated New Orleans, December 31, 1889, and was executed a few months after her failure to secure the first divorce applied for.

It was signed by her in the presence of two witnesses. It does not purport to be what is known in the Louisiana law as the olographic will, nor is it in the proper form of the nuncupative will by public or private act as recognized by the law of this State. She, however, averred herself in the will to be a resident of Mississippi, and it was there presented for, and admitted to, probate. Its validity as a will has not been contested either in the courts of Mississippi or in this State, and Mr. Nouvet has been recognized as executor by the courts here.

The will instituted the sisters of the testatrix and the relatives in

France of her deceased husband, Francois Amare, her residuary legatees, first bequeathing a few small special legacies to other persons, and leaving to her husband, Wm. Rogge, one dollar.

In March, 1896, this suit was brought by Rogge against the executor and the residuary legatees.

He avers that he is a creditor of the succession of Mrs. Rogge, deceased, in the sum of five thousand dollars for moneys advanced and loaned her, four thousand dollars of it on the 14th of September 1886, a week before his marriage to her, and the other one thousand dollars on or about October 1, 1886, a few days after his marriage.

He asks judgment for this sum.

He next sets forth that the property shown on the inventory of the succession, as opened in Louisiana, is community property, and he asks to be adjudged entitled to one-half thereof, and for partition and settlement of the community.

Lastly, he alleges that he is in necessitous circumstances, that his wife died rich, and that if for any reason he be denied recognition as partner in community, then, in the alternative, he prays to be decreed entitled to the marital fourth of the estate.

The executor and instituted heirs file answers alleging that the conjugal residence of this married couple was established in Mississippi immediately following the marriage, in the home where the wife had previously resided for thirty years; that he was guilty of cruel treatment and violence toward her and finally of abandonment; that on these grounds, which are averred to be sufficient under the laws of Mississippi, she recovered a decree of divorce against him after due and legal proceedings; and that thereafter he ceased to be her husband.

They deny that the plaintiff ever loaned any money to the deceased, and deny that any of the assets or property of the succession appearing on the inventory belong to the community alleged to have existed between plaintiff and the deceased, and deny that any community ever existed.

They specially represent that all the effects and assets of the estate were the separate, paraphernal property of the deceased, acquired with and by her separate funds always under her sole and exclusive administration.

Plaintiff's petition had referred to the decree of divorce, denouncing it as null and void, because of want of citation or legal process, but there had been no prayer for relief as against it.

The parties went to trial on the issues as made up and during the progress of the trial plaintiff presented a supplemental petition in which he set forth that it was *ten* thousand dollars instead of *five* thousand that he had loaned his wife just prior to their marriage—naming the same day, September 14, 1886, as that on which he had let her have the second five thousand dollars. In this petition he elaborated his claims, as surviving spouse, in the community and averred fuller grounds for his contention that the Mississippi decree of divorce was a nullity.

The filing of this amended petition was resisted on the grounds (1) that it came too late; (2) that it changed the substance of the original demand in that it claimed judgment for assets (alleged to belong to the community) which were within the jurisdiction of the court in Mississippi where the *primary* succession had been opened, the mortuary proceedings taken in Louisiana being *ancillary;* and (3) that the court here had no jurisdiction over assets within the jurisdiction of the Mississippi court and under administration there.

These objections to the reception of the supplemental petition were by consent referred to the merits, but not to be considered waived.

Still later, when the trial of the case was drawing to a close, a second supplemental petition was presented. Its purpose was to attack as fraudulent the decree of divorce granted by the Mississippi court. The prayer was for judgment declaring the divorce to have been fraudulently obtained and without force or effect as against the plaintiff herein.

The filing of this amendment was resisted on the ground that it came too late and because it changed the substance of the original issue.

The court refused the filing and plaintiff expected, attaching the paper to his bill.

There was judgment in favor of defendants rejecting in *toto* the demands of plaintiff, and he prosecutes this appeal.

The question of practice raised in regard to whether or not plaintiff could, after the trial begun, amend his pleadings, as was sought to be done by the presentation of his first amended petition claiming ten thousand instead of five thousand dollars, need not be passed upon.

The evidence entirely fails to convince us that plaintiff at any time

loaned Mrs. Amare, his intended wife, either five thousand dollars as first claimed, or ten thousand dollars, as subsequently claimed, or any other sum of money.

If it were ten thousand dollars he had loaned her on September 14, 1886, as he, later, averred, it is not easy to understand how he or his counsel could have made the mistake of setting forth in their first petition it was only one-half of that sum he had advanced her on that day.

Again, it is altogether improbable that, living away from his wife, with his circumstances becoming poorer and poorer, until after a while he was bereft of everything to meet the demands of his creditors, with no property, living in poverty, unable to labor because of his maimed condition, he should have permitted seven or eight years from the time he ceased to live with his wife until her death, to elapse without taking steps, judicially or extra-judicially, to recover so large a sum as ten thousand dollars due him for money he had loaned her!

The wife was rich, entirely able to refund the money if she owed it; he was poor and in necessitous circumstances, badly needing the amount.

And under the law of Mississippi, where the wife lived, and whose jurisdiction he himself had accepted, it would have been an easy matter to recover the alleged loan, because there the husband and wife may sue one another. Mississippi Code of 1892, Sec. 2290.

There is no explanation of this long silence.

It will not do to say that he expected her in her will to make restitution.

The relations between the couple did not justify any hope whatever on his part that she would remember him in her will. According to his statement she had forced him to leave her home, she had grown tired of him, she had no longer any use for him. The evidence discloses that she distrusted him, would not suffer him to have anything to do with her affairs, accused him of pilfering her money, of being a drunkard, of maltreating and beating her, that she was afraid of him, feared for her life, etc. And finally she severed all connection with him whatever by divorce proceedings.

Under circumstances like these he would indeed be an unreasonably sanguine man who hoped to be the beneficiary of testamentary bequests from the woman.

The money that was loaned David & Co. on September 14, 1886, was, we are satisfied, her separate funds. It was handed to them by her and the note was taken in her name. So, too, the funds deposited that day and subsequently in bank in her name (which amounts, with that loaned David & Co., went to make up the ten thousand dollars which he claims he loaned her) were her separate property, and his connection with the same, always in her presence, was that of mere service rendered in assisting her, making himself useful and accommodating to the woman he was on the eve of making his wife. At the time he claims to have loaned her the ten thousand dollars he was largely indebted to David & Co. and to other parties, was in fact insolvent, his property was mortgaged, he was in arrears for interest, etc., and it is taxing the credulity too greatly to be asked to believe that he got together and handed her, a rich woman in her own right, ten thousand dollars as an ante-nuptial loan.

We entirely agree with the conclusion of the trial judge rejecting this demand. See Bodenheimer vs. Executors of Bodenheimer, 35th La. Ann. 1005; Wood vs. Egan, 39th La. Ann. 684.

THE COMMUNITY CLAIM.

Plaintiff's claim to one-half of the assets as shown on the inventory, based on the averment that the same belonged to the community of acquets and gains, rests on grounds no more secure than did his pretension as to the ante-nuptial loan.

And this is so whether we consider the matrimonial domicil of this couple to have been established and maintained in Louisiana or in Mississippi after the marriage. The proof is satisfactory it was established in Mississippi. Indeed Rogge substantially averred it under oath in his answer filed in the Chancery Court of Mississippi to his wife's first bill for divorce.

Nor is it necessary to pass upon the question of the validity or invalidity of the decree of divorce to determine the issue here raised.

If we consider that these parties were never divorced and that they remained man and wife, though living apart, down to her death, still plaintiff has no claim for community assets, for the very good reason that there are no community assets and never have been. Everything appearing upon the inventory is, without doubt, the separate, paraphernal property of the wife. It was all acquired

with her separate and paraphernal funds, of which she had the sole and exclusive control and administration, and the investments stood in her ante-nuptial name, Mrs. C. M. Amare. The husband did not even have knowledge of them.

While it is true that property purchased during the marriage, whether in the name of husband or wife, is *presumed* to belong to the community, it is a presumption which may be rebutted. And the rule is well established that property acquired during the community in the name of the wife may be shown to be paraphernal in character by proof of the origin, existence and investment of paraphernal funds administered by her separately and apart from her husband. Stauffer, Macready & Co. vs. Morgan, 39 La. Ann. 633; Rouyer vs. Carrol, 47 La. Ann. 768; Miller vs. Handy, Sheriff, 33 La. Ann. 160; Succession of Lewis, 45 La. Ann. 833; C. C. 2407, 2386, 2402.

This husband, from the time of his marriage in 1886 to the death of Mrs. Rogge in 1895, realized no profits from any source. He owned and cultivated for a few years after the marriage a plantation in Iberville Parish, but the proof shows he came out in debt each year, owed his commission merchant large balances, and the place was lost to him by foreclosure of mortgage in May 1891.

He had separated from his wife before that, and after losing the plantation he was more or less dependent upon others for support. He never at any time during the marriage gave his wife a single dollar, and did not contribute anything whatever towards the community, nor towards the acquisition of the property appearing upon the inventory.

During the marriage the wife had no business, or trade, or other means of earning money that could fall into the community, or be invested for its account. Her only source of revenue, from which she supported herself and the family establishment, and from which she derived the funds invested in the effects mentioned on the inventory, was property separate and paraphernal in character, which she owned prior to her marriage and retained the sole administration of after marriage. She was rich in her own right, had abundant resources and ready cash, for which she was constantly seeking investment, and undoubtedly made the investments, for her own account, in her own name and with her own funds, now figuring as assets on the inventory. See Ellis, Syndic, vs. Rush, 5 La. Ann. 116.

The community of acquets and gains resulting from this marriage possessed nothing, earned nothing, invested nothing.

It follows there are no community assets to be divided; no settlement of community affairs to be gone into.

THE CLAIM FOR THE MARITAL FOURTH.

Denied his claim as creditor of the wife's estate for ten thousand dollars, and denied his assertion of right to share in property alleged to belong to the community, this husband makes his last stand upon Art. 2382 of the Civil Code, which prescribes that if either the husband or the wife die rich, *leaving* the survivor in necessitous circumstances, the latter has a right to take out of the Succession of the deceased what is called the *marital portion*, which is one-fourth part of the succession property where there are no children.

But even from it must he be dislodged, for under the inexorable facts of the case his pretension can not find there, either, any sufficient breastwork of defence and protection.

The principle upon which the right of the necessitous surviving spouse to take the marital portion, the reasons, the cause, the motive of the law in granting it, is founded upon the consideration, or policy, that neither of the married persons, who have lived together in the common enjoyment of wealth and of the position which it gives, shall be suddenly reduced to want, and, accordingly, a part of the estate of the opulent deceased is appropriated to relieve the survivor, who, in the absence of it, would be reduced to poverty. Succession of Fortier, 3 La. Ann. 105; Pickens vs. Gillam, 43 La. Ann. 350.

But as to his or her right to take the marital fourth, the surviving spouse is not an heir and the portion entitled to is not an inheritance. It is, therefore, not a vested right, nor is it a debt; it is a gift, a bounty, bestowed not by the deceased but by the law, when the conditions surrounding the relations of the parties to each other before and at the time of the dissolution of the marriage by the death of one of them, and surrounding the one surviving after the dissolution, meet the requirements of the law. Thus the spouse dying must be rich, or comparatively so; the one surviving, in necessitous circumstances, or comparatively so, with regard to the other.

Again, the one dying rich—possessed of wealth which had been the common enjoyment of the conjugal pair—must *leave* the other in necessitous circumstances. If these conditions do not exist the

reason, the motive, the purpose of the law fails, and the right to take does not attach. Connor vs. Connor, 10 La. Ann. 451; Succession Justus, 44 La. Ann. 721.

For over eight years this husband and wife had not lived together prior to the death of the wife. He had resided in one State, she in another. They had no relatious with each other of any kind. She had twice brought suit for divorce against him, recovering a decree the last time. For years there had been no common enjoyment of the wealth the wife possessed. She did not die *leaving* him in necessitous circumstances. Her death did not suddenly snatch him from the enjoyment of riches and reduce him to the condition of penury.

The "leaving" of this couple—the parting between them—had occurred years before the one with riches died.

The husband had gone his way—she hers—long before. He had ceased for nearly a decade to have the enjoyment of either her society or her property or means. Under these circumstances his right to claim the marital fourth cannot be held to exist. Pickens vs. Gillam, 43 La. Ann. 350.

In reaching this conclusion we recognize fully and approve of the principle announced in Gee vs. Thompson, 11 La. Ann. 657. In that case the wife was driven by the conduct of the husband to place herself under the protection of the law. She had sued for and recovered a judgment of separation from bed and board. The court held that by placing herself under the protection of the law she had not put herself in a worse condition; that the judgment of separation did not dissolve the marriage; that by it the law had, on account of the husband's bad conduct, excused her from living with him; and that being his wife when he died and legally excused from co-habitation, no fault was attachable to her and she was recognized as entitled to the marital portion.

The husband in the instant case presents no such state of facts as did the wife in that case.

Judgment affirmed.

Rehearing refused June 29, 1898.

No. 12,703.

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ACHILLE E. MARX ET ALS. VS. MEYER BROS. ET AL.

1. Several creditors of a common debtor may join as plaintiffs in a revocatory action to annul acts of the debtor and others done in fraud of their rights, and

may make parties defendant in such action all who are charged with complicity in the collusion.

2. While the claims of such creditors may not be cumulated for *jurisdictional* purposes, where, under the averments of the petition, a moneyed judgment is claimed against defendants largely in excess of the minimum jurisdictional limit of this court, the appeal will be maintained.
3. The law reprobates all unfair preferences by which an insolvent debtor seeks to give one creditor an advantage over another.
4. And the fact that the machinery of the law and the courts is used as a cloak to effectuate the fraudulent purpose aggravates the offending.

APPEAL from the Fifth Judicial District Court for the Parish of Ouachita. *Potts, J.*

A. A. Gunby and *C. Newton* for Plaintiffs, Appellants.

Charles J. Boatner, F. G. Hudson and *E. T. Lamkin* for Defendants, Appellees.

Argued and submitted January 14, 1898.
Opinion handed down April 18, 1898.
Judgment annulled and rehearing refused June 28, 1898.

The opinion of the court was delivered by

BLANCHARD, J. "Meyer's Star Emporium" was a mercantile establishment located at Monroe, Louisiana, with a branch house at Alexandria.

These establishments were owned and conducted by Mrs. Alice Meyer, a married woman, separate in property from her husband, doing business as a public merchant.

Jonas Meyer, her husband, was charged with the direction and management of the business.

In the summer and autumn of 1896 he made large purchases of goods in northern cities on credit, based upon representations of the solvency and prosperity of the firm.

These goods having been received at Monroe and Alexandria, sales and collections were pressed and much money was realized.

But no debts for the goods thus bought, beyond an inconsiderable amount, were paid.

The accounts and notes for these purchases were maturing.

District Court was in session in Ouachita Parish in December 1896. The term was drawing to a close and the final adjournment of the court occurred December 24th.

On the evening of December 22nd, about six or seven o'clock, after business hours, and after the office of the clerk of court had been closed for the day, counsel representing certain creditors of Mrs. Alice Meyer appeared at the Court House and dispatched a deputy clerk to the residence of his principal for the key of the office. This being procured the attorney presented and caused to be filed seven suits against the Meyer Star Emporium and its proprietor.

The claims upon which these suits were based aggregated over thirty thousand dollars, and on each the debtor had confessed judgment.

These favored creditors were Meyer Bros., B. & S. Adler, P. Lowenberg, Miss Eva Steinau, Benjamin Adler, the Monroe National Bank and the Merchants & Farmer's Bank.

Meyer Bros. were merchants in Monroe, and *brothers* of Jonas Meyer, the husband and business manager of the debtor.

Besides their own claims against this debtor, they were sureties on the note for ten thousand dollars which the debtor had executed in favor of B. & S. Adler, upon which note the suit of the latter was based.

Meyer Bros. were also endorsers on the paper held by the two banks named, and declared on in their suits.

P. Lowenberg was brother-in-law of Jonas Meyer, and Miss Steinau was the aunt of Mrs. Alice Meyer.

It thus appears that all the claims upon which judgments were confessed were either held by members of the family of the debtor, or secured by some of them.

It also appears that the claims thus confessed were not current indebtedness of the firm in the sense that they represented the recent purchases of goods, except possibly to a small extent. They were, for the most part, over one year old and some of them two years old at the time the judgments were confessed.

The seven suits referred to were entered on the judge's docket on December 23rd., but not on the bar docket of the court. The confessions of judgment were proved up, not in the morning hour of the court, as is the custom at the Monroe bar, but some time in the afternoon (about 3 o'clock) of December 23rd. This was an hour when, usually, few attorneys are present in court.

sippi. He was cited by publication under the Mississippi statute in such cases. In August 1889, he filed an answer to this proceeding, contesting the same and praying for judgment for an annual allowance out of the wife's estate for his support and maintenance, averring his poor circumstances and his incapacity for physical labor on account of the loss of his right arm.

The wife failed in this suit. Her bill was dismissed August 16, 1889, because of failure to establish the allegations thereof. Nothing was allowed the husband.

In June 1892, three years later, the wife brought a second action for divorce in the Chancery Court of Mississippi. She averred her continued residence in Mississippi and her husband's non-residence. The grounds set up were substantially the same as those alleged in the first bill, and, in addition, she charged wilful desertion and assault and battery. The citation was by publication—the wife deposing that her husband was a resident of Louisiana, but that his postoffice address was unknown to her.

The husband did not appear and no answer was filed on his behalf.

In August 1893, more than a year after the filing of the bill, a decree of divorce in favor of the wife was handed down.

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This will was dated New Orleans, December 31, 1889, and was executed a few months after her failure to secure the first divorce applied for.

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The will instituted the sisters of the testatrix and the relatives in

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In March, 1896, this suit was brought by Rogge against the executor and the residuary legatees.

He avers that he is a creditor of the succession of Mrs. Rogge, deceased, in the sum of five thousand dollars for moneys advanced and loaned her, four thousand dollars of it on the 14th of September 1886, a week before his marriage to her, and the other one thousand dollars on or about October 1, 1886, a few days after his marriage.

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The executor and instituted heirs file answers alleging that the conjugal residence of this married couple was established in Mississippi immediately following the marriage, in the home where the wife had previously resided for thirty years; that he was guilty of cruel treatment and violence toward her and finally of abandonment; that on these grounds, which are averred to be sufficient under the laws of Mississippi, she recovered a decree of divorce against him after due and legal proceedings; and that thereafter he ceased to be her husband.

They deny that the plaintiff ever loaned any money to the deceased, and deny that any of the assets or property of the succession appearing on the inventory belong to the community alleged to have existed between plaintiff and the deceased, and deny that any community ever existed.

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sippi. He was cited by publication under the Mississippi statute in such cases. In August 1889, he filed an answer to this proceeding, contesting the same and praying for judgment for an annual allowance out of the wife's estate for his support and maintenance, averring his poor circumstances and his incapacity for physical labor on account of the loss of his right arm.

The wife failed in this suit. Her bill was dismissed August 16, 1889, because of failure to establish the allegations thereof. Nothing was allowed the husband.

In June 1892, three years later, the wife brought a second action for divorce in the Chancery Court of Mississippi. She averred her continued residence in Mississippi and her husband's non-residence. The grounds set up were substantially the same as those alleged in the first bill, and, in addition, she charged wilful desertion and assault and battery. The citation was by publication—the wife deposing that her husband was a resident of Louisiana, but that his postoffice address was unknown to her.

The husband did not appear and no answer was filed on his behalf.

In August 1893, more than a year after the filing of the bill, a decree of divorce in favor of the wife was handed down.

In July 1895, Mrs. Rogge died at her home in Mississippi.

Her succession was opened in the Chancery Court of Harrison County, Mississippi, a paper was presented as her last will and testament, it was admitted to probate, and P. F. Nouvet qualified thereunder as testamentary executor, he having been named as such in the will.

This will was dated New Orleans, December 31, 1889, and was executed a few months after her failure to secure the first divorce applied for.

It was signed by her in the presence of two witnesses. It does not purport to be what is known in the Louisiana law as the olographic will, nor is it in the proper form of the nuncupative will by public or private act as recognized by the law of this State. She, however, averred herself in the will to be a resident of Mississippi, and it was there presented for, and admitted to, probate. Its validity as a will has not been contested either in the courts of Mississippi or in this State, and Mr. Nouvet has been recognized as executor by the courts here.

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Plaintiff's petition had referred to the decree of divorce, denouncing it as null and void, because of want of citation or legal process, but there had been no prayer for relief as against it.

The real facts were that the debtor was utterly and hopelessly insolvent when Jonas Meyer went north to purchase goods.

She owed then over forty thousand dollars, perhaps as much as fifty thousand dollars. Instead of the crops being good, an unprecedented drought was on, having commenced in April and not ending until October, which destroyed the crops to an extent so great that government and other aid was solicited in behalf of the stricken region.

Jonas Meyer admitted on the stand he knew the condition of the crops when he started North to make his purchases.

He kept concealed from those he traded with the fact that his house owed Meyer Bros. an enormous sum. He told them only of the small indebtedness due the banks in Monroe.

The fact was that Meyer's Star Emporium owed Meyer Bros. between forty-five thousand dollars and fifty thousand dollars in notes, accounts and loans, and from the testimony it appears that the indebtedness of the house must have been about sixty thousand dollars when the seizure occurred.

Jonas Meyer returned to Monroe from the North in October. He had bought his goods on such terms as to time that the bills would not mature until late in December and through January. Not one of plaintiffs' and intervenors' claims was four months old when the seizure was made.

Notwithstanding the drought the business shows cash sales and receipts for October, November and December amounting to about thirty thousand dollars. This is exclusive of sales on credit. But up to the time the stores were closed by seizure, it does not appear that anything was paid on account of the thirty thousand dollars worth of goods purchased in the summer and fall, save the paltry sum of about nine hundred dollars.

Early in December Herman Meyer, of Meyer Bros., wrote Adler, who held a claim for ten thousand dollars (for which Meyer Bros. stood surety), telling him the Star Emporium was in a bad way and advised him to send his claim right away to attorneys (mentioning the law firm who were his own attorneys), that they might protect his interest.

About the same time Miss Steinau (aunt of debtor) was written to by her brother, David Steinau,l iving in Monroe, to send her claim to the same legal firm. One of the Steinaus (Albert) was a clerk in the debtor's store.

All of the claims held by the parties who were to be favored were cumulated in the hands of the same attorneys.

There is no pretence that the insolvency of the debtor was not known to these creditors, or their representatives. It was certainly known to the attorneys, and their action, which was that of the creditors, was influenced thereby. C. C. 1984; 2 R. 38; 3rd La. Ann. 248; 6 La. Ann. 552; 4th La. Ann. 329; 8 La. Ann. 81. One of the attorneys, who testified, admits that the judgments confessed were more than enough to cover all the property seized.

It is vain for these creditors and this debtor to deny complicity and co-operation. The confessions of judgment themselves (a favor conferred upon a select few only, all represented by the same agents) demonstrate this. These confessions were all signed at the same time at the debtor's residence. Every facility was extended by the debtor, and accepted by the creditors, to put their claims in such form as to be quickly executory against the property, proceedings were unduly expedited to this end, while the debtor stubbornly, and even bitterly, contested the suits brought by other creditors, even those who did not attach or sue to revoke. She not only fought their claims and attachments, employing several lawyers in the defence, but demanded in reconvention fifty thousand dollars damages against those who, after the stores had been closed by the seizure at the suit of the favored creditors, had the temerity to levy attachments on the same goods.

Not only did the debtor utter no word of complaint against the seizure made by the preferred creditors, but it appears that Jonas Meyer was active in the endeavor to thwart the other creditors. Plaintiffs herein were frustrated by him in the efforts made by their counsel to obtain sureties on the injunction bond, which, if obtained, would have stayed the sale of the goods under the executions issued on the confessed judgments pending this litigation.

The ground for the attachment of the goods by the excluded creditors, after the same had been seized at the suit of the favored creditors, was the preference shown the latter by the insolvent debtor in the confessions of judgment executed in their favor. The judge below sustained the attachments, notwithstanding the strenuous defence made against them by the debtor.

In preparation for the collapse, the debtor, a few days before the confessions of judgment were given, sold for cash the only piece of

real estate she owned, and on the very day of the confessions she disposed of her stock in the Building and Loan Association of Monroe for twelve hundred and thirty-seven dollars and sixty cents. Besides this, all the cash on hand in bank and in the store disappeared just as the seizure was coming on. Yet Jonas Meyer testified he did not know the store was to be seized, and this notwithstanding he had, the day before, signed the confessions, with his wife, in authorization of her, and knew the court was in session.

In the desire and haste to include all who were intended to be favored, and exclude others, judgments were actually confessed on claims not yet due. One of the notes sued on by the Merchants and Farmers' Bank was not due and the note itself was at the time in New York as collateral security for a loan the bank had contracted there. The president of this bank testified he did not know *how* the confessions were taken, or *why* taken. This note, held by the bank and not due, was the one P. Lowenberg, brother-in-law of the debtor, was endorser on. So, too, the note for two thousand one hundred dollars held by the Monroe National Bank (and likewise confessed on) did not mature until December 22, the very day the confessions were signed and the suits filed. Counting days of grace this note was not demandable until December 25, 1896. It thus appears to have occupied the fortunate position of having had judgment by confession entered upon it before it was actually due.

The solicitude about this note is easily accounted for by the fact that Herman Meyer, of Meyer Bros., brother of the debtor's husband, was guarantor thereof.

It is a circumstance worthy of remark that none of the members of the firm of Meyer Bros. went upon the stand in this hotly contested and protracted litigation, nothwithstanding the large interest they had in its outcome and the fact that they lived in Monroe where the case was being tried.

Meyer Bros. purchased at the sale the stock of goods in Monroe, and that in Alexandria, as well as the other property seized, including notes, accounts and other assets.

After the purchase, they conducted both businesses at the old stand. Jonas Meyer was retained as salesman at the Monroe house.

After buying the goods at a price far less than their real value, Meyer Bros. published an advertisement of the stock of merchandise of the Star Emporium for sale, in which it was stated to be a bank-

rupt sale of thirty thousand dollars worth of goods, purchased by them at sheriff's sale at great sacrifice, and to be sold for cash regardless of cost. It is shown that in the months of January, February, March, April, May, June and July, 1897, their cash sales of these goods amounted to twenty thousand dollars.

On the first of August, a large remnant of the stock unsold was moved into Meyer Bros. store, and Jonas Meyer still continued to be salesman there.

What the sum total was, eventually realized by Meyer Bros. from this bankrupt sale, is not shown.

Nor does it appear whether they were accountable to the other seizing creditors for their share of what was realized at the private sales, or only for such creditors' *pro rata* of the sum for which they bid in the property at the sheriffs' sales.

We do not find it necessary to pass upon any of the numerous bills of exception, found in the record.

They relate to the rulings of the court *a qua* admitting or refusing evidence offered. We will say, however, that much testimony offered by plaintiffs was excluded that should have been admitted. Averments of fraud and collusion enlarge the scope of the reception of evidence.

The law of Louisiana does not recognize "preferred" creditors. It mercilessly reprobates all unfair preference by which an insolvent debtor seeks to give one creditor an advantage over another. And it declares that a debtor's property being the common pledge of his creditors, every act, device or machination by which they are prejudiced may form the subject of the revocatory action. C. C. 1969. The fact that the machinery of the law and of the courts is used to effectuate the fraudulent purpose, aggravates the offending. Newman vs. Baer, 50th La. Ann. —; Prats vs. Creditors, 5 R. 288; Stone vs. Kidder, 6 La. Ann. 552; Muse vs. Yarborough, 11 L. 530; 35 La. Ann. 885.

The case at bar is almost identical in its facts with Blodgett vs. Hogan, 10 La. Ann. 18, and the priuciple there announced must govern here. If the stock of goods and property of this debtor had been conveyed by private act, under the circumstances mentioned, to the favored creditors, the transaction would not stand a moment before the assault of the complaining creditors. Nor can it be held any more stable because sought to be done under cloak of the forms of law.

Plaintiffs and intervenors are entitled to the alternative remedy, of either having the confessions of judgment, the judgments based thereon and the executions and sales thereunder annulled, and the property, or its proceeds, applied to payment of their demands, or to judgment for their debts against the possessors of the property, or its proceeds. Stone vs. Kidder, 6 La. Ann. 552; C. C. 1977.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered and decreed that, in so far as plaintiffs and intervenors herein are concerned, the confessions of judgment executed by Mrs. Alice Meyer in favor of the seven creditors hereinbefore named, the judgments of the court *a qua* based thereon, and the executions and sales thereunder of the debtor's property, be set aside and annulled, and that the property sold under said executions, or its proceeds, be applied to payment of the claims of the plaintiffs and intervenors herein, and that to this extent and for this purpose plaintiffs and intervenors do have judgment and recover of the seven creditors referred to, *in solido*, the amount of the proceeds of said property as shown by the sheriffs' returns on the executions aforesaid.

It is further ordered and decreed that, in the alternative, plaintiffs and intervenors do have and recover of Meyer Bros. and the individual members of that firm, purchasers and possessors of all the property sold under the executions aforesaid, *in solido*, the amounts due said plaintiffs and intervenors, respectively, by the insolvent debtor, Mrs. Alice Meyer.

It is further ordered, etc., that the costs of both courts be taxed against defendants and appellees.

MR. JUSTICE MILLER: I dissent on the question of jurisdiction.

ON APPLICATION FOR REHEARING.

A re-examination of this case discovers no ground for setting aside the judgment heretofore pronounced by the court. But we have concluded to amend in one particular the decree rendered, and, accordingly, it is amended and reannounced so as to read as follows:

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed and it is now ordered and decreed that, in so far as plaintiffs and intervenors herein are concerned, the confessions of judgment executed by Mrs.

Alice Meyer in favor of the seven creditors heretofore named, the judgments of the court *a qua* based thereon, and the executions and sales thereunder of the debtor's property, be set aside and annulled, and that the property sold under said executions, or its proceeds, be applied to the payment of the claims of the plaintiffs and intervenors herein, and that to this extent and for this purpose, plaintiffs and intervenors do have judgment and recover of the seven creditors referred to, the amount of the proceeds of said property as shown by the sheriff's returns on the executions aforesaid. It is further ordered and decreed that, in the alternative, plaintiffs and intervenors do have and recover of Meyer Bros., and the individual members of that firm, purchasers and possessors of all the property sold under the executions aforesaid, *in solido*, the amount due said plaintiffs and intervenors, respectively, by the insolvent debtor, Mrs. Alice Meyer.

It is further ordered, etc., that the costs of both courts be taxed against defendants and appellees.

Rehearing refused.

No. 12,891.

MONROE BUILDING AND LOAN ASSOCIATION VS. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY. IN RE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY APPLYING FOR CERTIORARI, OR WRIT OF REVIEW, TO THE COURT OF APPEALS, SECOND CIRCUIT, STATE OF LOUISIANA.

The policy sufficiently identified the property of the mortgagee (named) as the property insured. And, in this respect, the claim that mortgagee's right to recover was not sustained by proof, was rejected.

On the second ground urged by relator in defence, against mortgagee's claim—

Held: That the insured continued as party to the contract after the mortgagee was made payee of the policy, and the relation between the insurer and insured remained unchanged.

The insurer, by violating the contract, vitiated the policy.

Failure to observe substantial conditions precedent will discharge the insurer.

Harry H. Hall and *A. A. Gunby* for Petitioner.

Hudson, Potts & Bernstein for Monroe Building and Loan Association, Respondent.

Submitted on briefs July 16, 1898.

Opinion handed down November 21, 1898.

The opinion of the court was delivered by

BREAUX, J. This was an action upon a policy of fire insurance for one thousand dollars issued in the name of the owner of the property.

The property was encumbered by a mortgage in favor of the "Monroe Building and Loan Association," and the policy was made payable as follows: "Any loss that may be ascertained and proven to be due the assured under the contract shall be payable to Monroe Building and Loan Association as its interest may appear at the time of the fire and remainder, if any, to the assured."

One of the written conditions upon which the policy was issued was that the assured "shall not make any other insurance on the property hereby insured without the consent of the company"—in case of other insurance "this policy shall be void." The insured obtained additional insurance from another company on property covered by the policy, issued by the Liverpool, London and Globe Insurance Company.

The property, while insured, was destroyed by fire.

The mortgagee, upon the insurance company's refusal to pay, brought suit against it for the amount of the policy.

The mortgagee (the Monroe Building and Loan Association) in its petition averred that its mortgage was for a larger amount than the policy; that mortgagor had, in the act, bound himself to keep the property insured in its favor, or in case of its failure it authorized mortgagee to take out the insurance to be effected, and charge the premium to the mortgagor; that the policy was the property of and had been held by it since its issuance.

The insured sets forth that when the mortgage debt was created in 1888 the mortgagee obtained a policy from the insurer, and for each subsequent year (including the year the policy sued upon was issued) "plaintiff itself, in its own interest, took out a policy from the defendant insurance company, under the terms of the mortgage policies covering the risk, the premiums upon which were charged to and paid by the insured, who had no other connection with the policy."

The averments which we have stated are substantially sustained by the record. The court, whose finding of fact we accept as true and correct until the contrary is made to appear by the weight of the testimony, sets forth in its decision: "There was some effort to show, and stress was laid upon the claim," that Ethridge (who was the insured) first applied for this policy in 1887, and that the contract sued upon "is a renewal of that policy." It seems that there never was a "formal written application," and that the policy was issued upon Ethridge's verbal request to the agent. We consider the policy as an independent, original agreement taking effect from its date without relation to "and unaffected by facts connected with prior policies."

"While it may be a renewal of previous contracts in the sense of which the term is understood by insurance men, it is to be interpreted according to the conditions" and circumstances existing at the time of its execution.

We do not infer that the facts as related to any particular year were different. From the first year to the last the mortgagee contends that the policies were issued to it, the mortgagee "in its interest," the premiums were charged to and paid by Ethridge, who "had no other connection with the policies."

The mortgagee contends: "It is not true that the policy sued upon, No. 1692, was issued and delivered to W. M. Ethridge as defendant company alleges, but was executed and delivered to plaintiff."

A question of proof arose.

We referred to the opinion and found that the contract of insurance was made by the owner, Ethridge, "who paid the premium," and the loss, if any, should occur, was to be paid to plaintiff (the Monroe Building and Loan Association), who was his mortgage debtor; the policy was obtained in fulfilment of an obligation on his part to keep the property insured in his creditor's favor, and the evidence shows that the plaintiff caused the policy to be taken.

The defences made by the insurance company against the demand "was that the plaintiff, mortgagee, had no right to sue on the policy; that it does not belong to the plaintiff."

(Quotation from the decision of the Court of Appeals.)

Upon this basis, as to facts, the court pronounced judgment in favor of the mortgagee for the amount of his claim, thereby affirming the principles upon which the District Court based its judgment.

The rule is universal: a policy, conditional to be vitiated and made void, in case of additional insurance in another company without notice is vitiated and made null by a breach of the condition.

The legal propostion is not here disputed.

This question is whether it was "other insurance of the same interest."

The mortgagee claims that it was its interest which was insured and not the interest of the owner.

The clause directing to whom the policy was to be paid in case of loss is not materially different from the usual clauses in such cases. The fact that there was no special reference in the clause to a mortgage held by the creditor is not of itself valid ground for defence.

A general creditor has no insurable interest in the property of his debtor. Insurance companies insure the interest held by creditor in the property insured. Woods on Insurance, Vol. 1, p. 688; Ross vs. Insurance Co. 27 An. 409.

We would not be justified in assuming, that the insurance company had not insured the property with reference to the mortgage, but that it was the insurance of a mere general creditor. In was an insurance *in presenti*. The contract, as to the mortgage, went into effect from its date. The words of the clause: "this contract shall be payable to Monroe Building and Loan Association as its interest may appear to the time of the fire, refers to an actual interest insured at the date of the policy." It was on that day, that the insurance company bound itself to pay any loss by fire to the property.

The first ground above urged by the relator, the Liverpool & London & Globe Insurance, is in our view not tenable.

We take up for review the second ground urged.

The loss being payable to the mortgagee, is he entitled to receive the amount of the policy?

The endorsement on the policy being: "loss payable to the mortagee" secures to the mortgagee, while his mortgage is extant, the right of recovering any amount which may become due by the insurance company in which the insurance was effected upon that condition.

The question arises, in the light of the stipulations which remained in the policy, is the insurer any longer a party to the contract?

In our view he still continues, as one in interest, and the stipula-

tion that he was not to reinsure remained in force. Any failure on his part to perform that which he bound himseif in the contract of insurance discharges the company. He, the insured, Ethridge, was left in a situation in which it was possible for him to avoid the contract. The fact, that the loss, if any, was made payable to the mortgagee, did not have the effect of cancelling the conditions precedent to recovery.

Reliance was placed at bar upon the case of Cannon vs. Insurance Company, 49 An. 1367, 1276.

The case is not similar in that in that case the court held that the mortgagee, of his own motion, had taken out insurance in name of mortgagor, or owner of the property, without the authorization of the latter, and that it was in effect insurance by mortgagee of his interest for his account.

In the case before us for decision the insurance was taken out by the owner in his own name, and he remained a party to the contract.

We have carefully read each of the authorities to which our attention was called by counsel for respondents. They do not, in our judgment, sustain respondent's views.

It is therefore ordered, adjudged and decreed that the judgment rendered by the District Court in favor of the Monroe Building and Loan Association in said case; also the judgment of the Court of Appeals, affirming the judgment of the District Court and condemning the Liverpool and London and Globe Insurance Company to pay one thousand dollars and costs, be annulled, avoided and reversed.

It is further ordered, adjudged and decreed that the demand of the demand of the plaintiff be and is hereby rejected at its costs in all courts.

No. 12,916.

STATE OF LOUISIANA EX REL. J. T. SHERBURNE VS. JOSHUA G. BAKER, JUDGE.

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The right of trial by jury is a substantial right which is not to be denied as to offences which had been committed at the date that the law was adopted. The provision in the Constitution of 1898 providing for the trial of criminal cases, not necessarily punishable at hard labor by the court, without a jury, is *ex post facto* in its application to offences committed before the Constitution was adopted.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

Chaffe & Bowers for Relator.

John J. Finney, Assistant District Attorney, for Respondent.

Submitted on briefs September 26, 1898.
Opinion handed down November 21, 1898.

The opinion of the court was delivered by

BREAUX, J. The relator was arraigned, pleaded not guilty, and elected to be tried by a jury.

Prior to his trial, the Constitution of 1898 was adopted, limiting the jurisdiction in the trial of a certain class of cases to the court alone.

When the case was called for trial, the relator urged that he was entitled to a trial by jury; that the act for which he was prosecuted was committed before the date of the adoption of the Constitution.

The court decided that he had no right to such a trial, proceeded to try the case, and found the accused guilty as charged.

He, averring that the new law would operate *ex post facto* if his conviction remains unreversed, invoked the supervisory jurisdiction of our court.

The Constitution of 1879, guaranteeing to the defendant the right of trial by jury, was in force at the date the act was committed.

There is weighty argument in support of the proposition that the Convention had the power to change the method of trial, as relates to minor offences, of a date anterior to the constitutional article in the Constitution of 1898, by transferring all judicial power of trial to the court alone, without a jury.

It is true that this court has passed upon questions similar to this, upholding such power.

In State vs. Carter, 33 An. 1214, the court expressly announced that the Legislature was competent to change judicial proceedings regarding trial for offences committed prior to the change. In State vs. Caldwell, 50 An., *ante*, p. —, it was decided that the constitutional inhibition regarding the enactment of *ex post facto* laws did not apply as to the question therein raised. The facts were not absolutely similar to those in the case before us for determination. The case before us is a stronger case for the accused.

There are at least two decisions, in other jurisdictions, in which the question now before us was presented, and a conclusion arrived at similar to the decision in the cited cases. McCarthy vs. State, 25 Pac. Rep. 299; *In re* Wright, 27 Pac. Rep. 565.

In the early days of the jurisprudence of the Supreme Court of the United States it was decided that the words *ex post facto* had a technical and restricted meaning in matter of law, and that they refer only to "crimes, pains and penalties," and do not include questions exclusively of remedy. Calder vs. Ball, 3 Dallas, 386, 401.

Such, in substance, was the definition of the correct and judicious Story, in his Commentaries on the Constitution. He cited a number of authorities in support of his text.

A law, unless it applied to crime itself, or unless in some way it aggravated the offence, would not be *ex post facto* in its effect if the foregoing definition be taken as correct and complete, and if as such it be closely followed.

But in course of time the definition of *ex post facto* was somewhat broadened in its effect or scope by the Federal courts. They reeognized as prohibited, enactments when they attempted to make an act done before the passing of the law criminal which was not criminal when done, or when they sought to aggravate a crime or inflict a greater penalty, or to amend the rules of evidence that would make worse and more difficult the defence of an act of prior date.

This latter definition of the courts gave rise to argument different to that which we have heretofore characterized as of weight. It led to a different conclusion from that arrived at in the decisions cited *supra*. The use of juries in criminal cases from time immemorial, a system of trial, always referred to as being of the greatest importance in the administration of justice; the *palladium* of liberty as it is sometimes alluded to, all tended to give to the claim of trial by jury an inviolable character as related to acts preceding any substantial change in the law.

The last utterance of the Supreme Court of the United States is contained in Thompson vs. Utah, 170 U. S., pp. 343-355.

It is a case of recent date, to which our attention was lately invited. It was rendered only in April of this year, and was not before us when we decided the case in June last.

The accused in the last cited case was indicted for larceny, but he was tried after Utah had been admitted into the Union.

The defendant was found guilty. He moved for a new trial on the ground that the jury that tried him was composed of only eight persons, whereas, by the law in force at the time of the commission of the offence charged, the lawful number was twelve.

His application having been overruled, he excepted. He was sentenced. The judgment was affirmed by the Supreme Court of Utah.

The Supreme Court of the United States, on a writ of error, which that court had issued to the Supreme Court of Utah, said that by statutes of the Territory of Utah, in force when the offence charged was committed, a jury consisted of twelve persons, and held that twelve being the number, the State of Utah did not acquire as to offences previously committed the power to enact that the accused should be tried by a jury composed of less than twelve persons.

The court said: "It is not necessary to review the numerous cases in which the courts here determined, whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient, then, to say that a statute belongs to that class which by its necessary operation and its relation to the offence, or its consequences, alters the situation of the accused to his advantage," citing several decisions in support of the text. In that view, the law, as sought here to be applied, is *ex post facto*.

Some of the methods of trial may be changed, even as to offences of a prior date, but the law securing to the accused the right of trial by jury can not be repealed as relates to acts which had been done at the time of the repeal. The courts of the United States concluded that the provision of the constitution of Utah for the trial of cases committed before the territory became a State could not deprive the accused of the right of trial by jury of twelve persons, the number required by the statutes of Utah while it was a territory, and at the time that the offence charged was committed.

The right guaranteed to the accused in the cited case was equally as well guaranteed to the accused in the case here. The jury were the judges of the law and the facts of the case at the date he was indicted—*i. e.*, under the Constitution of 1879. The decisions of the Supreme Court of the United States are always entitled to consideration, especially those relating to questions here involved.

The accused in the case before us for decision had, in our view, a right to trial by jury, after the Convention had adopted the articles of the Constitution. The accused, we think, could, at the time his case was called for trial in the District Court, have been compelled to stand his trial before a jury as constituted; but not before the District Court without a jury. In other words, the law did not as to past offences, have the effect of repealing the old law.

It is therefore ordered, adjudged and decreed that the writs of *certiorari* and prohibition be and they are sustained to this extent: the judgment and sentence in this case are annulled and quashed as not good in law and the verdict found is set aside and the case is remanded to the District Court of the parish of Orleans to be proceeded with according to law.

No. 12,560.

CITY OF NEW ORLEANS VS. PHILIP WERLEIN.

[50 1251
104 496]

Property once dedicated to public use is *extra commercia* and inalienable by seizure and sale under execution against a municipal corporation, unless it is made affirmatively and clearly to appear that its use had been abandoned or lost by *non-user*.

ON APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

Samuel L. Gilmore, City Attorney (*R. A. Tichenor* of Counsel), for Plaintiff, Appellee.

Edwin T. Merrick for Defendant, Appellant.

Argued and submitted January 29, 1898.
Opinion handed down November 21, 1898.

The opinion of the court was delivered by

WATKINS, J. The plaintiff seeks to recover the square of ground in the city of New Orleans which is bounded by Poydras, Carroll, Baronne and Perdido streets, alleging same to be property dedicated to public use, and constituting a portion of the *Place Gravier*, in the

ancient *Faubourg St. Mary*, and not susceptible of alienation, private ownership or private possession—same being *extra commercia*, and exclusively under the power and dominion of the sovereign.

The defendant alleges that said property was adjudicated to Andrew C. Lewis, on the 25th of September, 1878, under an execution which was issued under a money judgment in the suit of John Klein vs. City of New Orleans, No. 7801, in the United States Circuit Court for the State of Louisiana, and that by various *mesne* conveyances the same was transferred to him, and upon which he founds his title and possession thereof. On these issues the case was tried and judgment pronounced in plaintiff's favor, and the defendant has appealed.

In conjunction with his answer the defendant urged pleas of estoppel and *res adjudicata*, predicated upon the suit of the city, in which the marshal's sale was enjoined in the United States Circuit Court, and the judgment thereof rejecting its demands; but same were by the Judge *a quo* overruled, and to his ruling the defendant's counsel retained a bill of exceptions.

This statement of the pleadings suffices to show that it is conclusively admitted by the defendant that the city of New Orleans was possessed of a title to the property in dispute at the time of the marshal's sale to Lewis; and hence the sole question remaining for decision is, whether or not the property was the subject of judicial alienation at that time.

The plaintiff puts its case upon its acquisition of the property as a *locus publicus*, and the title from Gravier dedicating same to public use, and the inalienability thereof on that account; and the contention of the defendant is that the public use of the property had been abandoned by the city many years antecedent to the seizure and sale of Klein, and was consequently the proper subject of a judicial disposition. And to that end-all of the defendant's parol proof was directed, though unsuccessfully. The averment of the plaintiff's petition is "that said sale by the United States' marshal to Andrew C. Lewis, was and is absolutely null and void, and that no title or right whatever in and to said property passed by said sale to said Andrew C. Lewis, or to the defendant herein, who claims through *mesne* conveyances from said Andrew C. Lewis.

"That said property is property which was dedicated to public use long prior to the date of said marshal's sale, by Bertrand and

John Gravier, and forms part of the Place Gravier in the Faubourg St. Mary, in this city; and that said property was at the date of said marshal's sale and *has ever* since been, absolutely unsusceptible of alienation, of private ownership, or of private possession, and that said Werlein's possession is illegal and in bad faith.

"Petitioner further avers that she is invested by law with the *administration and possesson for the public benefit* of all property in this city (which is) dedicated to public use, and has the right to sue for the recovery of the possession of, and to establish the title and right of use of the public to any such property."

The prayer of the petition conforms to the foregoing averments.

Counsel for the defendant places reliance chiefly upon his plea of *res adjudicata*, and advances the proposition that, notwithstanding the fact of the inalienable character of the property in suit as a *locus publicus*, same having been *actually adjudicated* at marshal's sale, it has become an accomplished and incontestible fact which can not be again controverted.

We make from counsel's brief the following extract, viz.:

"I am well aware of certain authorities to the effect that property dedicated to public use can not be sold under a judgment; but the court must bear in mind that this property has been already sold under a judgment, and that judgment has never been attacked to this day. To attack it a suit would have to be brought in the court that rendered it. It may be that the judgment was wrong, but it is nevertheless *res jadicata*, unless reversed or annulled.

"This was, also, the judgment of a court of the United States having jurisdiction of the case, and is its action to be disregarded and annulled by your Honors after nearly twenty years of acquiescence? The decisions which say that the title to a *locus publicus* can not be divested mean that it can not be divested *if the proper proceedings are instituted to prevent it.*" (Our italics.)

We do not agree with counsel in that proposition, neither with regard to its application to the facts stated with reference to his plea of *res adjudicata* nor the law governing it.

The facts disclosed by the record are that Klein obtained a *money* judgment against the city of New Orleans in the United States Circuit Court, and thereunder caused an execution to issue, and the property in suit to be seized; and same was subsequently sold to Andrew C. Lewis.

The instant suit attacks the validity of that sale, but does not question the legality of the judgment under and by virtue of which the sale was made.

Admitting that the judgment is and was perfectly valid, and all proceedings thereunder perfectly formal and regular, the suit of the city declares, that the purchaser acquired no title, and none was transferred to the defendanl, for the reason that the property adjudicated was *extra commercia* and inalienable, under the execution of a judgment creditor.

That notwithstanding there was a valid judgment pronounced against the city for an incontestible debt in favor of Klein, yet the city, as judgment debtor, had no right, title or *private* interest in the property which was the legitimate subject of seizure and sale under execution.

Consequently, the divestiture of the title of the *public* does not, in any manner, depend upon the validity of the judgment or the regularity of the sale thereunder.

Indeed, counsel has altogether misinterpreted the defendant's plea of *res adjudicata* and estoppel, as same is not based upon the money judgment nor the sale thereunder. It is solely predicated upon the decree which was rendered in the *injunction suit* of the city which sought to restrain the sale upon ground different from those now assigned for the illegality of the sale.

The judge *a quo* states the ground of that injunction suit very concisely and we will reproduce same in lieu of a summary of our own, viz.:

"1. That said Klein had caused his judgment to be registered in the office of the Administrator of Public Accounts, agreeably to the provisions of Act No. 5 of 1870, Extra Session, and had accepted and availed himself of the provision of that act as a means of realizing upon said judgment; and that said act prohibited the issuance of a writ of *fieri facias* upon any judgment so registered, and that said prohibition was binding on Klein.

"2. That Klein was not the owner of the judgment, but had transferred it to Lesassier and Binder.

"3. That the writ issued for a much larger sum than the balance due on said judgment."

Upon that statement it is quite evident that the city did not resist the execution on the ground that the property seized was not the legitimate subject of sale and inalienable.

Nor is that the defendant's contention; but that it was a defence which was susceptible of having been made in that case, and not having been made, was presumably abandoned, and in consequence thereof, was necessarily covered by said injunction suit and the decree of the United States Circuit Court against the city.

This, as we understand it, is the contention of defendant's counsel; and that is an altogether different proposition from the one bbove quoted from his brief.

And considering the plea of *res adjudicata* as it is presented in the pleadings, the judge *a quo* said:

"It does not appear to have been suggested in the pleadings that the property seized was a *locus publicus*, and upon the issues as presented, the preliminary injunction was dissolved and complainant's bill dismissed; and the property was accordingly sold by the marshal to A. C. Lewis," etc.

And hence he held, that the demand or cause of action stated in the injunction suit was not the same as that stated in the instant suit, and the plea of *res adjudicata* was rejected.

But taking the contention of the defendant's counsel as stated by him in his brief, viz.: "That it can not be disputed that it is a principle of law universally admitted that it is not only what is set up and shown in a petition that is barred by the plea of *res adjudicata*, but what *might have been* set up and shown," as well, and defendant's situation is not, in our opinion, improved.

The principle contended for is founded on considerations of equity that are held to obtain between private litigants; but we do not think them equally applicable to cases wherein questions of public interest, or those which concern property vested in the public, are at issue, as in the instant case.

On this question our learned brother of the lower court very appropriately observed:

"A different rule is applied by the courts to public corporations than that which is applied to individuals, and particularly is this true with respect to such corporations when acting as administrators or trustees of essentially public rights and public property."

A similar statement of the law was announced by this court in Canal Company vs. City, 44 An. 396, speaking through Mr. Justice Fenner as its organ, viz.:

"Were ordinary litigants and private interests alone concerned,

it would doubtless be too late to obtain relief, but we can not permit the public interests represented by the city of New Orleans to suffer injury by such an inadvertence of counsel. Precedents justify us in extending such protection to municipal corporations with a more liberal allowance than in the case of private litigants. 1 An. 215; 3 An. 230; 4 An. 130, 352; 7 An. 495."

But the decision so much relied upon by defendant's counsel does not go so far as his contention suggests, as will appear from the following extract, viz.:

"So far as the *demand* involved in the action is concerned the judgment has closed all controversy; its validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it.

"The judgment is not only conclusive as to what was actually determined respeoting *said demand, but as to every matter which might have been brought forward and determined respecting it.*"

Accepting this statement of the doctrine of *res adjudicata* same is perfectly consistent with the contention of plaintiff's counsel and the opinion of the judge *a quo*, for it is to the effect, only, that the judgment pronounced is absolutely conclusive as to what was actually determined respecting the *demand* of the petition, and also with regard to every other matter which might have been brought forward *concerning said demand.*

But in the city's injunction suit the demand related to the right of Klein to execute his judgment against the city at all, consequently everything which actually appertained to that demand, or might have been therein alleged concerning it, are absolutely concluded by the judgment which was thereon pronounced.

But it did not affect the right of property in the land which had been thereunder seized and sold.

Indeed the judgment was rendered against the city as a municipal corporation as the debtor of Klein, and Klein sought to execute it by the seizure and sale of the property as that of the city; while in point of fact the title had been vested in the *public* by dedication thereof to public use.

And in the pre-ent suit the city appears in the capacity of an administrator or trustee of this public use—a capacity altogether different from that in which it appeared in the injunction suit—and that fact is fatal to the pretensions of the defendant, for the reason

that it is an essentlal to the maintenance of the plea *res adjudicata* that the parties to the two suits must be not only the same, but that they shall appear in the same identical capacity.

The foregoing deductions necessarily lead to the conclusion that the judge *a quo* correctly rejected and disallowed the defendant's plea of *res adjudicata*.

The plea of estoppel by conduct on the part of city officials in causing the property in question to be assessed and taxes thereon collected as that of property in commerce and in other similar ways must be decided on similar principles.

Our predecessors in dealing with a similar question said, in Municipality No. 2 vs. Orleans Cotton Press, 18 La. 272, viz.:

"These allegations, if proven, would have considerable force, if the plaintiffs sued in the right of a municipality, or if they claimed anything belonging to the corporation; but they only vindicate the right of the public to *loci publici*, things out of commerce and in which the corporation, represented by the plaintiffs, can have no property. The dedication to public use being once established, can not be affected by any act of the municipal officers."

Not only is it a fact which is inferentially admitted by the defendant, that the property in suit was dedicated to public use by Gravier, but that question was expressly decided and forever put at rest by our predecessors in Railroad Company vs. Municipality No. 2, 19 La. 62.

It is unquestionably true that, notwithstanding property has been dedicated to public use, and has thus become consecrated to the public, and thereafter *extra commercia* and inalienable, same may lose that character, by abandonment or *non-user;* but the abandonment or *non-user* must be clearly shown or evidenced by acts and circumstances clearly indicative of such a purpose.

True it is, that the proof does show that certain persons sustaining the relations of tenants and usufructuaries to the city did erect and maintain upon the property in dispute an expensive building, and that the same was used for their private advantage and income; but those persons and others who were permitted to so use the property, went into possession when it was in an untenantable condition, and raised and improved it so that its value as well as its right of occupancy became largely accelerated. But the proof shows that said buildings and improvements were destroyed by fire, and that.

the city urges no claim therefor. There is no proof of abandonment or *non-user*.

On reason and authority we are of opinion that the conclusions of the judge *a quo* are correct.

Judgment affirmed.

No. 12,804.

JOSEPH ROWE VS. CHICAGO LUMBER AND COAL COMPANY.

This court will not remand a case in which the party seeking the remanding, has had full opportunity to produce his testimony and has been fully heard, least of all, can this remanding be directed on the strength of *ex parte* affidavits filed in this court, charging in effect, that plaintiff and his witnesses swore falsely, and that defendants were subjected to a conspiracy to defraud them by the judgment sought and obtained

If these affidavits can be sustained, the defendants' remedy is the action to annul the judgment, the result of fraudulent practices. C. P., Art. 607 *et seq.*

When the contract for the purchase of logs by the mill owner stipulates for delivery by the vendor in the defendants' boom; that the mill owner will saw the logs in a reasonable time, and pay for them according to the mill scale, the rights of the "logger" or vendor will be adjusted by the number of logs delivered in the boom; and not by the logs claimed to have been sawed when that sawing is delayed by the mill owner, and the logs are not sawed for months.

APPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

Elam & Egan for Plaintiff and Appellee.

Saunders & Miller and *Wm. Goss* (*Walter Hyde Saunders* of Counsel) for Defendant, Appellant.

Argued and submitted May 17, 1898.

Opinion handed down November 21, 1898.

The opinion of the court was delivered by

MILLER, J. This appeal is by the defendants from the judgment for the price of logs he claims to have delivered defendants under their contract with him.

The defendants, engaged in the business of sawing timber and pre-

paring lumber for use, made a contract with plaintiff to purchase from him, at the rate of three dollars the thousand feet, the pine logs to be delivered at defendants' mill, payment to be made by the mill scale or measurement. The plaintiff claims to have delivered three thousand five hundred and twelve logs under the contract, equal, he contends, to one million three hundred and thirty-three thousand four hundred and twenty-two feet, at three dollars per thousand feet, aggregating four thousand and twenty-six dollars, subject to a credit of one thousand and ninety-two dollars, and the petition claims the residue. The defendants allege in their answer that the custom understood and agreed to by the plaintiff was that he should be paid only for timber delivered at defendants' mill after it had been received and measured, and that he had been paid for all timber so received and measured. The judgment was in favor of plaintiff for nineteen hundred and seventy-nine dollars, and answering the appeal he prays for an increase of the judgment.

The question of the character of the contract between the parties is first in the order of investigation. The controversy is withdrawn from the operation of the legal principles that govern the contract of sale and subjected to the contract not put in writing, but is to be deduced from the copious testimony we find in the record. The plaintiff's contention is his obligation was to deliver the logs in the defendants' boom in the Sabine river, that it was to be sawed by defendants promptly, and paid for according to the scale or measurement of the mill. His own testimony is quite distinct to that effect. On both sides testimony was offered of the contracts of the mill with other parties.

The objection by plaintiff to this species of testimony, that his rights are not to be tested by the contracts of others, is unimportant in view of his offer of the same kind of testimony, and in view of our conclusion as to the effect of all the testimony on this point. From the defendants' witnesses come the statements in effect that with contracts similar to that of plaintiff they were not to be paid until their timber was sawed, and some of the witnesses testify that no time of sawing was agreed upon. It is brought to our notice that the timber of the parties who thus speak on the question of time was actually sawed with reasonable promptitude, and that fact, we think, has a pertinence quite equal to the testimony of these parties. The plaintiff, in turn, has produced a number of witnesses who had log contracts with the mill. They testify with directness

and without material variance that their contracts stipulated delivery by them in the defendants' boom. With all due allowance for such expression of "sawed quick," "sawed at once," or "in ten days," it is the fair result of all the testimony, the contracts required sawing in a reasonable time, and all the witnesses concur and reiterate payment was to follow the mill scaling, and to be made according to the mill scale. The defendants have not offered their manager, to whom all the testimony points as making the plaintiff's contract, as well as the contracts of the other parties; but we have in the record his letter to one of the parties. In that letter there is the statement of delivery to us at Logansport at three dollars per thousand feet, mill scale. On all this testimony it is our conclusion there were distinct stipulations in this contract. Delivery by plaintiff and the other parties in defendants' boom; sawing of the timber in a reasonable time, and payment by defendants according to the mill scale. Delivery in the boom occurs throughout the testimony and must have its effect. We have, too, the plaintiff's statement that in his log delivery of the previous year he had lost by the length of time his logs had remained in the boom before they were sawed and paid for. He testifies to obviate any such construction of his contract now sued on; he insisted on the agreement, as we find it in his testimony, and that testimony is before us without contradiction from the manager. In all the testimony from the witnesses produced by defendants there is the iteration—payment was to be by the mill scale, or not until the scaling at the mill, and similar statements.

In our view, this line of testimony has limited, if any pertinence. The question presents no issue of the time of payment; nor is it disputed the mill measurement of the logs sawed was to be accepted. The question is whether the plaintiff, under his contract of delivery in the boom, prompt sawing, and payment, is to be concluded and limited in his demand by the logs claimed to have been sawed by the mill in the period protracted, as we read the record, for months after, it is incontestible, his deliveries were completed in the boom. In our opinion, due effect must be given in determining the rights of the parties to delivery in the boom by plaintiff; prompt sawing and payment according to the mill measurement, and the judge of the lower court, in our opinion, has given a correct solution of the contract, that defendants, after suffering the logs delivered by plain-

tiff to remain in their boom for months, can not require him to accept their account of logs sawed as conclusive, and without reference to the number actually delivered in the boom. That actual delivery in the boom must have its influence, and to that issue we have given our careful attention.

We think it established with reasonable certainty that the plaintiff cut, placed in the water in the hands of the raftsmen, for transmission to defendant's mill, three thousand five hundred and twelve pine logs; giving due effect to all the testimony, including that of the raftsmen, and allowing for the loss of logs by sinkage, or other causes indicated by the testimony, and recognized by the judgment of the lower court, we think it reasonably certain that the number of logs reached the defendants' boom fixed by the judgment, and with that number defendants should be charged. We have given attention to the part of the argument that claims a larger credit to the defendants than that they have been allowed. The process adopted by the lower court for its conclusion on this branch of the case is, in our opinion, borne out by the record. The lower court finds that in the account closed between the parties the amount ascertained to be due the plaintiff of two hundred and nine dollars, and that in that account one thousand two hundred and fifteen of the logs delivered by the plaintiff were accounted for, or rather, credited to plaintiff. From the total logs claimed to have been delivered the sinkage is deducted, fifteen per cent., from this residue the court deducts the number of logs credited in the adjusted account, and makes defendants liable for the remainder at three dollars per thousand feet, and on the basis that three logs make one thousand feet. Great weight is deservedly to be attached to the finding of fact of the lower court, in this case based on his appreciation of testimony of numerous witnesses taking up a very large space of the record. While this court must review questions of fact, as well as of law, and accordingly, we have given our best attention to this part of the case, we are disposed to maintain the judgment on such an issue of fact as this record presents, unless the error is manifest. We find no such error. To the amount thus ascertained to be due plaintiff for logs, not credited to him in the adjusted accounts, the lower court adds the amount found due to him on that account and gives judgment accordingly. Our attention is called to an error of calculation made by the lower court of seventeen dollars and forty-

three cents in computing the amount due for six hundred and seventy-one thousand one hundred and eighty-seven feet of timber at three dollars per one thousand feet. We think the error is evident, and plaintiff is entitled to that increase in the amount allowed him.

Our decision is based on the testimony in the record. The defendants appear to have had full opportunity for defence. We perceive no complaint that they were not afforded time to obtain the needful testimony. Numerous witnesses were produced on both sides with the result of a record of over one hundred and fifty pages pages of finely typed testimony; after all this we are asked to remand the case on the strength of affidavits filed in this court that the defendants have been the victim of a conspiracy, that the witnesses swore falsely, and that plaintiff has avowed the fraud, or more properly, the crime imputed to him by the affidavits. It is quite true the court, in a class of cases where the testimony in the record indicated an imperfect presentation, and the probability that further evidence would secure a more satisfactory determination, has remanded. In a recent State case we remanded, because, in our opinion, the State had not been allowed the fair opportunity to present its case. We can not bring this case within the exceptional circumstances on which we have hitherto remanded cases, and we do not feel authorized to deprive plaintiff of his judgment in a case of copious testimony on both sides, and with no complaint that full scope was not allowed defendants in the lower court, and to do this on the strength of *ex parte* affidavits filed in this court, imputing fraud to plaintiff's witnesses. If these affidavits can be sustained, the Code gives the appropriate remedy to annul the judgment and to that remedy we must remit the defendants.

It is therefore ordered, adjudged and decreed that the judgment of the lower court against defendants be increased by the addition of seventeen dollars and forty-three cents ($17.43), and as thus amended the judgment is affirmed with costs.

No. 12,801.

JOHN ADER VS. EDWARD P. FOLEY AND JAMES A. BRENNAN.

1. The constable who without any writ, takes into his possession property against the will and protest of the owner, makes himself and his bondsmen liable in damages, nor will it make any difference that the constable acted on the

strength of the note of the owner the constable supposed erroneously authorized the taking of the property.

2- While this court is not inclined to sanction damages for wrongful conduct out of proportion to the injury of which plaintiff complains, yet, in a suit of this character the court will, in the assessment of the damages, give an amount calculated to mark the judicial condemnation of wrongful conduct for which redress is sought.

ON APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

Benjamin Rice Forman and *B. R. Forman, Jr.*, for Plaintiff, Appellee.

Bernard McCloskey for Foley and Brennan, Defendants and Appellants.

Benjamin Ory for Albert Fourcade, Defendant and Appellant.

Argued and submitted November 9, 1898.
Opinion handed down November 21, 1898.
Rehearing refused December 19, 1898.

The opinion of the court was delivered by

MILLER, J. The defendants appeal from the judgment condemning them to pay plaintiff five hundred dollars damages for an alleged illegal appropriation of his property.

In a suit for rent the plaintiff's property was seized and the seizure was released on a forthcoming bond signed by one of the defendants as surety; from the judgment against him in the magistrate's court plaintiff appealed, and the judgment of the lower court was reversed. Before that reversal the plaintiff addressed his surety a note expressing thanks to him, and stating, in effect, that the appeal would not be prosecuted, but the property which had been seized and released on the forthcoming bond would be surrendered to settle the landlord's claim. The surety, anxious to be released of liability on the bond, carried the note to the constable who had executed the writ of provisional seizure, but had later released the property on the forthcoming bond, and at the instance of the surety, the constable, without any writ in his hands, proceeded to plaintiff's store and took

possession of its contents, cloths and the tools and implements of plaintiff's occupation, a merchant tailor. The testimony fixes the cost of this property at six hundred dollars. It was taken by the constable against the plaintiff's earnest protest, and is still in possession of the constable.

The plaintiff's petition sets forth the action of the surety and constable, charges malice of the defendants, that their action was wholly illegal and violent to the great injury of plaintiff in his business and reputation, and besides actual damages, claims punitory damages of the surety, the constable and his official bondsmen made defendants. The answer denies malice, alleges the note of the surety to plaintiff as authorizing the steps taken by the constable and denies the alleged injury to plaintiff.

It will be perceived that the dispossession complained of by the plaintiff was of property he supposed he would be called on to surrender to the landlord, and which the plaintiff proposed in his note to deliver for the relief of his surety. On that note the surety acted in directiug the constable to make the seizure. True, the note did not contemplate the interposition of the constable, nor any coercive action by the surety. We think, however, some allowance is to be made for the supposition on the surety's part, that in obtaining possession of property by means of the constable's action, it was accomplishing the surrender the plaintiff's note announced he was ready to make. For the surety's primary action, mistaken as we think it was, the plaintiff's note must exert some mitigating influence in the judgment we are called on to give the plaintiff. But with all due allowance for the plaintiff's note urged upon us as a justification of the taking of his property, we can not regard the note as tending, in any way, to excuse the dispossession of plaintiff, after his protest, both to the surety and the constable. The note was voluntary, and plaintiff was at liberty to withdraw the consent the note gave, and obviously had the right to protest against the method adopted by the surety in seeking possession of the property. The action of the surety and constable in taking the property, after that protest, was violence simply, without warrant of law.

We have in our examination of the case given the defendants all the benefit they can reasonably claim from the plaintiff's note. We can not appreciate that plaintiff complaining of the unlawful acts of defendants is to be denied relief, because, to avert the wrong done

him, he did not furnish another bondsman to take the place of the defendant, his surety. It may well be he could not give a new surety, but in no view was he required to make the effort under penalty of forfeiting his right to damages. It is claimed the constable is willing to surrender the goods. If they had been surrendered our judgment would accord due influence to the surrender, but the constable retains possession of the property.

In our view the case is one for damages against the constable for taking possession of plaintiff's property without any writ to authorize his action, against the surety for instigating the proceedings of the constable and against the other defendant, the bondsman, and the circumstances warrant and call for punitory as well as actual damages.

On the question of damages to be allowed the plaintiff, the court has had some difficulty, incident to this class of cases in adjusting the amount. In connection with the alleged injury to plaintiff's business and credit we must give due consideration to his condition of financial embarrassment resulting, as we gather from the record in his cession to his creditors. We do not feel authorized to allow, as part of the damages, the fee of the attorney, who brings suit to obtain redress for plaintiff's injuries caused by the wrongful conduct of defendants. We are not inclined to give damages out of proportion to the actual injury of plaintiff, and beyond the amount appropriate to mark the judicial condemnation of wrongful conduct, the basis of the suit. Under all the circumstances, we think it proper to award the plaintiff six hundred dollars with the right reserved to defendants to the credit for the present value of plaintiff's property taken by the constable, thus placing on defendants the depreciation in value of the property, since the plaintiff was dispossessed.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be amended so as to give the plaintiff six hundred dollars, instead of five hundred, this amount six hundred dollars ($600) to be credited with the present value of plaintiff's property wrongfully seized by the constable, provided the property be surrendered by him when this judgment becomes final, the value to be ascertained by an appraisement to be made under the direction of the lower court and at defendants' costs, and as thus amended, the judgment of the lower court is affirmed, defendants to pay all costs.

50 1266
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No. 12,670.

MRS. MARGARET R. COX ET AL. VS. MRS. NANNIE VON AHLEFELDT ET ALS.

The power of the owner to dispose of his property by donations *inter vivos* or *mortis causa* is limited by the number of his children living when he dies, hence called forced heirs, and the disposable portion when he leaves a daughter and the children of two deceased daughters, grandchildren being counted in place of their deceased parent, is one-third; the other two-thirds is the *legitime* of the forced heirs. C. C., Arts. 1493, 1495.

This disposable portion is ascertained by adding to the property the deceased leaves at his death the value of all property he has disposed of by donations *inter vivos*, deducting his debts, and the residue determining the disposable portion according to the number of his children, fixes also their *legitime* as his forced heirs. C. C.. Arts. 1505, 1506

Whether forced heirship is ownership in its full sense, of which the heir is seized of right, as applied to property embracing the *legitime* in the hands of third persons holding under alienations by the donors to whom the property has passed by the donations, nominal sales or similar acts of the deceased donor to the prejudice of his forced heirs, it is clear that by his death the right of action is vested in them to reduce or set aside such acts that impair their *legitime*, and to recover it from third persons holding under transfers from the donees. C. C., Arts. 1493, 1495, 1504, 1517: Code Napoleon, Arts. 930, 2444; 2d Troplong, p. 127, Secs. 736, 741; p. 287, Sec. 903; p. 292 *et seq.;* 2d Mourlon, p. 292, Sec. 593; p. 311, Secs. 620, 621; 3d Boilleux, commenting on Art. 920, Code Napoleon.

This right of action of the forced heir passes to his heirs and assigns. C. C., Art. 1504; Code Napoleon, Art. 930; 12th Laurent, p. 185, Sec. 139; 3d Boilleux Comentaire sur Article 920, Napoleon Code; 2d Mourlon, pp. 311, 313, 623; 12 An. 465.

This suit of the heir of the forced heir is not the revocatory action, but one of "reduction" or "revendication" to preserve or recover the *legitime*, of which he can not be deprived by the donation or similar acts of the deceased donor, and to which no alienation by the donees can convey title. C. C., Art. 1517; C. N., Art. 930; 6 Martin, 529; 12 An. 401; 32 An. 357.

APPEAL from the Twentieth Judicial District Court for the Parish of Ascension. *Guion, J.*

Fenner, Henderson & Fenner, Richard McCulloh and *Leigh Robinson* for Plaintiffs, Appellants.

Carleton Hunt, Samuel L. Gilmore, J. C. Gilmore, R. N. Sims and *E. N. Pugh* for Defendants, Appellees.

Argued and submitted December 30, 1897.
Opinion handed down February 7, 1898.
Rehearing refused June 30, 1898.

The opinion of the court was delivered by

MILLER, J. The plaintiffs, collateral heirs of Susan Robinson, a granddaughter of the late Oliver Beirne, sue his testamentary heirs, to establish the asserted rights of the plaintiffs in respect to that part of the immovable property in Louisiana alleged to have belonged to Mr. Beirne at the date of his death, and which he could not under our law dispose of to the prejudice of his children and their descendants, the plaintiffs claiming to have succeeded as heirs to the rights of Susan Robinson, the granddaughter and one of those our law made forced heirs of Mr. Beirne, living, at the date of his death, but since deceased.

The domicile of Mr. Beirne was West Virginia. He executed his last will in 1885 and died in 1888. He left surviving his daughter, Mrs. Von Ahlefeldt; the children of his predeceased daughter, the issue of her marriage with William Porcher Miles, and Susan Robinson, the child of another predeceased daughter. The will made some provision for Susan Robinson by directions respecting the West Virginia property of Mr. Beirne, but constituted as his residuary legatees his grandchildren, the issue of the marriage of his predeceased daughter with William Porcher Miles. A few days after the date of the will Mr. Beirne by authentic act executed in this city conveyed to Mrs. Von Ahlefeldt, his daughter, all his immovable property in Louisiana, consisting mainly of sugar plantations, aggregating a large value, the price stipulated being one million dollars, for which Mrs. Von Ahlefeldt made ten promissory notes of equal amounts, two of which were payable annually from one to five years after their date. A year later, that is in January, 1887, about the date of maturity of the one-year notes, Mr. Beirne gave written instructions to his testamentary executors in the form of a letter to them addressed, and which, with his will, came into their hands when he died, by which instructions the executors were to return to Mrs. Von Ahlefeldt all her notes on the execution of a conveyance by her to the Miles children of all the property conveyed to her by Mr. Beirne. At a later date, that is in January, 1888, it is charged Mr. Beirne acquired for himself, placing the legal title in Mrs. Von Ahlefeldt, another plantation in Louisiana. After Mr. Beirne's death Mrs. Von Ahlefeldt conveyed to the Miles children, as contemplated in the testamentary letter of Mr. Beirne, all the property conveyed to her, as well as the Houmas plantation, the title of

which was in her name. The consideration of this sale was stated to be the return to Mrs. Von Ahlefeldt of the ten notes she had executed and three hundred thousand dollars besides, but the petition charges that the three hundred thousand dollars represented no consideration given by the Miles children for the property, but consisted of the legacy to Mrs. Von Ahlefeldt of two hundred thousand dollars they owed her as residuary legatees of Mr. Beirne, and the other one hundred thousand dollars was for the relinquishment by Mrs. Von Ahlefeldt of her other rights as his forced heir, largely exceeding in value, the petition charges, one hundred thousand dollars. Subsequently, the Miles children, as residuary legatees, conveyed to the Miles Planting Company the sugar plantations, and to the Tulane Educational Fund the city property, all embraced in the sale to the Miles children by Mrs. Von Ahlefeldt.

The petition charges that the sale by Oliver Beirne to Mrs. Von Ahlefeldt was a simulation, as was the placing of the title to the Houmas plantation in her name, Mr. Beirne being the real purchaser and owner; that no price was ever paid by Mrs. Von Ahlefeldt for the property sold her by Mr. Beirne, no possession ever passed to her, but that he, as owner, remained at all times in possession of all the Louisiana property, and that the whole purpose of the sale to Mrs. Von Ahlefeldt and placing in her name the Houmas purchase was to disguise and effect the testator's intention to leave at his death the Louisiana property to the Miles children, constituted prior to the alleged fictitious sale, and prior to the Houmas purchase, his universal legatees. With respect to the conveyance by Mrs. Von Ahlefeldt to the Miles children, the petition substantially charges that the conveyance for the return of her notes, and the additional consideration of paying her the legacy of two hundred thousand dollars owed by the children, and for the relinquishment of her rights as forced heir of Mr. Beirne, was simply transmitting the property to the Miles children as residuary legatees and not as purchasers; that the Von Ahlefeldt sale was hence a fraudulent simulation, in so far as it purported to represent any ownershlp in Mrs. Von Ahlefeldt or conveyance of ownership by her, and that the residuary legatees, in their conveyances to the Miles Planting Company, admit the simulation of their purchase from Mrs. Von Ahlefeldt by describing the property as inherited by them from their deceased grandfather, Oliver Beirne. Thus, the petition in

effect charges that all the immovable property in Louisiana, sold by Mr. Beirne to his daughter, Mrs. Von Ahlefeldt, and that purchased by him and placed in her name, was owned by him when he died; that under the law he could not dispose of two-thirds of that property; that Susan Robinson, as the child of his deceased daughter, became vested with title to one-third of the two-thirds, and that by the death of Susan Robinson, leaving no ascendants or descendants, plaintiffs inherit concurrently with her other collateral heirs five-sixths of her rights; the petition further charges that if, notwithstanding the allegation of fraudulent simulation, the acts attacked by the petition are deemed donations, embracing as they do all the immovable property of the testator in Louisiana, then the donations are void, because in excess of the disposable portion, one-third, the testator leaving at his death one daughter and the children of two deceased daughters; the petition further avers that as to that portion of the property left by the testator, conveyed by the residuary legatees to the Tulane Fund, inasmuch as a college has been built on the property by the purchasers, petitioners confine their demand to their portion of the price paid by the purchasers, but if that relief be denied, they reserve their right as forced heirs to assert their demand for their share of the property, and as to the sugar plantations conveyed to the Miles Planting Company it is charged all are subject to plaintiffs' rights. The relief asked is that the sale to Mrs. Von Ahlefeldt and her title to the Houmas plantation be decreed simulated, that all that property be adjudged that of Oliver Beirne at the time of his death; that the title of Susan Robinson to one-third of two-thirds of the property, and petitioners' rights to five-sixths of two-ninths as her heirs be recognized; that there be decreed an accounting for revenues and all other necessary relief. The exceptions of no cause and no right of action and of prescription was sustained, and plaintiffs appeal.

Under our law the father leaving three children can dispose of but one-third of his property, and grandchildren take the place of their deceased parents. That portion of his property the testator can not dispose of to the prejudice of his children accrues to them at his death, and is called their "*legitime.*" If by donations *inter vivos* the deceased has infringed on the *legitime* the law grants to the forced heirs the appropriate action to recover the property thus donated, or so much as is requisite to make up the *legitime.* If the *legitime* is

encroached upon by the testamentary dispositions of the deceased, the Code gives the forced heir the requisite action against the legatees to preserve the *legitime*. C. C., Arts. 1493, 1494, 1495, 1504, 1517. Until the death of the parent the *legitime* has no existence. When death occurs, then the disposable portion is ascertained by adding to the property left by the deceased, the value at the time of the death of all the property donated by him, his debts are deducted and the disposable portion is adjudged by the proportion the number of his children then living bears to the residue. It results that donations *inter vivos* retain full effect during the life of the donor, and even after, unless attacked within the prescribed period by the forced heirs, their heirs or assigns. C. C., Arts. 1502, 1503, 1505, 3542.

As we appreciate the plaintiffs' petition they sue to subject the Louisiana property left by Mr. Beirne, to the demand for that portion of the *legitime* of Susan Robinson accruing to plaintiffs as her heirs. The result of all the allegations in the petition is, the import that by Mr. Beirne's will in favor of the Miles children, followed by the nominal sale to his daughter, Mrs. Von Ahlefeldt, and her conveyance to these children after his death in accordance with his request contained in the testamentary paper he left, all the Louisiana property has thus been transmitted to the Miles children, who in turn have conveyed to the Miles Planting Company, fully apprised, it is charged, that the conveyance embraced the *legitime* of Susan Robinson. The suit is directed against the Miles children as legatees, and necessarily against the Miles Company as holding the *legitime* on which plaintiffs assert their demand. It is manifest, the action is entirely distinct from the revocatory action, *i. e.* that of creditors to avoid the fraudulent contracts of their debtors, so much discussed at the bar. The Code describes a suit of this character as that of "revendication" to obtain the *legitime* of the heir. Civil Code, Art. 1517. The case is presented on pleadings that admit all the allegations in the petition.

The legal questions are as to the effect on immovable property in Louisiana of Mr. Beirne's will in favor of the Miles children to the exclusion of his grandchild, Susan Robinson: whether under our law such a conveyance as that by Mr. Beirne to Mrs. Von Ahlefeldt accompanied with the direction to convey to the heirs named in his will, and that accomplished as he had directed, and all this followed by the transfer by the Miles children to the Miles Planting Company,

places the property beyond the demand for the *legitime* of the grandchild: the further question is, whether the plaintiffs, the collateral heirs of Mr. Beirne's forced heir, are clothed with her rights, and whether the suit can be maintained in the form it is brought and for the relief it seeks.

That the will of Mr. Beirne, in so far as it seeks to direct the disposition of immovable property in Louisiana, must conform to our law, in respect to forced heirship, needs but the statement. The argument that questions the plaintiffs' rights as collateral heirs of Susan Robinson, might be deemed to come first, in order of discussion, but it will be more satisfactory to treat the question in connection with others arising in the case.

A large part of the discussion has been devoted to the nature of forced heirship. It has been insisted it creates no ownership, but gives only a right of action. In support of this it is urged that any donation by the owner is valid in his life and retains its force after his death, unless successfully assailed by his forced heirs. All this as to the force of the donation is to be accepted and results from the provisions of the Code. But in our view the character of the title of the forced heir to his *legitime—i. e.*, that part of the property the owner leaving children can not dispose of to their prejudice, is to be determined not merely by the action the law gives the forced heir to recover the *legitime* but by the provisions of the Code that confer the right the action enforces. That children can not be deprived by their parent of that portion of his estate the law "reserves for them" conveys the idea of ownership incident to the parent's death, and an ownership supported by the action the Code gives when that death occurs, to be exerted against the legatees or heirs of the testator as well as against the third persons the donees of the testator, who may be in possession of the *legitime*. C. C., Arts. 1493, 1495, 1517. As one of the commentators puts it, it is not the mere right of heirship by which the heir succeeds to the *legitime*, "mais la sienne propre," and throughout the elaborate discussions of the French jurists, "la réserve" or *legitime* is treated as accruing to the forced heir at the death of the parent as effectively as the death of the owner vests title to the property he leaves, in his heirs generally. The forced heir, too, consistently with his peculiar title of far superior nature to that of the ordinary heir, takes the *legitime* without liability that attaches to the ordinary heir for the debts of

the deceased, nor does the *legitime* brought back to the succession by "the effect of the revendication or reduction" become subject to those debts. 2 Troplong, p. 292, par. 910 *et seq.*; 5 Toullier, p. 112 *et seq.*; C. N., Art. 921; Civil Code, Art. 1517. In the light of the Code itself, made clearer if that were possible, by that shed by the French commentators, it seems to us, not at all in accord with the law, to treat the *legitime* as vesting a mere right of action. That action is simply the correlative or "la sanction de la réserve nait avec elle." 2 Mourlon, p. 311.

Nor do we think the argument for the defendant more successful in the effort to withdraw the title to the *legitime* from the operation of that principle of our law that makes the death of the owner vest all his rights in the heirs. Civil Code, Arts. 940, 941, *et seq.* The application of this principle, "le mort saisit le vif," is made more distinct by the articles of the Code which deem the forced heir so completely seized of right of all the succession property as to require the legatees to demand of the forced heir the delivery of the legacies. C. C.; Arts. 392, 893, *et seq.* It is contended the forced heir can not be deemed seized of right of the *legitime* when it is held by third persons and an action is necessary for its recovery. This argument is supposed to derive strength from the provisions of the Code that give to the donation exceeding the disposable portion full effect unless set aside by the action of the heirs; hence it is contended the forced heir can not be deemed seized—*i. e.*, the owner of that property actually in the hands of those holding under titles from the owner to whose succession the heir is called. It seems to us the argument loses its apparent force when it is considered that the axiom of our law, "le mort saisit le vif," supposes all property donated by the parent to the prejudice of the *legitime* to be returned to the succession of the deceased parent, when he dies, so as to form part of the property he leaves. C. C., Art. 1505. Thus the donee, when the donation exceeds the disposable portion, holds the *legitime* during the life of the donor by a title conveying no ownership in the ordinary sense, but by a tenure determinable by his death when by the operation of forced heirship the property is brought back to his succession, and brought back freed from any of his debts, and with the restoration of fruits from the date specified in the Code. C. C., Art. 1515. Hence all the French authorities treat the opening of the succession, *i. e.*, the death of the deceased,

as extending to and including the *legitime*; that is, by the death the *legitime*, though in the hands of the donee or of others to whom it may have been conveyed by the owner, is brought back and treated as part of the succession property. "Bien qu'etablie pour des raisons d'ordres public, la reserve differe point de la succession, or des que le droit hereditaire est ouvert par le deces du defunt il se transmet avec ce patrimoine de l'heritier et il peut etre exercé comme tout droit pecuniaire par les creanciers de l'heritier." 12th Laurent, p. 185, par. 130; 2d Mourlon, pp. 311, 313; Boilleux, commenting on Art. 920, C. N. We think, therefore, the forced heir is seized of right of the *legitime* by the death of the parent, and the fact that the property composing the *legitime* is then in the hands of third persons is no obstacle to the vesting of the right of the forced heir. But whether or not forced heirship is ownership in its fullest sense, or whether the forced heir is or is not within the rule "Le mort saisit le vif," seems to us a discussion not at all calculated to aid the defendant's case. It is quite certain the right of action of the forced heir for his *legitime*, springs into existence with the death that calls the heir to the succession. That incontestible right of the forced heir of Mr. Beirne the plaintiffs seek to exercise, and that other question, whether the plaintiffs as collateral heirs of the forced heir are clothed with her rights, remains for examination.

The Code declares that the reduction of the donation *inter vivos* or *mortis causa* can be claimed "only" by the forced heir or by his heirs or assigns. "Only" emphasizes that the heirs of the forced heir can sue, and whether they sue the legatees to reduce the testamentary disposition in excess of the disposable portion, or to "revendicate" when the *legitime* is in the hands of the donee or others holding under titles from the deceased, the suit of the forced heir is derived from the articles of the Code that transmit the rights of the forced heir to his heirs. C. C., Arts. 1504, 1517. Against the express language of the Code it is insisted, that it is only the forced heir of the forced heir that the Code intends shall have this right to sue. We are thus asked to weave into a clear, unequivocal article of the Code, as to those capable of exerting the action under discussion, a qualification surely not expressed nor implied, as we think, by any fair interpretation of language. In support of the argument our attention is directed to the foundation of the limitation of the parent's power to

dispose of his property; that is, the obligation of the parent to the child. It is hence contended the law restricts the action to children and their descendants. This policy of the law is illustrated by the copious citations of authority in the discussion at the bar and furnished in the briefs. All the commentators announce that policy and it is carried out in the Code: "En general chacuns peut disposer librement de ses biens, ne amoins la loi limite cette faculte en raison de l'existence de certains heritiers qu'elle favorisse specialement. Ces heritiers sont les descendans et les descendans l'orsquil en existe." 3d Boilleux, commenting on "la portion disponible et de la reduction." C. N., Art. 913. Undoubtedly the law refuses to the collateral heir of the donor any right to attack his dispositions of his property. The Code on this point is too clear to need any authority. If plaintiffs were suing as collateral heirs of Mr. Beirne they would be repelled by the text of the Code. It is insisted that the same theory that denies the collateral heir of the donor any right to assail his dispositions *inter vivos* or *mortis causa* should exclude the collateral heir of the forced heir who goes to the grave without any such attack. But the question is whether the Code has carried out the policy under consideration to the extent asserted in the argument. The forced heir of the donor, the Code declares, shall have the right to attack any of his dispositions that impair the heirs' *legitime*. But the Code also declares that the heirs or assigns of the forced heir shall have the same right. Any argument against the action of the heirs of the forced heir, founded on policy, must be referred to the articles of the Code that enforce the policy with respect to the forced heir of the donor, but does not enforce the policy against the heir of the forced heir. If we are to give effect to the Code as it is written, the plaintiffs as the collateral heirs of the forced heir of Mr. Beirne are brought clearly within the scope of the article of the Code; that gives this action not only to his forced heir, but also to the heirs and assigns of the forced heir. It is urged, too, that collations can be demanded only by children and their descendants of the owner, to whose succession they are called. Civil Code, Arts. 1228, 1235. This is on the theory of equality among children. The analogy drawn from the articles of the Code on the subject of collations is also supposed to be fatal to the transmission of the action under discussion in this case to the heir of the forced heir. It is claimed, o o, that the statutory provision for the widow and children in

necessitous circumstances, limited as it is to the persons named in the statute; the marital fourth, restricted as it is to the needy spouse, are all guides to the conclusion that the plaintiffs, as collateral heirs of Susan Robinson, do not succeed to her rights as the forced heir of Mr. Beirne. Arguments deduced from supposed analogies depend for their strength on the similitude of the subject supposed to furnish the analogy, with the subject to which it is proposed to apply the analogy that is asserted. It would not readily occur that our law respecting collations; or the provision for the surviving spouse left in distress; or that the widow and children of the insolvent husband, could afford any aid whatever in solving the question here, whether the action of the forced heir for his *legitime* passes to his h-ir. With due consideration of this line of authority resting on supposed analogies, we have been unable to find the least restriction or qualification of the explicit article of the Code that the rights of the forced heir passes to his heirs. If we are to go beyond the Code, we have the same instruction. The article of the Napoleon Code similar to that of our Code on this subject is restricted to donations *inter vivos*. The right of the forced heir to claim the reductions of donations *mortis causa* was deemed too clear to require any express provision; such donations in excess of the disposable portion were left to that adjustment, incidental to the application of the property left by the deceased to the payment of his debts, including the *legitime* of the forced heir. The Napoleon Code gives the action to reduce the donations *inter vivos*, and to revendicate when the *legitime* is in the hands of the donee or others claiming under titles of the deceased, to the forced heir and *to his heirs and "ayants cause,"* creditors being included under this last term. C. N., Art. 921, 930. Our Code discarded this last term which included creditors, preserving the more restrictive word "assigns" and recognizing the right of action of the heirs of the forced heir. In the discussions of the French jurists, unless it has eluded our research, there is not the trace of any question that the right of the forced heir for the recovery or preservation of his *legitime*, passes to his heirs without qualification of any kind. The passage from Laurent, already cited, epitomizes the concurrence of the French commentators on his subject. 12th Laurent, p. 185; 2d Mourlon, p. 311, 313; 3d Marcadé. p. 472. It seems to us the conclusion is irresistible that whether tested by the Code sufficiently clear, or by the jurisprudence of France, that the right of

action the plaintiffs exercise in this case passed to them as the collateral heirs of Susan Robinson.

It is claimed on behalf of the defendants that the petition is inconsistent in its allegations, as well as in its prayer for relief. It is urged that the attack on the conveyance to Mrs. Von Ahlefeldt as fraudulent, treats it as serious, and the prayer that the conveyance be annulled is also inconsistent with the other allegations of the simulation of the conveyance. The averments that no price was paid by Mrs. Von Ahlefeldt, that no possession passed to her; that ownership with all the control that ownership gives was exerted by Mr. Beirne at all times while he lived, convey in the most expressive terms the simulation of the conveyance. It does not occur to us that the import of these allegations is changed because of the word used by the pleader to designate the motive of Mr. Beirne, nor that the simulation, so distinctly alleged, disappears because of the prayer that the conveyance be annulled. It is further insisted that the defendants were entitled to be apprised whether the conveyance was assailed as a simulation, and if that be the view of the petition, the suit can not be maintained because there is no averment that the conveyance, if simulated, if available as a donation, exceeded the disposable portion. Our jurisprudence was that the heir could not assail the dispositions of property by the donor to whose succession the heir was called, unless the dispositions exceed the disposable portion, was changed by the Act No. 5 of 1884. Irrespective of any encroachment on the *legitime*, that act confers on the heir the right to attack any simulated sale by which the owner, to whose rights the heir succeeds, has sought to dispose of his property. Rachal vs. Rachal, 4 An., p. 501; Croizet vs. Gaudet, 6 Martin, O. S., p. 529; Hopkins vs. Buck, 5 An., p. 487. Moreover, under the charge that the conveyances to and by Mrs. Von Ahlefeldt embraced all the immovable property of Mr. Beirne in Louisiana, it seems to us the prejudice to the *legitime* of the grandchild attempted by those conveyances is substantially averred. We think, too, that the plaintiffs under the allegations in the petition were entitled to ask the alternative relief that if the conveyance to Mrs. Von Ahlefeldt should be deemed a donation, that it be annulled to the extent it exceeded the disposable portion. It is also argued on behalf of the defendants that the prayer of the petition that the transfers by Mrs. Von Ahlefeldt and that by the Miles children to the

Planting Company be annulled in so far as these conveyances impair plaintiffs' rights supports the objection to the action. If, however, the suit is viewed as that of the heir to recover the *legitime*, the fair import of the petition, the avoidance of the transfers of Mrs. Von Ahlefeldt and that to the Miles Company to the extent sought by the petition are to be deemed the necessary incidents of the relief afforded by the law. Inasmuch, too, as the transfers to the Miles Company passed the interest of Mr. Beirne's heirs, parties to that conveyance, to ask, as the petition does, that the transfer be annulled only so far as it seeks to impair the plaintiffs' rights, is entirely consistent with the measure and limit of the relief to which they are entitled. It is claimed the Miles children are to be treated as purchasers from Mrs. Von Ahlefeldt. Under the allegations of the petition admitted by the exceptions there was no price paid by the children; the three hundred thousand dollars stipulated was the amount of the legacy due to Mrs. Von Ahlefeldt and for the surrender of her rights as an heir. The whole purpose of the purchase, the petition charges, was to accomplish Mr. Beirne's purpose to dispose of all his Louisiana property so as to make the Miles children the beneficiaries. The petition treats the purchase as fictitious, known to all the parties. In that view the purchase interposes no obstacle to this suit. Again, if the conveyance by Mr. Beirne was fictitious, embracing the *legitime* as charged in the petition, neither that conveyance, or that by which Mrs. Von Ahlefeldt transferred to the children, whatever consideration they might have given their co-heir, Mrs. Von Ahlefeldt, no portion of it accruing to the grandchild or her heirs could affect the plaintiff's rights, if we are to give due effect to the allegations of the petition. Mrs. Von Ahlefeldt, as the case is presented on the pleadings, acquired no title and could convey none to the *legitime* of the grandchild. Nor in our view do the Miles Company, acquiring with full knowledge, the petition charges, of the rights of the grandchild, stand in any better position than their vendors. It is our conclusion the petition in its allegations and the relief it seeks, is consistent with the suit the law gives to asset the *legitime* of the forced heir when it is held at the owner's death, by titles from him, which the law does not make effective against his forced heir or against the heirs of the forced heir.

We have given due attention to the argument that the plaintiffs are estopped from disputing the title of the Miles children because

of the qualified demand of the plaintiffs in respect to that portion of Mr. Beirne's property conveyed to Mrs. Von Ahlefeldt, by her to the Miles children, and by them to the Tulane fund. We understand the plaintiffs' position in this respect defined in their petition to be: they are entitled to their share of the property, but as it has been sold to an educational institution and a college has been erected on the ground, that plaintiffs will take their proportion of the price if practicable, otherwise they claim their portion of the property itself. This it is claimed is a recognition of the title of the Miles children. Claiming the price without qualification would be a ratification of the sale to the Tulane fund; but the conditional claim is, in our view, no ratification of that sale, and, least of all, none as to the other property held by the Miles Planting Company.

The pleas of prescription are met by the allegations of the insanity of the grandchild; and if these allegations are true there was a suspension of prescription. This issue, therefore, with the others, must be tried.

We have taken this controversy, as we are bound to do, on the assumption of the truth of the allegations in the petition. On the allegations we think plaintiffs are entitled to be heard. In our view the petition shows a right of action in plaintiffs and a cause of action, if there is a distinction between the cause and the right, as the exceptions imply.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, that the defendants' exceptions be overruled and that the suit proceed to trial on the merits.

BREAUX, J., concurs in the decree.

Rehearing refused June 30, 1898.

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No. 12,686.

METROPOLITAN BANK VS. EMILE MULLER ET ALS.

1. When the promissory note to the maker's order is transferred by him to his creditor with the names of parties placed on the back of the note while in the maker's hands, the holder acquiring with full knowledge that the names of such parties were thus placed on the note for the accommodation of the maker, they will be regarded as sureties for the maker, and not as endorsers in the sense of the law merchant. Story on Promissory Notes, Secs. 133, 134, 188; 1 Randolph Negotiable Paper, 829, 831, 832 and 834; 4 Rob. 161; 10 La. 574; 4 An. 273; 95 U. S, 90, and line of decisions in the Digest; 1 Hennen, p. 172, No. 1.

2- As sureties of several for the same debt, defendants primarily liable *in solido* are entitled to a division of the debt so as each shall respond for his share or part of the debt, unless they have renounced the benefit of division, and on being sued demand such division. C. C., Arts. 3049, 3050; 4 An. 273; 9 An. 423; 12 An. 630.

ON APPEAL from the Civil District Court for the parish of Orleans. *Ellis, J.*

Dinkelspiel & Hart for Plaintiff, Appellee.

Harry H. Hall, E. E. Moise, Buck, Walshe & Buck, Carroll & Carroll, Theodore G. Spitzfaden, J. B. Rosser, Jr., for Defendants, Appellants.

Argued and submitted November 9, 1898.

Opinion handed down December 5, 1898.

The opinion of the Court was delivered by.

MILLER, J. This appeal is by six defendants, sued as endorsers of a promissory note. The defence is, omitting exceptions not insisted upon, that the defendants are sureties, liable each only for his *virile* share, and the answers insist the plaintiff's demand be restricted to the portion of each defendant, *i. e.*, one-sixth of the debt. The petition claimed judgment against defendants *in solido*, the judgment *in solido* was rendered, and the appeal presents the single question of the character of the obligation incurred by defendants in placing their names on the back of the paper sued upon.

We have in the record the agreed statement that at one and the same time, the note sued on was made by the Brewing Association to its own order, by it endorsed, endorsed also by the six defendants; that it was thus endorsed for the accommodation of the maker, and by the maker with the names of defendants upon it, was delivered to the plaintiff, acquiring with full knowledge of all the facts incorporated in this agreed statement.

The argument for the defendants that they are to be viewed as joint endorsers, hence only liable jointly, is based upon decisions arising on promissory notes made by two or more parties to their own order, expressing no obligation *in solido*, and hence creating a

joint liability not changed by the endorsement of the makers. Chadwick vs. Waters, 3 Martin N. S., 437; Baggett vs. Rightor, 4 R. 18; Mayor, etc., of New Orleans vs. Ripley *et als.*, 5 La. 122; 1 Hennen's Digest, p. 177, No. 4. This line of decisions does not, in our view, furnish the solution of the question here of the liability, not of a note of joint makers who endorse it, but of the liability of parties not makers or payees, but who place their names on the back of negotiable paper, while in the hands of the maker, who hands it to his creditor acquiring with full knowledge of all the facts.

The endorser under the commercial law is the payee, who, acquiring from the maker, endorses the note to convey title to another, the endorsee, and the endorsee becomes endorser when he, in turn, places his name on the note to transfer it. This is the general rule, though there are cases in which the party is deemed an endorser merely, because his name is on commercial paper after that of the payee. It is obvious, however, that the parties, defendants here, who put their names on the back of the paper while in the hands of the maker, who thereupon handed it to his creditor, the plaintiff, the holders acquiring the paper with knowledge of all the facts, are not endorsers under the law merchant. Their endorsements belong to the class known as irregular endorsements. In the jurisprudence of some of the States they would be deemed joint makers. Our own courts, dealing with these irregular endorsements given under circumstances falling within the principle of the decisions of our courts, have held the endorsers are to be treated as sureties. 1 Randolph on Promissory Notes, Sec. 66; Story on Promissory Notes, Secs. 133 *et seq.;* Gilbert vs. Cooper, 4 R. 161; Smith vs. Gorton, 10 La. 374; Goos vs. Martin, 95 U. S. 90, and line of decisions collated in 1st Hennen's Digest, p. 172, No. 1. We understand the plaintiff places the liability of the defendants on the footing of sureties, recognized by our own, and in our view, by the general jurisprudence.

If these defendants are to be deemed sureties for the Brewing Association they are entitled to the rights arising out of their contract. The Code declares that several persons who become sureties for the same debt are liable *in solido*, but they have the right of being sued to demand that the creditor shall reduce his demand to the share or portion of each of the sureties. This right of division is excluded only when the sureties have renounced it, or when one or more of the sureties are insolvent, and their insolvency has occurred

before the division of the debt has been demanded by the other sureties. Civil Code, Arts. 3049, 3050; McCausland vs. Lyons, 4 An. 273; Gordon vs. Succession of Diggs, 9 An. 422; Rawlins, Duncan & Co. vs. Barham, 12 An. 630. In this case there is no renunciation by the sureties of the benefit of division, nor is there any issue of the insolvency of any of them. The right of division is wholly distinct from the exception of discussion to which reference is made in the plaintiff's argument. To preserve the benefit of division, it suffices, in our opinion, that on being sued the sureties demand that division. To exact more is to go beyond the requirement of the Code. We find in each of the answers of the defendants the demand that the plaintiff be restricted in his recovery to the *virile* share of the defendants. In the case from 4th Annual we cite, the suit was on a promissory note against two parties deemed to be irregular endorsers, and hence sureties. The court in that case epitomized the law thus: Sureties for the same debt are liable *in solido*, but that solidarity ceases when, being sued, the sureties claimed the division of the debt. It was solidarity tempered with this right of division. The right was *in facultate*, as the court expressed it, and was to be allowed whenever the sureties chose to claim it. In that case the sureties made no such demand except in argument, and, as a consequence, lost the right. Here, the division is claimed, and under the imperative requirement of the law must be allowed.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be and it is hereby avoided and reversed, and it is now adjudged and decreed that each of the defendants, E. Muller, Peter Blaise, Theodore Brunner, Joseph D. Taylor, E. F. Hoppe and Charles J. Babst, do pay plaintiff one-sixth of the amount of the note sued upon, with interest on said one-sixth as stipulated in the note, and that plaintiff pay costs.

NICHOLLS, C. J., and BREAUX, J., dissent.

No. 12,732.

ROBINSON MINERAL SPRING CO., LIMITED, VS. LOUIS P. DEBAUTTE.

All the stockholders of a corporation having executed a full, complete and perfact act of ratification of an adjudication at public auction, same relieves the sale of any and all the alleged illegalities in the proceedings leading up to

same, such as want of authority in the board of directors to direct a sale to be made, and that the adjudication was at a price less than a stockholders' meeting had previously authorized to be accepted therefor.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Ernest T. Florance for Plaintiff, Appellant.

G. V. Soniat and *E. Howard McCaleb* for Defendant, Appellee.

Argued and submitted April 21, 1898.
Opinion handed down June 22, 1898.
Judgment amended and rehearing refused June 30, 1898.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. The motion is based upon several grounds.

1. That the appeal is premature.

The appeal is prosecuted from a final and definitive judgment which rejects the plaintiff's demand from which he is appellant.

It appears that in the lower court, the auctioneer who sold the property in controversy took some proceedings looking to the deposit in the possession of the clerk of court of the sum of four hundred and fifty dollars; but that proceeding was not initiated until some days after the date of the judgment, and the appeal had been taken.

We can not perceive in what way these proceedings affect or prevent the party already cast from appealing from the judgment which had been already rendered against him.

2. That certain documents are missing from the transcript.

But the motion fails to state, that said papers had been filed in the suit prior to the rendition of judgment, or that their non-production is attributable to the appellant in any way.

Failing in this, mover shows no cause for complaint.

3. That the plaintiff applied for and obtained a previous order of appeal which it failed to perfect and prosecute.

The present appeal was taken in exact keeping with our opinion in State *xe rel.* Minerai Springs Co. vs. Jndge, 49 An. 1527.

The motion to dismiss is denied.

ON THE MERITS.

This suit has for its object to compel the defendant to accept title to the property described in the petition of plaintiff, and comply with the terms of the adjudication by paying his bid of four thousand five hundred dollars, with interest.

On the trial there was judgment in favor of the defendant rejecting the plaintiff's demands, and from that judgment he has appealed.

In limine, the defendant tendered several exceptions, viz.:

1. The court was without jurisdiction because the property in dispute is situated in the State of Mississippi.

2. That the charter of the plaintiff, a Mississippi corporation, does not authorize the board of directors to sell, transfer or assign the lands in controversy; nor to prosecute a suit which has for its object the alienation of realty.

These exceptions were by the judge *a quo* referred to the merits to stand as part of the defendant's answer.

The theory of plaintiff's suit is, that on the 6th day of May, 1896, there was sold at public outcry, by an auctioneer of the city of New Orleans, a certain described tract of land situated in the county of Madison, State of Mississippi, containing two hundred acres more or less, less certain reservations mentioned and described, and that at said offering same was adjudicated to the defendant for the sum of four thousand five hundred dollars, and same was evidenced by a *proces verbal* which bears date June 27, 1896.

That on the 30th of June, 1896, the plaintiff made a formal tender of an act of sale, but that the defendant refused and declined to accept the same or to pay the price of adjudication.

Plaintiff corporation shows that the defendant and adjudicatee was at the date of said adjudication and for some time thereafter the president of the corporation, and, as such, personally cognizant of all the affairs of the company; and that he knew of the causes and reasons which led up to said sale, and was, as president, charged with the duty of consummating and carrying same into effect.

That it, in accordance with the expressed wish of the defendant,

[illegible]

[illegible]

[illegible]

intending and caring for the interests and well-being of the general stockholders.

The corporation having acquired the ownership of a valuable piece of real estate and taken title thereto, the president necessarily possessed knowledged of same without the title having been formally recorded.

The points on which the defendant's counsel rely are (1) that the charter of the corporation did not authorize the board of directors to sell its property under any circumstances; (2) that a meeting of the stockholders authorized a sale for ten thousand dollars and nothing less; (3) that the title being originally in the names of the original corporators, and their title to the corporation not having been recorded prior to the adjudication, the conveyance tendered is a questionable one; (4) that the title tendered to the defendant as adjudicatee was not subsequently ratified by all the stockholders.

Whether the charter of the corporation authorized the directors to make the sale or not is of no consequence, as it is specially admitted that the stockholders had authorized the sale, albeit for a price in excess of the amount for which it was adjudicated to the defendant.

It is of no consequence that the title of the corporation to the property sold had not been formally registered at the date of the adjudication—

(1) For the reason that same was a purely formal act which could be performed subsequently, and thus make the adjudicatee perfectly secure.

(2) The want of registry does not go to the validity of the conveyance, or create a cloud over the title, unless and until some adverse right has been intermediately acquired thereupon to the prejudice of the adjudicatee.

This state of facts is neither alleged nor shown.

But if all these things be as claimed for them by the defendant's counsel, same are cured perfectly and completely by the subsequent ratification of the stockholders.

And the plaintiff in his petition claims that the corporation procured and produced a full and complete ratification of the sale and adjudication to the defendant for the sum and price of four thousand five hundred dollars, and that same was annexed to and made part of the act of sale which was tendered to the adjudicatee.

The pertinent facts which are necessary to be considered are, that in 1893 a number of gentlemen residing in the city of New Orleans formed a syndicate for the purpose of purchasing the property known as the Robinson Mineral Springs In the State of Mississippi.

Their names are:

George Q. Whitney	$1,000
I. L. Lyons & Co	1,000
H. R. Gogreve	1,000
Isidore Hernsheim	1,000
W. W. McWhan	1,000
E. T. Shepard	1,000
Pearl Wight	1,000
L. P. De Bautte	1,000
Fred. G. Ernst	1,000
Chas. Scheeneck	500
C. O. Wilcox	500

All of them except Charles Scheeneck paid in the amount of money placed opposite to their respective names, and W. E. Lawrence took his place.

L. E. Lyons, acting as the agent or trustee of the syndicate, purchased the property in dispute, and thereupon the plaintiff corporation was organized and the defendant was chosen president.

In June, 1893, this property was purchased by the corporation in pursuance of a resolution which was adopted at a meeting of all the stockholders.

Soon afterward George Q. Whitney transferred his interest to Herman Roehl, and same was formally recognized by the company.

Of all these facts and transactions the defendant as president had full knowledge; and this fact is evidenced by the minutes kept by the corporation.

He had then full knowledge of the withdrawal of both Scheeneck and Whitney, because he had issued to new holders the *pro rata* of stock which had been allotted to them in consideration of the assignment of their respective interests in the aforesaid property.

From the 30th of May, 1893, to the 29th of October, 1896, the defendant was continuously president of the corporation—he becoming adjudicatee on the 6th of May, 1896, of the aforesaid property.

Notwithstanding it was the duty of the defendant, as president, to have had the title of the corporation recorded, he failed and neglected to do so; and, during a period of three years, he caused the corporation to be advertised as the owner, to place its goods on sale as owner, and as owner, to actually expend all of its available resources and contract an indebtedness of one thousand seven hnndred dollars beyond its means.

And finding the corporation placed in the impossibility of paying off this debt, the president inaugurated the proceedings necessary to effect a sale of said property in order to satisfy same, and appeared on the day of sale and bid it in for the sum of four thousand five hundred dollars; and when a title is tendered him, he declines compliance with the terms of the adjudication upon the technical grounds, which he either created, or is directly and immediately responsible for as the president of the corporation.

Every stockholder was duly notified of the resolution of the Board of Directors to sell, by a registered letter, and the receipt of each one of them is produced in evidence; and with this evidence, and having received no protest from any director, the company proceeded with the sale.

The defendant having raised the foregoing objections after the auction sale, a formal written ratification by every one of the stockholders was procured and same was annexed to and made a part of the title which was tendered to the adjudicatee.

That is to say, every single stockholder with the exception of Whitney and Scheeneck, but including Lawrence and Roehl, who had three years previously, and to the full knowledge of the defendant and adjudicatee, been substituted in their respective places.

In our opinion, the ratification was full, perfect and complete, and it cured all the suggested defects in the proceedings.

The judgment must be reversed and the defendant adjudged to accept title and complete the adjudication by paying the price.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that there be judgment in favor of the plaintiff, and compelling and requiring the defendant to accept the title tendered to him and complete the adjudication by paying the price and all costs of both courts.

ON APPLICATION FOR REHEARING.

BLANCHARD, J. The contention is that the court omitted to consider the exceptions of want of jurisdiction and no cause of action. These were filed by defendant *in limine* and after argument thereon were ordered by the trial judge to be referred to the merits. Whereupon defendant, reserving the benefit of his exceptions, filed his answer.

The exceptions appear not to have been specifically passed upon

by the court below. Its general judgment was in favor of defendants, apparently on the merits, rejecting the demands of plaintiff, and this appealed ensued.

This court, considering also the case on its merits, reached the conclusion the judgment was erroneous and decreed its reversal.

Defendant, in this application, reiterates its plea to the jurisdiction and contends that this being a suit for the specific performance of a contract of sale of land situated in another State, the courts of Louisiana are without jurisdiction to compel defendant to accept title and to pay the purchase price.

There is no force in this contention.

When a party domiciled in this State purchases in this State from another, also in this State, property located in another State, he can be sued here in the court of his domicile, which has jurisdiction to compel compliance by order or decree acting directly on the person of such purchaser, and held to pay the price which he contracted to pay. Seixas vs. King, 39 La. Ann. 512; Hayden vs. Yale & Bowling, 45 La. Ann. 362.

This is a suit for the price with tender of title. The *situs* of the property does not affect the completeness of the contract of sale, nor the liability to pay the price therefor.

The court had jurisdiction.

It is further contended that an obligor will not be compelled to specifically comply with his contract where the obligee can obtain redress by a suit for damages for non-performance, and for this reason no cause of action herein is shown.

Numerous decisions of this court in the past attest beyond controversy the right of action by a vendor against his vendee to compel compliance with the terms of a sale agreed upon, or with those of an adjudication made at public auction.

By the codal provisions of the law the obligations of a buyer are to pay the price of sale and to receive delivery of the thing sold. C. C. 2549.

And on failure of the buyer to pay the price, the seller may compel him to do it by offering to deliver the thing to him. C. C. 2551.

That is the present case. Defendant is tendered the title and is sued for the price of the sale.

There is no foundation for the exception of no cause of action.

On the merits our conclusion is that no reason exists for changing

the judgment heretofore rendered by this court, so far as same holds the defendant liable.

The plaintiff files a petition in the nature of an application for rehearing, asking that the decree herein be amended by directing payment of interest by defendant at the rate of five per cent. per annum on the amount of the purchase price from the date of adjudication, which was May 6, 1896.

The original petition asks for interest only from June 30, 1896, the date of the tender of title. Interest should be allowed from that time, and the decree will be corrected accordingly.

For the reasons assigned it is ordered that a rehearing be refused, and, amending our former decree, it is now adjudged and decreed that the judgment appealed from be annulled and reversed, and that there be judgment in favor of the plaintiff ordering and compelling defendant to accept the title of the property tendered him on the 30th of June, A. D. 1896, and condemning him to pay to plaintiff the sum of four thousand five hundred dollars, the price thereof, together with legal interest thereon from said 30th of June, A. D. 1896, until paid, and costs of both courts.

12,741.

GERMANIA SAVINGS BANK OF NEW ORLEANS VS. DAVID LEMLEY.

On appeal from an order of seizure and sale the legality of the order alone can be inquired into. If the notice, or three days demand of payment, be defective, either in substance or in the manner of its service, it may afford ground for injunction, or other relief in the court below, but can not be the subject of appeal.

Where an act of mortgage authorizes the mortgagee to take out insurance in case the mortgagor fails to do so, and stipulates that the premiums paid up to a certain sum shall be considered covered by the mortgage, such premiums, within the limit, may properly be included in the order for executory process as an incidental expense, upon production of the receipt, or an affidavit showing payment thereof by the mortgagee.

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

Buck, Walshe & Buck for Plaintiff, Appellee.

Carroll & Carroll for Defendant, Appellant.

Argued and submitted April 22, 1898.
Opinion handed down May 16, 1898.
Rehearing refused June 30, 1898.

The opinion of the court was delivered by

BLANCHARD, J. From an order of seizure and sale defendant prosecutes this devolutive appeal and files an assignment of errors, but inasmuch as only two of the errors complained of are argued in the brief, we assume the others are abandoned.

It is urged that the order *and writ* are void: (1) because there is a fatal defect in the demand; (2) because executory process issued on the claim for insurance premiums, as well as for the amount of the note, interest and costs, whereas there was no authentic evidence establishing the claim for such premiums.

The first may be disposed of briefly. On an appeal from an order of seizure and sale the legality of the order alone can be inquired into. If the notice, or three days demand of payment, required to be served upon the debtor, be defective or irregular, or insufficient, either in substance or in the manner of its service, it may afford ground for injunction, or other relief in the court below, but can not be the subject of an appeal. Romain vs. Denny, 17 La. Ann. 127; Dodd vs. Crain, 6 R. (La.) 60; Fazende vs. Flood, 24 La. Ann. 425.

As to the second, that no authentic evidence was produced that the debtor owed for insurance premiums, these facts appear from the record: A note for seven thousand dollars was executed, a mortgage securing this note was passed in authentic form, this mortgage imports confession of judgment, contains the pact *de non alienando*, authorizes by its terms executory process, stipulates that the buildings on the lots mortgaged are to be kept insured by the mortgagor for an amount equal to the debt, and that if the mortgagor neglects or refuses to do this, the mortgagee is authorized to do so at the expense of the former.

It is stated that the mortgagee may, upon the default of the mortgagor, effect this insurance at a rate of premium not to exceed two per cent. "at the cost, charge and expense of said mortgagor," and following this is the declaration in the mortgage of confession of judgment for the full amount of the note with interest and "all costs, charges and expenses whatsoever."

Clearly, the insurance premiums were intended to be classed as "charges and expenses" incidental to the main indebtedness, and judgment therefor, up to two per cent. on seven thousand dollars, was confessed by the debtor in favor of the creditor, who was authorized to effect the insurance and pay the premiums.

The mortgage, in express terms, declares that it is intended to cover and does cover the reimbursement and payment of all expenses, such as attorney's fees, protest fees, costs, charges and insurance premiums.

The debtor failed to insure the buildings and the creditor did so, paying a premium of one hundred and six dollars and fifty-five cents, less than the two per cent. authorized in the act of mortgage.

When the debtor defaulted in the payment of the note at maturity, executory process was sued out and along with the petition was presented the note, a certified copy of the mortgage and the affidavit of the creditor of the fact of payment of one hundred and six dollars and fifty-five cents as insurance premium. The order issued, covering by its terms the note, interest, premium, attorney's fees and costs.

The act of mortgage furnished authentic evidence justifying the inclusion of all these items of indebtedness in the order and writ.

It supplied authentic evidence of *the right* (C. P. 732) to collect insurance premiums to the extent named in the act, upon production of receipts, or an affidavit, showing payment thereof by the creditor.

The fallacy of the contrary argument lies in considering the unauthentic receipts, or affidavit of payment, the basis of the right to regard such payment as part and parcel of the mortgage, whereas the real basis is the stipulation to that effect in the mortgage itself, on a matter to be regarded as an expense or charge incidental to the main demand, or the principal indebtedness represented by the note.

The case of Cumming vs. Archinard, 1 La. Ann. 279, cited by appellant, differs from the case at bar. There the plaintiff took an order of seizure and sale for *more* than was due in this, the decree allowed interest for a longer time than was stipulated in the note and mortgage. It was for a few days only, it is true, and the difference amounted to but three dollars and fifty-six cents. But because it was for more than was actually due the court set aside the order on appeal and immediately granted in lieu thereof another for the correct amount.

Here it is not pretended that the decree issued for more than was due. There is no contention that the insurance premiums are not due and had not been paid by the mortgagee.

In Fazende vs. Flood, 24 La. Ann. 425, the court held that cost of protest was an expense incident to the collection of the note and could be recovered as part of the costs in the executory proceedings, though no authentic evidence was produced of either the cost of the protest, or of its payment. None was thought necessary, and the decree, which included such cost, was sustained.

In Pele vs. Meaux, 17 La. Ann. 60, cited by appellant, it was said that the stipulation in the mortgage relative to insurance premiums was a mere incident to the contract. In that case no *amount* was mentioned in the act of mortgage as covering or intended to cover such premiums, and nothing appeared as to the cost of the protest of the note. The court, saying "there is no evidence authentic, or of any kind, respecting these claims," and "we find nothing in the record to establish the amount of these two items," amended the decree so as to exclude the same. The instant case differs, for here the mortgage does fix an amount for the insurance premiums, which may be paid by the mortgagee on the default of the mortgagor, and there does appear in the record the affidavit of the mortgagee of payment of premiums for a sum *within* that stipulated for such purpose in the mortgage.

This brings the case precisely within the rule laid down in Grunewald vs. Manufacturing Co., 49 La. Ann. 489, where it was held that "insurance premiums may also be included in the order (of seizure and sale) when the amount is not in excess of that allowed in the act."

This debtor comes with bad grace before the court complaining that the decree includes an insurance premium, when he undertook in the mortgage act to keep the property insured for the benefit of the mortgagee and agreed that if he did not do so the mortgagee may, and that the premiums paid by the latter should be covered by the mortgage. He failed to insure; the creditor was compelled to do so, and obtained insurance at a percentage less than that authorized in the mortgage.

The appellee asks damages for frivolous appeal, but as the question herein discussed may not, perhaps, fairly be considered as heretofore

settled by decisions of the court, we deem it proper not to allow such damages.

Judgment affirmed.

His Honor, the CHIEF JUSTICE, and MR. JUSTICE BREAUX concur in the decree as regards the amount of the mortgage and interest, but with reference to the premiums of insurance, they dissent from the majority of the court for reasons assigned in their separate opinions this day handed down.

SEPARATE OPINION.

NICHOLLS, C. J. Though the premiums of insurance if paid by the creditor might be secured by mortgage, when the fact of such payment and the amount thereof would be established, yet being matters in *pais*, under the terms of this mortgage, they should not have been included in the order of seizure, though payable out of the proceeds of a sale to be made under the executory proceedings. The fact that they were included in the order did not invaiidate the whole order of seizure. It might have been enjoined to that extent. No suspensive appeal having been taken from the order, and the sale having taken place without opposition, the question as presented has now no special significance.

BREAUX, J. I concur in the decree to the amount of the mortgage and interest.

With reference to the amount of insurance, I do not think it is covered by the mortgage so as to authorize the writ of seizure and sale; although it is due and should be paid from remaining proceeds of the sale.

No. 12,756.

JOSEPH SOLOMON VS. EDWIN S. GARDINER ET AL.

All testimony offered by defendant in support of his plea in reconvention having been ruled out, the jury should have been instructed there was no evidence before them touching such demand, and that as to same they should return a verdict as of non-suit.

The verdict having been silent as to such demand in reconvention, it was error on part of the trial judge to incorporate in the final judgment drawn up and signed by him a decree rejecting it. There should have been dismissal as in case of non suit merely.

Where the averments of an answer and plea in reconvention sufficiently show

that the violation of the contract complained of was an *active* one, no formal putting in default was necessary.

The averments of the reconventional demand, in respect of the damages claimed, held to be sufficiently definite and precise to admit evidence in support thereof. Error in its exclusion.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Dinkelspiel & Hart for Plaintiff, Appellee.

Edwin T. Merrick for Defendant, Appellant.

Argued and submitted May 19, 1898.
Opinion handed down May 30, 1898.
Rehearing refused June 28, 1898.

The opinion of the court was delivered by

BLANCHARD, J. Plaintiff sues upon a promissory note for seventeen hundred and seventy-seven dollars and fifteen cents, which defendant Gardiner had drawn payable to order of himself and by him endorsed, and which the other defendant, Peter Doerr, had also endorsed. Judgment was asked *in solido* against them.

Plaintiff was, or had been, a member of the commercial firm of Joseph Solomon & Co., of Chicago, engaged in the business of the manufacture and sale of clothing.

Defendant Gardiner was a clothing merchant and merchant tailor in New Orleans.

In December 1896, these parties entered into an agreement by which plaintiff's firm stipulated to furnish defendant with complete sample outfits such as were required for soliciting in his business as merchant tailor; also to supply defendant with a line of woolens, described, to be used for display at his place of business, but which were furnished on consignment only and not to be charged on defendant's regular account, and which were subject to be recalled by plaintiff's firm, some of them during the season, the others at the close of the season. It was further stipulated that the firm would open a regular account with defendant and extend to him a

line of credit of one thousand dollars on thirty days' time, with a discount of seven per cent. on remittances, and to fill promptly all orders which defendant would send in under the contract.

This business relationship having been established, it is averred by defendant that one of the plaintiff's firm came to New Orleans in the latter part of January 1897—a month and a half after the contract had been entered into—and visited his place of business, and while there agreed to extend his (defendant's) credit and to increase the limit in which remittances should be made from thirty days to ninety days.

Following this, defendant ordered and received from plaintiff's firm goods amounting to the sum of one thousand seven hundred and seventy-seven dollars and fifteen cents, which represented the state of the account between them on the 6th of July, 1897, at which time, it is averred by defendant, the same member of plaintiff's firm appeared a second time in New Orleans and at his place of business, and although the amount mentioned was not due under the terms of their agreement, he (defendant) "was induced and misled" into giving to plaintiff's firm the note sued on, with Peter Doerr as security, "under the pretence and fraudulent assurance" of the firm that if the debt were thus arranged for and secured, the firm would extend his credit thereafter to as much as three thousand dollars, thereby enabling him the better "to carry on his large and growing business."

The note and security having been obtained, defendant represents that plaintiff's firm "did maliciously, fraudulently and deceitfully and without cause violate their said agreement with him by refusing to furnish or supply him with the goods agreed upon," and that this violation and refusal begun and took place immediately following the execution of the note as aforesaid.

He claims, too, that while plaintiff's firm were assuring him of their good will and of the assistance they were going to afford him in his business, they were fraudulently, maliciously and secretly negotiating with a rival house for the transfer of their New Orleans business to it, and did so transfer it in July, 1897, immediately following the execution of the note sued on. He charges bad faith and malice on the part of plaintiff's firm in thus withdrawing without cause and without notice their business from his hands, and avers that by this unwarranted act and violation of the contract he

was materially injured in his credit, was unexpectedly deprived of the means of doing business, of carrying on his business properly for the season following the withdrawal, was greatly embarrassed by having all the goods recalled from his store, leaving it empty, and by his inability to furnish customers.

He represents that injury to his business and loss of trade followed, damaging him in the sum of five thousand dollars, which he prays judgment for in reconvention against the plaintiff as a member of the firm of Joseph Solomon & Co., and for trial by jury.

The answer of defendant Doerr was to the effect that he became surety on the note for the purpose of facilitating Gardiner in his business, and with the understanding that plaintiff's firm should and would enable the said Gardiner to increase and enlarge his business, which understanding plaintiff has in bad faith and fraudulently violated, thereby destroying the consideration of the note, and that he would never have endorsed the note had he been advised of the secret intention of the plaintiff to withdraw their business from Gardiner.

On the trial evidence was offered by defendant in support of his claim in reconvention. This was objected to by counsel for plaintiff on the ground (1) that there is no allegation in the answer and plea in reconvention that plaintiff had been put in default; (2) that the averments of the reconventional demand as to the damages claimed are too vague, indefinite and uncertain to admit of proof thereof—no particulars of any kind being given, no items of damage being specified, only a gross sum in damages being claimed.

These objections were sustained and all of defendant's testimony excluded.

Whereupon the trial ended with a verdict by the jury in favor of the plaintiff for the amount of the note sued on, with interest, protest fees and costs. Nothing whatever was mentioned in the verdict as to the reconventional demand, but when the trial judge came to write up and sign the judgment he not only decreed in favor of plaintiff for the amount as found by the jury, but proceeded further and decreed the rejection outright of the reconventional demand of defendant Gardiner.

Thereupon both defendants took orders of appeal to the Court of Appeals from the judgment decreeing plaintiff's right to recover the amount of the note, and defendant Gardiner took an order of appeal here from the judgment rejecting his demand in reconvention.

As a matter of practice as well as of law there was error in not instructing the jury there was no evidence before them touching the reconventional demand, and that as to such demand they should return a verdict of non-suit. So, too, there was error in the judgment signed decreeing the rejection of the reconventional demand. It should have been one of non-suit.

The ruling of the court denying defendant Gardiner the right to offer evidence in support of his demand in reconvention was erroneous as to both the grounds stated above.

The terms of the answer and plea in reconvention in respect to the violation of the contract complained of, sufficiently show it to have been an *active* violation. In such case no formal putting in default was necessary. C. C. 1932; Allen, West & Bush vs. Steers, 39 La. Ann. 589; Dwyer Bros. vs. Administrators, 47 La. Ann. 1235; Abels vs. Grover, 15 La. Ann. 247; Millard vs. Farley, 15 La. Ann. 519; Levy vs. Schwartz, 34 La. Ann. 213; Morton vs. Pollard, 9 La. 175; 8 La. 522; 18 La. 513; 17 La. Ann. 203; 36 La. Ann. 425; 14 La. Ann. 81; 9 R. 377; 2 La. Ann. 957.

The averments of the reconventional demand in respect to the damages claimed were sufficiently definite and precise to admit of testimony in support thereof.

Bickham & Son vs. Hutchinson, 50 La. Ann. (not yet reported); Doullut vs. McManus, 37 La. Ann. 802; Tracey vs. Tuyes, 7 N. S. 356.

It is, therefore, ordered, adjudged and decreed that the verdict and judgment appealed from, in so far as the same reject and disallow defendant Gardiner's demand in reconvention, and deny him the right to offer proof in support thereof, be annulled, avoided and reversed, and that this cause be remanded to the court *a qua* to be proceeded with according to the views herein expressed and the law-costs of both courts, accruing in respect of said demand in reconvention, to be taxed against plaintiff and appellee.

No. 12,749.

THE STATE VS. GEORGE W. DAVIDSON.

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1. The power to fix places for the sale of food commodities for the daily wants of the community exerted by ordinances establishing the markets and prohibiting sales of such commodities elsewhere, is a municipal function vested by the charter in the city of New Orleans. Act No. 45 of 1896, Sec. 14: 49 An. 618.

2. Hence, it is competent for the council to prohibit the sale of perishable food commodities in the railroad depots or landings of the city, except such sales of the articles in the unbroken packages in which the articles are imported into the State.

3. The ordinance as one intended to prevent the conversion of the railroad depots and landings into places for the offering and sale of perishable food commodities is not to be annulled for alleged oppressiveness or unreasonableness, and the exception removes any incompatibility between the ordinance and the commerce provision of the Constitution of the United States. Const., Art. 1, Sec. 8; Brown vs. Maryland, 12 Wheaton, p. 436.

ON APPEAL from the First Recorder's Court of New Orleans. *Finnegan, J.*

Jas. J. McLoughlin, Assistant City Attorney, and *Samuel L. Gilmore*, City Attorney (*Bernard Bruenn* of Counsel), for City of New Orleans, Plaintiff, Appellee.

Denègre, Blair & Denègre for Defendant, Appellant.

Argued and submitted November 11, 1898.
Opinion handed down December 5, 1898.

The opinion of the court was delivered by

MILLER, J. The defendant, fined for the violation of an ordinance of the common council, entitled "An Ordinance to prohibit the sale of onions, cabbages, potatoes and other perishable articles at railroad depots and public landings," prosecutes this appeal.

The defence is the ordinance violates the commerce clause of the Constitution of the United States; is violative of Art. 1, Sec. 155, of the Constitution of the United States, is oppressive and unjust, and that the ordinance exceeds the power of the council.

The ordinance prohibits "the receivers of onions, potatoes" and other perishable fruit from selling their commodities at railroad depots and public landings, in other than the original packages, and prohibits the receivers or consignees from selling at all except to licensed dealers; the ordinance further prohibits the sale at the depots by those who purchase the commodities, and prohibits all

sales at any other depot than that where the commodities were received.

It may well be that this ordinance, in some respects, transcends the authority of the council. But as this controversy is presented the defendant complains of the fine imposed on him for selling potatoes, not in the package in which they were imported, in a railroad depot. We are not called on to deal with the ordinance in any other aspect than that presented of the fine imposed on defendant for selling potatoes, a perishable food commodity, in the railroad depot. The question then is whether the ordinance authorizes the fine, and the further question is whether the council possesses the power to prohibit such sales in the depots of the railroads of this city.

The ordinance, like a statute, may be valid in part, and void as to the residue. The title of this ordinance, to regulate sales of perishable commodities,such as potatoes,onions, etc.,at railroad depots and public landings, is followed by a section of the ordinance prohibiting such sales in other than the original packages, *i. e.*, the packages brought on the cars. In this aspect the ordinance seeks to prohibit the conversion of the depots of this city into markets for the display, keeping and sale of perishable food commodities apt to become offensive and to menace the public health. In all cities the places of sale of such commodities, that is, in quantities adapted for the daily wants of the community, is, we believe, restricted to the markets designated by the council, at least we have always had such ordinances. This court has sustained the power of the council to enact such ordinances. State vs. Namias, 49 An. 618.

The argument for the defence that this ordinance has no relation to the public health or cleanliness of the city, but was passed to serve other purposes, has had our attention. In support of the argument it is urged or implied that private interests or rivalry in the business of selling these food commodities dictated the ordinance. It is not for the court to ascertain the motives that may have prompted the ordinance; the inquiry is whether its declared purpose is lawful, and whether the ordinance is restricted within the scope of that purpose. It may be that in the exercise of the police power of the city, private interests may suffer, but the private interests that may be affected by this class of ordinances regulating the places where perishable food commodities may be exposed for sale and sold must yield to the public interest of health and cleanliness the ordinance is designed to subserve.

It is claimed the ordinance is unreasonable and oppressive. The argument is aimed at the provision forbidding the sales of perishable commodities to any but licensed dealers, even in the original packages. We are not now dealing with that part of the ordinance, and no view is required to be expressed as to that prohibition clearly separable from the inhibition that the railroad depots shall not be used for the sale of these food commodities taken from the original package and disposed of in the quantities that may be desired by the purchasers. Nor are we called on to consider that other provision of the ordinance invoked to sustain this branch of the defendant's argument, prohibiting those who purchase in the original package from selling at or in the depots the commodity in the original package, and that extends the prohibition so as to prohibit such sales at depots other than that where the article was originally received. Again our attention is called to an exception in the ordinance that exempts from its operation the vendors who peddle fruits in the depots from baskets. We can not appreciate that forbidding the exposure for sale and sale in railroad depots, of onions, potatoes and similar articles, because they are perishable and apt to result in filth and offensive odors, is to be deemed unjust and oppressive for the reason that the "basket vendors" of fresh fruit is permitted. If this ordinance had undertaken to prohibit these "itinerant vendors" from "peddling fruit in baskets," in our view such a prohibition might well have been deemed oppressive. We have given attention to all these and other phases of the argument designed to attack this ordinance as unreasonable. In the restricted view we take of the ordinance already stated, we are unable to hold the ordinance exposed to this line of attack.

The Article 155 of the Constitution and the bill of rights in the Constitution are supposed by the pleadings of the defendant to be involved in the consideration of the ordinance. We presume, however, the argument that the ordinance is unreasonable and unjust, and an unwarranted interference with the business done at depots and landings, the ordinance is aimed to prohibit, embodies all that it is supposed can be urged, based on the provisions of the organic law cited in defendant's pleadings. The objection that the ordinance is an interference with interstate commerce and violative of the commerce clause of the Constitution of the United States is, we think, answered by the ordinance. Constitution United States, Art. 1,

Sec. 8. The ordinance imposes no restriction on the sale of the commodities in the original package, *i. e.*, in which the commodity is imported. When the transportation is completed, the articles taken from the package and offered for sale, the ordinance then operates to regulate the places of sale. It is settled that when the importation is complete, the property no longer, in the original package, but removed therefrom, and mingled with the property in the State, the mass becomes subject to the police as well as the taxing power of the State. Brown vs. Maryland, 12 Wheaton, p. 436, and the line of cases of that type.

Viewed only as an ordinance to prohibit the sale of perishable commodities at landings or railroad depots, and excluding from consideration all other portions of the ordinance, in our opinion, we have before us a municipal regulation within the competency of the council and the mere exercise of the police power presenting no conflict with the Constitution, Federal or State.

It is therefore ordered, adjudged, and decreed that the sentence of the lower court be affirmed with costs.

NICHOLLS, C. J., dissents.

No. 12,762.

STATE OF LOUISIANA VS. WM. WYATT.

ON MOTION TO DISMISS.

The appeal in a criminal case will not be dismissed *in limine* upon motion made to that effect on the ground that appellant reserved no bills of exception; that no assignment of error had been made, and no error was patent upon the face of the record. If the appeal was regularly taken the court will take cognizance of the cause and deal with it from the record. Brown vs. Land Co., 49 An. 1779.

Where the minutes of the court which show that an appeal had been taken on the 26th of February on behalf of the State in presence of the accused and his counsel is charged to be untrue and the cause being remanded for evidence on that point, appellee shows by parol testimony, introduced without objection, that no order of appeal was granted on the 26th, either in the presence of the parties or otherwise, he can not complain that by the testimony of the clerk and the District Judge it should be shown that the entry should have been made as for an appeal granted on the 23d of February. The more regular course to have been pursued was for the court to have ordered the minutes to have been amended and corrected and made to conform to the facts. As the law does not require that the accused, or his counsel, or either of them, should be present in court when the State takes an appeal from an adverse ruling, an erroneous statement that they were so present is an immaterial circumstance.

State vs. Wyatt.

ON THE MERITS.

The record showing that the accused was indicted on the 17th of February, 1897, that he was arraigned on the 23d August, 1897, pleading not guilty; that on the 26th of August the cause was continued to the next term of court; that on the 23d February, 1898, he filed a motion to quash the indictment, on the ground that the *venire* was drawn at a place other than the court house, and that defendant was up to that time ignorant of that fact *Held:* That the court erred in sustaining the motion. The motion to quash having been made by defendant after pleading to the merits, was too late, in the absence of an affirmative showing that neither the accused himself nor his counsel was ignorant of the facts when defendant pleaded. State vs. Brittin, 50 An. 277; State vs. Strickland, 41 An. 514; State vs. Robertson, 50 An. 92; State vs. Sterling, 41 An. 681; State vs. Henderson, 13 An. 490; State vs. Bazile, 38 An. 545; State vs. Hancks, 38 An. 469; State vs. Toups, 44 An. 904.

The circumstance that counsel may have acquired knowledge of the facts touching the *venire* at a time prior to his employment by defendant, and when he was not aware that the latter was charged with crime, does not have the effect of making such knowledge any the less (when he became employed) the knowledge of the accused in determining whether the motion to quash was filed tardily or not. State vs. Stricklaud, 41 An. 514; State vs. Frank M. Robertson, 50 An. 92.

ON APPEAL from the Fourth Judicial District Court, Parish of Jackson. *Machen, J.*

M. J. Cunningham, Attorney General, and *A. B. Hundley*, District Attorney, for Plaintiff and Appellant.

C. P. Thornhill for Defendant and Appellee.

Submitted on briefs November 12, 1898.
Opinion handed down December 5, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant, William Wyatt, was indicted by the grand jury of the parish of Jackson, on the 17th of February, 1897, for burglary and larceny, the regular term of the District Court having opened on the 15th of that month. The accused was arraigned on the 23d of August, 1897, pleaded not guilty, and asked for trial by jury. The case was fixed for trial for the 26th of August. On that day it was continued until the next term. On the 21st of February, 1898, the case was fixed for the 23d of that month. On that day defendant filed a motion to quash the indictment. The

motion was taken up, tried and sustained by the court. The testimony adduced on the trial of this motion was taken down and is transcribed in the record.

The motion to quash was as follows: "Defendant respectfully shows that the indictment returned against him herein is defective, null and void for the following reasons, to-wit:

"The grand jury which returned said indictment was illegal, null and void, because said grand jury was called and empaneled from a *venire* of jurors illegally drawn in this, that said *venire* was not drawn in the clerk's office in the court house as required by Act No. 99 of 1896, but if any such drawing actually took place, it took place at the commercial establishment of W. R. Carroll, in the town of Vernon. That the facts herein set forth as to the place of drawing the said *venire* of jurors was not known to this defendant until the twenty-third day of Febuary, 1898. Wherefore, the premises considered, he prays that the said indictment be quashed, annulled and set aside, and that he be discharged."

This motion was sworn to by defendant, but not by his attorney.

On the trial of the motion to quash W. R. Carroll, clerk of the court and one of the jury commissioners, was permitted to testify over objection to his being so allowed, urged by the District Attorney, and under a bill of exception reserved. He testified that he had been clerk of the court since 1892. The *venire* of jurors drawn for the February term of this court was drawn in his storehouse in the town of Vernon. The clerk's office in the town of Vernon was at the court house.

Cross-examined, he said: "My store is about seventy-five yards from the court house. The clerk's office is also occupied by the sheriff. The sheriff collects taxes a part of the time in the clerk's office. He also keeps a part of his books in the office. The clerk's office is about twelve feet by fifteen feet. We drew the jury at the store in order to have witnesses. I could not secure witnesses to witness the drawing of the jury at the clerk's office without having them to close the store. The witnesses who witnessed the *proces verbal* were present all the time during the drawing. I don't think any one else was present. I did the principal part of the office work at my store in 1897."

He testified further that Mr. Thornhill, attorney at law, wrote up the first part of the *proces verbal* at the clerk's request; that Mr.

Thornhill is defendant's attorney. Mr. Thornhill testified that he was not at that time counsel of Wyatt, and did not then know that there was a charge against him.

The State offered in evidence the minutes of the court in the case against the defendant, showing the arraignment of defendant and the fixing of the case for trial. The State, on the 5th of March, 1898, lodged a transcript of the case in the Supreme Court as having been appealed. In this transcript appear copy of the minutes of court of February 23, 1898, and February 26, 1898. The minutes of the 23d show that the motion to quash was filed, taken up, tried and sustained on that day. The minutes of the 26th show that the accused and his counsel being present, the District Attorney asked for and obtained an appeal to the Supreme Court returnable in ten days.

Defendant moved to dismiss the appeal on the grounds:

1. Plaintiff reserved no bill of exceptions to the ruling of the lower court, and there is no assignment of error, and no error patent upon the face of the record, without which there is no question presented for this court to determine or pass upon.

2. The transcript states in error that the order of appeal was asked for in open court in the presence of the accused and his counsel, whereas in truth and in fact no such order of appeal was asked for in the presence of the accused and his counsel, nor was the accused present in court at all on the 26th of February, 1898, at which time, according to the transcript, the appeal was asked for. Counsel for the accused was present on said 26th of February until the business of the court had been concluded, and the clerk was writing up the minutes thereof preparatory to final adjournment, but did not remain to hear the minutes read, and up to this stage of the proceedings no order of appeal had been asked for, and he was not aware that a transcript of appeal had been sent up to this court until advised to that effect by the clerk of this court.

3. That the State through the District Attorney had acquiesced in the judgment on the motion to quash.

In the event the court should hold that the first ground urged for dismissal was insufficient, defendant asked that the case be remanded to take testimony as to the facts contained in the second and third grounds.

On motion of appellant's counsel (the Attorney General consent-

ing) the court, on March 26, 1898, directed the cause to be remanded to the lower court to take testimony as to the facts contained in the second and third grounds of defendant's motion to dismiss. Evidence was taken as directed and returned. One R. J. Mitchell testified that he was present on the 23d of February, 1898, when the motion to quash was filed. Defendant Wyatt was at witness' house on the 26th of February, 1898. He did not visit the court house on that day. Witness knew of his own knowledge that he was not present on that day. The minutes of the court of February 26, 1898, which say that the appeal in this case was taken up in the presence of the accused and his counsel are erroneous in so far as the accused is concerned. He was not in the court at all on that day. Defendant's counsel, C. P. Thornhill, testified that he left the court house on February 26, 1898, before the final adjournment, and was not present at the taking of this order of appeal, as shown by the minutes of the case of the State vs. Wm. Wyatt. He was the attorney who represented Wyatt in the motion to quash, and this appeal was not taken and entered in his presence. On the day the motion to quash was sustained by the court, the court in concluding its remarks upon the motion to quash stated, by way of suggestion to the District Attorney, he had the right of appeal, and the District Attorney replied: "Yes, I intend to do so."

The State placed both the District Judge and the District Clerk upon the stand as witnesses, and they testified over objection urged by the defendant that the minutes of the court were the judicial acts and declarations of the prosecution itself, and the prosecution could not be heard to contradict its own judicial acts, declarations and admissions. The clerk testified that the judge makes a minute on his docket prepared for that purpose, and this is copied from the judge's docket; that he had examined the docket kept by the judge for the February term, 1898, and the docket shows that the State appealed. Being asked "to explain why the regular minutes of the court (evidently of the 23d February), as copied from the judge's docket, does not show the order of appeal," he answered: "I overlooked the order in the transcribing of the minutes of 23d February, 1898, the day the order of appeal was granted and entered on the minutes."

This question and answer were objected to by the defence on the ground that the minutes of the court of the 26th of February, 1898,

showed that the appeal was asked for by the State on the 26th; that the minutes being the judicial admissions and declarations of the prosecution itself, no evidence of any character was admissible to explain or contradict them. Being asked whether he knew of his own knowledge whether an order of appeal was asked for in open court in presence of the accused and his counsel, he answered he was not certain, but to the best of his recollection it was asked for in open court; he did not know whether accused and his counsel were present or not. The District Judge testified over the same objections that had been made to the questions propounded to and answered by the District Clerk. Being asked the question "whether he remembered when he passed upon the motion to quash, that the District Attorney, in the presence of the accused and his counsel, excepted to the ruling, reserved a bill and asked for an appeal," he answered that he was not positive, but his recollection was that at the conclusion of his remarks in passing upon the motion to quash, he observed to the District Attorney that he had a right to appeal if he desired to do so. The District Attorney thereupon reserved a bill to the ruling of the court and asked an appeal to the Supreme Court, which was granted, and he told the District Attorney to dictate his order of appeal, it being his usual custom in all cases of appeal to permit the attorneys to dictate their orders; that he then made an informal note on his docket that the State had taken an appeal.

To that portion of the Judge's answer touching the reserving by the District Attorney of a bill of exceptions to the Judge's ruling on the motion to quash, defendant urged the additional objection that if such bill was reserved the bill itself was the best evidence of that fact.

On the 26th of March, 1898, there was filed in this court a certified copy of three bills of exception signed by the District Court and filed therein on the 17th of March, 1898. The first bill was reserved to the action of the court in permitting defendant over objection of the District Attorney to file the motion which he did to quash the indictment, the District Attorney contending and objecting that defendant could not make such a motion after he had been arraigned and pleaded not guilty.

The second bill was reserved to the action of the court in permitting the clerk of court to contradict as a witness the recitals of the

proces verbal of the jury commissioners for the reason that the *proces verbal* was the best evidence of the proceedings of the jury commissioners, and that the clerk being a sworn officer of the court could not be heard to vary, alter or contradict, or change his own solemn acts underseal of the court, and that the motion failed to allege injury or fraud.

The third bill was to the actien of the court sustaining the motion to quash the indictment.

These bills are not before us under such circumstances as would justify us in taking notice of them. They were not made part of the record below and embodied in the transcript either originally or on the remanding of the case for evidence, nor upon *certiorari* contradictorily. We will have to dispose of this case independently of them.

ON MOTION TO DISMISS.

This court has frequently dismissed appeals with the statement that it did so for the reason that there was neither demurrer, nor bill, nor assignment of error, nor points, nor arguments, nor any errors apparent of record. State vs. Potter, 10 An. 281, was a case of that character, but this dismissal was not made *in limine* on a motion to dismiss, but after an examination of the record by the court. In order to say that there is no error apparent of record we have to take cognizance of the case. Brown vs. Land Co., 49 An. 1779. The more logical form of judgment in such cases would be an affirmance of the judgment appealed from. The minutes of the court as sent up in the "record" show an appeal taken by the State in this case on the 26th of February, 1898, in the presence of the defendant and his counsel. Defendant challenged the correctness of that statement. The proper method of proceeding if there was error therein was to have had the minutes amended and made to conform to the truth. As matters took shape testimony was taken on part of appellant to show that no order of appeal was granted on the 26th of February, 1898, as recited in the minutes, either in or out of the presence of the accused and his counsel. Error in the minutes has been shown unquestionably. No order of appeal was granted on the 26th of February, but an order was granted on the 23d of February, and should have been made to so appear on the minutes of that day. If the order was granted it is immaterial in this case whether it was

granted on the 23d or 26th of February, 1898. Appellant complains that the clerk and District Judge should have been permitted to testify as to the actual facts. We think, as we have said, that the proper course would have been for the minutes to have been amended to conform to the truth. The truth being that an order of appeal was granted on the 23d, we think, as matters stand, it is immaterial to the appellant whether it was ascertained by amendment or testimony. Appellant himself having attacked the minutes as erroneous and introduced testimony in support of that contention, the State was entitled in some way to show the actual facts. It was not necessary for the legality of an order of appeal that either the defendant or his counsel should have been present at that time. A statement on that subject in the minutes even if erroneous would be immaterial, It is not shown that defendant was not in court on the 23d of February when the order was granted.

There was no attempt made by appellant to show an acquiescence by the State in the judgment.

We think the motion to dismiss not well grounded, and the dismissal is therefore refused.

ON THE MERITS.

The record shows on its face that defendant was indicted on the 17th day of February, 1897; that he pleaded not guilty on the 23d day of August, 1897.

That on the 23d day of February, 1898, he filed a motion to quash the indictment, which was, at once, taken up, argued and sustained, and that the State appealed immediately. The Attorney General claims that the motion to quash was taken too late for the reason that the defendant had pleaded to the indictment. We think his contention on this point (borne out on the face of the record as to the facts asserted) is well taken. The case falls under and is controlled by the principles announced in State vs. Adam Robertson, 50th Annual, not yet reported; State vs. Sterling, 41 An. 681; State vs. Jack Brittin, 50 An. 277. Appellant attempts to justify his delay in not moving sooner to quash on the ground that he was not aware of the facts on which the motion was grounded until the 23d of February, 1898; but it is not shown that his counsel was not aware of those facts before, and if so, he should have acted on this knowledge sooner. State vs. Strickland, 41 An. 514; State vs. Robertson, 50th Annual, not yet reported.

In determining, in any particular case, whether counsel has acted tardily or not, the circumstance that the facts may have come to the knowledge of the attorney at a date anterior to his connection with the defendant's case does not dispense him from the duty of acting promptly upon the information in his possession at the time of his employment.

For the reasons assigned it is hereby ordered, adjudged and decreed that the ruling and action of the District Court appealed from herein sustaining motion to quash the indictment found against him be hereby annulled, avoided and reversed and set aside, the cause reinstated and remanded to the District Court for further proceedings according to law.

No. 12,950.

STATE OF LOUISIANA vs. JOE BERRY.

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Before what purports to be the confession of an accused person can be introduced in evidence against him, it should have been shown to have been freely and voluntarily made and not brought about by fear on his part, or inducements held out to him.

The mere fact itself that the confession was made while under arrest or imprisonment to the officer of the law arresting him or holding him in custody does not take from it the character of a free and voluntary confession.

A prisoner's confession to the officer arresting him or holding him in custody, will not be rejected merely because it was made in answer to a question which assumed his guilt.

The mere fact of the intoxication of the prisoner (not amounting to mania), at the time of his making a confession to the officer arresting him or having him in custody, does not exclude the confession. Confession, however, produced by intoxication, is a fact for the jury tending to discredit a confession.

Confessions made by prisoners to parties arresting them or holding them in custody should be closely scrutinized by the courts to make certain that instrumentalities intended merely for the vindication of the law should not be converted into engines of oppression and wrong.

ON APPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

M. J. Cunningham, Attorney General, and *J. B. Lee*, District Attorney, for Plaintiff and Appellee.

Wm. Goss for Defendant, Appellant.

Submitted on briefs November 26, 1898.

Opinion handed down December 5, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. Appellant was convicted of murder without capital punishment, sentenced to life imprisonment in the penitentiary, and from the sentence he has prosecuted this appeal.

The only question submitted to us for review is the action of the District Court in permitting a confession of the defendant to go to the jury, over the protest of the latter.

It was claimed by the defendant that the confession was not free and voluntary.

The testimony which served as the basis for the introduction of the confession is annexed to the bill as part thereof, and is as follows:

C. W. Smith, sworn, says:

"I am the constable of Ward 5, and arrested the accused. I found him at Mr. Airy's, about five or six miles from the scene of the homicide, about 10 or 11 o'clock at night. He made a statement to me in regard to the killing. It was a free and voluntary statement on his part. I offered him no inducement whatever for making the statement. I did not tell him that it would be better for him to make a statement. I did not tell him he would get out lighter if he made a statement. I made no threat or offered no violence against him to induce him to make a statement. I had him under arrest at the time, and he voluntarily made the statement to me without any inducements or threats of any kind.

"He made me a statement at the time he was first arrested, and he made me a subsequent statement at the house where the homicide was committed. At neither time did I offer any inducement, or threaten him, or tell him, it would be better for him to make a statement. Both statements referred to were free and voluntary on his part."

Cross-examined:

"Mr. Jim Bice, Jr., went with me to arrest him. I was armed with a shotgun and a pistol. Mr. Bice had a pistol. I think I found him about 10 or 11 o'clock at Mr. Airey's. The first words I told him was to hold up his hands, which he did. I asked him 'Why did you do it?' I tied him with a rope. The first words he said after I

told him to hold up his hands were: 'Who in the hell told you about it?' I asked him, 'what on earth he meant by killing Will?' I think it was about the time we went up to him. When I got to Mr. Airey's I got over in the cowpen, between where Joe's horse was unhitched and the house. Before I got over in the cowpen I heard them talking coming down where Joe's horse was, and recognized Joe's voice and got over in the cowpen. I don't know but what there was a lane leading to the house, and Joe was coming down beside the fence, and Mr. Airey was with him. When I heard Leon Airey tell Joe that he heard somebody, I then went up to the fence where they were as quick as I could, and drew my gun on him, and told him to throw up his hands. He threw up one, and I told him to throw up the other, and he done that. I think I told him that if he didn't throw up the other I would shoot him. I then got over the fence as quick as I could and tied him, and then searched him. I think he asked me the question: 'Who in the hell told you?' before I had gotten to him. It was just after this that I asked him why he had killed his brother, and in reply to what he had said, and it was then that he began to make the statement to me about how and why he had done it. He substantially made the same statement to me a number of times after that. Leon Airey went back in the house, and his father, Victor Airey, came out to where we were and asked what was the matter, and Berry replied: 'I told you I had killed the damned scoundrel,' or 'damn son of a bitch.' I don't recollect which epithet he used. (Defence objects and reserves a bill.) I remained with him at Mr. Airey's about half an hour. He made no further statement differing from the first he told me at that time. I went back with him to his (Berry's) house. I had him tied all the time. I suppose it was after 12 o'clock when I got back to his house. He made pretty much the same statement to me several times. We would ask questions along, and he would answer, until he thought he had answered enough, and would then say he would wait and see what Carrie would say about it. Carrie was his wife. He went to bed after he got to my house. It was probably 2 or 3 o'clock when he got to my house. Jim Bice was with me. I tied his hands behind him and tied his feet under the horse while he was riding. I loosed his hands from behind him and tied them down by his side after I got to my house. I came on to town with him next morning, and left my house probably at 8 or 9 o'clock. J.

J. Vealock came to town with me and him. I got there a little after 12. I don't know that he made any further statements to me between my house and town. The next morning at my house, after Berry woke up, my brother Frank asked him how he felt, and if he realized what he had done the night before; and Berry replied that he couldn't realize what he had done, and said he didn't believe he had killed Willie, and then said: 'I have talked too damned much now for my own good. I will wait and see what Carrie says.' When I arrested him I saw some indications that he was under the influence of liquor. He did not seem to be excited or scared when I was tying him. The moon was shining very bright when he was talking to me. I could see plainly who he was twenty steps off. I didn't tell him that he had better tell about it, or that it would be better for him to tell about it. As soon as I got to him after throwing my gun on him he began to make a statement. The first statement made was in answer to my question as to why he had killed his brother."

Re-examined:

"Mr. Berry knew me well, and knew I was the constable of the ward. I had only one man with me. Berry did not seem at all frigthened and seemed like he didn't care for anything. I suppose Mr. Berry is about thirty-five years old and passes for a white man."

Recross-examined:

"I always try to arrest everybody down there that I have a warrant for. I have never let one get away yet that I know of."

Defendant's counsel calls attention to the fact "that during all the time he was making the confession he was securely tied with his hands bound behind or at his side." He calls attention to the following statement by Smith at the close of his cross-examination. "As soon as I got to him, after throwing my gun on him, he began to make a statement. The first statement made was in answer to my question as to why he had killed his brother."

In the brief filed for defendant his counsel says: The accused begins his statement in answer to a question asked by a constable acting as deputy sheriff, while the deputy had his gun leveled at him and the statement was continued while accused was being tied and while under arrest. Smith's testimony shows that the prisoner's captors were plying him with questions which he answered reluc-

tantly. Smith says: "We would ask him questions along and he would answer until he thought he had answered enough." It will be observed this deputy undertook to tell what the prisoner thought thereby indicating that his captors were pressing him for a fuller confession. It will also be noticed that Smith assumes in his first question that the accused did kill his brother, for he says: "I asked him why he had killed his brother?"

We do not understand the witness Smith to say that the statement of the accused was made to him in response to a question, "why he had killed his brother?" propounded to him simultaneously with the leveling of the constable's gun at him, and while it was so leveled upon him. Had this been the situation, it might well be said that the answer was made under duress, while under the influence and fear of the gun directed against him. What the constable said was "that he threw (leveled) his gun at Berry, calling twice upon him to throw up his hands; that after this had been so, he climbed over the fence,advanced upon and arrested the defendant." The object of the leveling of the gun was evidently to ensure the constable's safety while moving up to Berry, and not to call threateningly for an answer to a question asked. The constable says that Berry "began to make the statement as soon as he (the constable) got to him, after throwing the gun, and not while throwing the gun on him. Parties making dangerous arrests are not apt to initiate proceedings by asking questions. A fair construction of the language of the witness is that the conversation between the parties occurred just as or just after the constable had reached defendant, and it is from that standpoint we must test matters. There is no claim that the tone of Smith's voice in asking the question he did of the defendant was threatening, or indicated any hostile feeling toward him. Two persons (Bice and Airey) were present, besides Smith, and defendant was in position to have shown anything like coercion, had such existed, by the testimony of one or the other, or both. It is unquestionable that before what purports to be the confession of a person accused of crime is introduced in evidence it must be shown that it was free and voluntary; not made under the influence of fear, inducements or promises. It has been held by this and other courts that the mere fact that the confession was made while under arrest or imprisonment to the party or parties arresting him or holding him in legal cus-

tody is not sufficient ground *per se* to take from the confession the character of its being free and voluntary. A confession made under such circumstances and shown affirmatively by testimony to have been made without intimidation, threats, menaces or inducements on the part of the officer of the law is admissible. State vs. Hash, 12 An. 895; State vs. Monie, 36 An. 513; State vs. Alphonse, 34 An. 18; State vs. Magee, 36 An. 309; State vs. Meekins. 41 An. 545; State vs. Hamilton, 42 An. 1205; State vs. Johnson, 47 An. 1230; State vs. Lewis, 39 An. 1111; State vs. Demareste, 41 An. 617; State vs. Chambers, 45 An. 37.

The fact that a confession was made to such persons and under such circumstances throws upon courts the duty of very closely scrutinizing the conduct of those officials and making sure that the instrumentalities intended merely for the vindication of the law should not be converted into engines of oppression or wrong. We find nothing in this case to break the force of Smith's declarations, under oath, that the statements made to him were free and voluntary, brought about by neither fear nor inducements. The facts disclosed by the testimony that Berry when arrested was under the influence of liquor furnishes a probable reason for his having so indiscreetly and injudiciously acted so far as his own interests were concerned.

Neither the fact of defendant's partial intoxication, nor that of his statements being made in response to question asked of him (State vs. Allen, 37 An. 687; State vs. Taswell, 30 An. 886; State vs. McGee, 36 An. 209), furnish in law legal grounds for excluding the confession, though they may affect its weight when before the jury. The following extracts taken from Wharton's Criminal Evidence (9th Ed.) bear directly on the issues raised in this case.

Section 649: "Confessions made to constables or other arresting parties, or to magistrates, can not be excluded unless it appears that there was a threat of harm or a premise of worldly advantage employed by an authoritative person." R. vs. Baldry, 12 Am. & Eng. L. and Eq. 591; 5 Cox. C. C. 528; 2 Ben. C. C. 430; Com. vs. Sturtivant, 117 Mass. 122; Com. vs. Smith, 119 Mass. 305; Murphy vs. People, 63 N. Y. 590; Wolf vs. Com., 30 Grat. 833; Aaron vs. State, 37 Ala. 106; State vs. Carlisle, 57 Mo. 102; State vs. Bruce, 33 La. An. 186; State vs. Staley, 14 Minn. 105; State vs. McLaughlin, 44 Iowa, 83; State vs. Ingram, 16 Kas. 14.

Section 661: "When a party is compelled by duress to make a self-disserving statement, this statement can not be put ip evidence against him. Legal imprisonment, however, does not operate to exclude a confession made during its continuance when no threats or promises are used. Thus, when a prisoner after his arrest, upon being interrogated, why he had killed his wife, replied: 'Because I loved her,' and said further, 'I killed her because she loved another better than me,' and also said to a fellow-prisoner in jail, that he had killed her, but if it was to do again, he would not do it; it was held that there was nothing in the circumstances under which the confession was made to render them inadmissible. State vs. Freeman, 1 Speers 57. That the prisoner's feet were tied does not exclude. State vs. Patterson, 73 Mo. 695."

Section 662:

"A confession is admissible when voluntarily made to the public officer, even though the prisoner be in custody of such officer unless the confession be in some sense elicited by threats or promises." Numerous authorities cited.

Section 663:

"A prisoner's confession will not be rejected as evidence merely because it was made in answer to a question which assumed his guilt. Thus, where the officer who committed the prisoner on a charge of murder, asked 'whether if it was to do over again, he would do it,' and the reply was, 'Yes sir-ree, Bob,' it was held that both the question and answer were admissible in evidence, as well as the fact that in making the reply the prisoner's 'manner was short.'" Carroll vs. State, 23 Ala. 29, and numerous other authorities.

Section 676:

"The mere fact of intoxication, unless amounting to mania, does not exclude a confession made during its continuance, even though the intoxication was induced by a police officer who sought in this way to lead the prisoner to confess. Confession, however, produced by intoxication is a fact for the jury tending to discredit a confession." (Authorities cited.)

We find no basis for holding that the proceedings of the case, the verdict of the jury and the sentence of the court were not in accordance with law and evidence.

The judgment of the District Court must be and it is hereby affirmed.

No. 12,719.

CHARLES E. ALTER VS. HOME INSURANCE COMPANY.

In case a loss is occasioned by the fall of a building through the owner's failure to protect and keep same in a secure condition, he must repair the same, and not the insurance company. In the absence of clear proof that such loss is covered by its risk.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

Branch K. Miller for Plaintiff, Appellant.

R. H. Browne for Defendant, Appellee.

Argued and submitted March 25, 1898.
Opinion handed down June 21, 1898.
Rehearing refused November 21, 1898.

The opinion of the court was delivered by

WATKINS, J. This action is for the recovery of seven thousand five hundred and five dollars and fifteen cents, as the amount of damages which were caused to the plaintiff's property by reason of defendant's alleged failure to have taken proper care in the reconstruction, after its damage by fire, of a portion of the party wall which separates it from the adjoining premises.

On the trial there was judgment rejecting the plaintiff's demand, and he has appealed.

Briefly stated, plaintiff's demand is that on July 29, 1889, defendant issued in his favor its policy of insurance No. 37,204, whereby it contracted and agreed to insure him against loss or damage by fire on the three-story brick, slated building, designated as No. 80 South Peters street, between Poydras and Lafayette streets, and running through to No. 12 Common street, in the city of New Orleans; that by successive renewals said policy was kept alive, and same was in force on June 20, 1892.

That during the month of April, 1892, while said policy was in force, said building was injured and damaged by fire so as to make same a total loss within the terms of said policy.

That due demand was made upon the defendant for indemnity for the loss sustained, and that negotiations occurred between them which resulted in an agreement with reference to the loss by fire to the effect that in lieu of paying the amount of loss sustained in money, the defendant should rebuild, or reconstruct said building, placing it in a good and sound condition.

That the duty of reconstructing said building was not discharged by the defendant in accordance with its obligation; that the work of reconstruction was negligently and faultily performed.

That amongst the parts of said building which, by reason of the damage received by fire, required demolition and reconstruction, was a part of a division or party wall between plaintiff's property, No. 80 South Peters street, and the adjoining building, No. 78 South Peters street; and that in active violation of its contract to repair the fire damage done thereto, and reconstruct same and place it in a safe and sound condition, the defendant failed and neglected to take down and demolish same, but let it remain standing in a weak, dangerous and unsafe condition, with the purpose and intention of using and building on same in the reconstruction of the edifice which was damaged by fire.

That said party wall being weak and entirely insufficient to be used in such reconstruction, it became and was the duty of the defendant to have taken same down and removed, and to have erected a new, sound and safe party wall in its stead.

The plaintiff then avers that while the said work of reconstruction was in progress the said portion of the party wall collapsed and fell, causing the collapse of the adjoining building, No. 82 South Peters street, the upper floor of which was used as a factory, where there were at the time a large nnmber of operatives employed; and that by said collapse two of said female operatives were injured.

That two of them, Pauline Knoop and Emma Steppe, brought suits against him for damages for the personal injuries sustained; and the former recovered a judgment for one thousand five hundred dollars, and the latter the sum of four thousand dollars.

That in the defence of those suits he paid and expended in attorney's fees the sum of thirteen hundred dollars, and in costs the sums of three hundred and twenty-three dollars and twenty-five cents and three hnndred and eighty dollars and forty-three cents, aggregating the amount claimed of the defendant in this suit.

Plaintiff alleges that included in its obligation to reconstruct said building was the duty imposed upon the defendant of taking proper and sufficient precaution, pending the work, to prevent the collapse and falling of said party wall between Nos. 78 and 80 South Peters street; and, also, to so conduct said work of reconstruction that no injury would thereby result, or be caused to any third person.

That under its contract the defendant did assume the full charge and control of the work of reconstruction, in which petitioner took neither part nor participation; and that same was at the sole and exclusive risk of the defendant company as a contractor.

Plaintiff finally avers that it was by reason of the defendant's breach of contract that said accident was caused and said damages inflicted upon the said two female operatives aforesaid.

The defendant first tendered a plea of prescription of twelve months under the twelfth clause of its policy of insurance; and, in the alternative, urges the following defences, viz.:

It admits the execution of the aforesaid policy of insurance, and that it was in full force in 1892 when the adjoining building No. 82 South Peters street was destroyed by fire.

It avers that the walls of plaintiff's building were old, rotten and weak; and having nothing to support them they fell down, having been exposed to inclement weather, causing the alleged damages referred to.

That it subsequently agreed by arbitration and compromise to undertake to repair the front wall and forty feet of the party wall, through a competent and skilful contractor, and before the work could be done it was abandoned by agreement with the plaintiff and a settlement was then effected with him.

That it denies that the party wall was in any manner damaged by fire, or that it was or became in any manner responsible under its contract to repair or rebuild the same, or that it at any time had charge or control over the wall which fell down. And it avers that said wall fell, solely by reason of its rotten and decayed condition; and that it was the duty of the plaintiff to have taken care of same, and not suffered the damage to have occurred.

On the 23d of April, 1892, a fire occurred in the building No. 80 South Peters street, in which the Klotz or Margaret's Bakery was kept; and that building immediately adjoined the building of the plaintiff which the defendant had insured—No. 80 South Peters street—there being a party wall between the two.

The only apparent damage which No. 80 had sustained by the fire was an awning in front of it which had been damaged by the falling debris and the blistering of the side of the party wall.

Soon after the fire, the defendant sent its builder to examine the building No. 80, and received a report in conformity with the foregoing statement. That of the party wall there "was actually some forty feet down;" but the estimate made by the expert shows about sixty-four feet.

The testimony of this expert builder and contractor that this was the only portion of the party wall with which either he or the insurance company had anything to do; that was the only portion of the party wall which was embraced in the agreement of the insurance company to rebuild.

It shows that the front wall of No. 82 was demolished as low down as the second story.

The weight of the evidence shows that the party wall was quite an old one; and that it was very poorly anchored, and so badly cracked that holes or fissures could be seen through them.

That as a result of the fire, the joists and rafters, by means of which the building No. 82 had been connected to that of the plaintiff, were all drawn out or torn out by the demolition of the building as a result of the fire.

It further shows that in this condition the wall was suffered to remain standing for several days, and while the weather was rainy and bad—the fall occurring on the 20th of June, subsequent to the fire.

The contractor states that he had charge of no portion of the plaintiff's building except that above described; and that after he took charge of it, he "shored up the timbers, floor-beams, and the roof."

He says the estimated cost of the repairs was fourteen hundred dollars, and that for that price the repairs of the party wall were undertaken, and that his instructions from the insurance company were to build the number of feet of wall indicated.

That he had no charge or control of any other portion of the wall.

This witness was asked this question, viz.:

"Q. What portion of the wall was it? Was it immediately continuous from where you had agreed to repair, or was it a section beyond that?

"A. It was a section beyond that."

The testimony shows that the portion of the wall which the insurance company was engaged in repairing fell during the latter part of May, and during the time the workmen were engaged in effecting the reconstruction thereof, the rear portion of the wall fell—that is, about the 20th of June.

Consequently it is evident that very nearly two months had elapsed between the date of the fire, which occurred on the 23d of April, 1892, and the time when the falling of the party wall occurred, which did the injury for which the plaintiff seeks to recover damages, namely, June 20, 1892.

It is equally evident and indisputable that very nearly six weeks intervened between the date of the fire and that of the falling of the portion of the party wall which the insurance company undertook to repair. It is shown by all the evidence upon the subject that during this interval of time there were frequent and heavy rains; and that on the 20th of June, when the rear portion of the party wall fell, the rain was so continuous that the contractor's workmen were necessitated to do their work between showers.

The weight of the testimony is to the effect that the aforesaid rear portion of the party wall was in no way properly shored up or secured.

In our opinion the decisions of this court in Knoop vs. Alter, 47 An. 570, and Steppe vs. Alter, 48 An. 363, virtually decide this case against the plaintiff. This suit is instituted for the express purpose of obtaining from the insurance company a repetition of the damages he was condemned to pay to the plaintiffs therein.

The records and opinions in those cases show that the defence of Alter was an attempt to fix the whole responsibility upon the insurance company for the damage which was inflicted upon the plaintiffs therein, and considering that this court fixed the responsibility directly upon *him* the duty is placed upon him in this case to either demonstrate the error or incorrectness of those decisions, or by additional evidence show that those cases would, in all likelihood, have been differently decided had such additional evidence been before the court when such decisions were rendered.

But in our conception plaintiff has done neither.

This we think sufficiently appears from the portions of the evidence which is herein cited, and those portions to which reference is made.

The portion of the party wall which the insurance company agreed with Alter to repair and reconstruct only fell down on the 23d of May, and the fire occurred on the 23d of April previously. It is not claimed that the insurance company had come under any obligation to the plaintiff for the reparation of any damage prior to the date first mentioned.

It is not shown that the plaintiff did anything in the meanwhile to protect his own wall, but it is affirmatively shown that he left it in an unsafe and unprotected condition.

It is shown that the rear portion of the party wall, the fall of which occasioned the damage complained of, occurred on the 20th of June following the first break in the wall, and that that portion of the wall had been, up to that time, apparently safe and entirely intact, and was not in the possession or under the control of the defendant's contractor.

That said rear portion of the party wall was not embraced in or covered by the agreement and compromise between the plaintiff and defendant, and consequently its reconstruction was never contemplated by either of them.

In the Knoop case our opinion states:

"It is not shown by the evidence that the insurance company had undertaken to repair the wall which caused the damage.

"On the contrary, the repairs were limited to the front portion, the forty feet which had previously fallen. The contract between the insurance company and the builder was to rebuild from the front to the rear, a distance which did not include the standing wall, from which it does not appear that (Alter) withheld his assent."

Again:

"Primarily, every one should keep his building in repair so that damage may not be occasioned by the ruin." C. C. 670, pp. 573, 574.

That principle of the Code is reinforced by the opinion of this court in Insurance Company vs. Werlein, 42 An. 1046.

On careful investigation of the law and evidence we are satisfied that this case was correctly decided in the court below.

Judgment affirmed.

Rehearing refused November 21, 1898.

No. 12,951.

STATE OF LOUISIANA VS. LUM WILLIAMS.

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Questions of fact occurring in the course of the trial in the court below, and which are therein assigned as error by counsel for the accused, are not examinable in the Supreme Court.

ON APPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

M. J. Cunningham, Attorney General, and *J. B. Lee*, District Attorney, for Plaintiff and Appellee.

J. D. Roach for Defendant and Appellant.

Submitted on briefs November 26, 1898.
Opinion handed down December 5, 1898.

The opinion of the court was delivered by

WATKINS, J. The defendant was charged with and found guilty of the crime of incest, and sentenced to imprisonment in the penitentiary for the period of fifteen years, and from the verdict and sentence he prosecutes this appeal.

In the court below deiendant's counsel, *ex industria*, filed an assignment of errors and retained one bill of exceptions; and in this court he has filed a plea of prescription, and also a plea to the jurisdiction of this court.

The charge of the bill of indictment is, that the defendant, on the 18th of May, 1898, "then and there being the father of Mary Williams, and within the prohibited degree, did unlawfully and feloniously and knowingly cohabit with the said Mary Williams, without marriage, the same being prohibited, and commit the crime of incest," etc.

As the record shows that the indictment was returned into court and filed therein upon the 4th of August, 1898, it is clear that the pleas of prescription of six and twelve months which are leveled at the indictment are not sustainable on the face of the same; and it is manifest from the extract which we have made from the indictment that this court possesses jurisdiction of the prosecution.

But the trend of counsel's argument is, that the testimony adduced at the trial tended to show that the crime, if any was committed by the accused, was committed while the parties to the criminal act resided in the State of Texas, and therefore beyond the jurisdiction of the court of first instance; or, if within its jurisdiction, then that the testimony showed that such acts were committed more than twelve months prior to the finding of the indictment.

This, we take it, is the purport of the first paragraph of the bill of exceptions, though it is somewhat inartistically drawn.

The second paragraph is to the effect that the trial judge erroneously allowed a verdict to be entered "on the testimony of Savannah Williams, whose declarations were at variance with the charge of the court as to time, place and residence," etc.

To this bill of exceptions the judge appends the statement that "the verdict was not, so far as the court knows, based upon (the testimony) of Savannah Williams, as there was ample evidence to support the verdict exclusive of hers."

This declaration satisfactorily disposes of the defendant's bill of exceptions.

The assignment of errors which was filed in the court below presents no question of which this court can take cognizance, as they appertain exclusively to matters *dehors* the record, and have particular pertinency to the testimony which was adduced before the jury *vel non*.

The two motions for the allowance of a new trial proceed somewhat upon the same line, and further assign the discovery of new and additional evidence; but the defendant's counsel did not make the evidence relied upon as having been newly discovered a part of the record by annexing same to a bill of exceptions taken and reserved to the ruling of the judge, and for that reason we decline to consider and pass upon the same.

On the state of the record as presented there is no relief which we can give to the accused.

Judgment affirmed.

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No. 12,920.

THE STATE OF LOUISIANA VS. JUSTIN CANCIENNE.

It is not error of the trial judge to refuse permission to counsel for the accused, to address his argument to the jury in the Freuch languge on the ground that it was their mother tongue, the jurors having been examined on their *voir dire* and cross-examined in the English language and without objection on the part of the accused, and all the witnesses for the State and for the defence having been interrogated and cross-interrrogated in English.

It is not error of the trial judge to exercise control of counsel for the accused with regard to the extent of his cross-examination of a juror on his *voir dire*, if same be reasonably exercised.

If in point of fact the discretion of the trial judge has been erroneously exercised in this regard, the accused has no ground of complaint if the record discloses that he was not thereby compelled to take on the panel an obnoxious juror who voted in favor of his conviction during the deliberations of the jury.

ON APPEAL from the Eighteenth Judicial District Court for the Parish of Lafourche. *Caillouet, J.*

M. J. Cunningham, Attorney General, and *L. C. Moise*, District Attorney, for Plaintiff, Appellee.

Clay Knobloch and *Howell & Martin* for Defendant, Appellant.

Argued and submitted November 12, 1898.

Opinion handed down December 5, 1898.

The opinion of the court was delivered by

WATKINS, J. Originally the defendant was indicted for the crime of having murdered his wife, was found guilty of manslaughter, and sentenced to imprisonment in the penitentiary for a term of eighteen months; and from the verdict and sentence he successfully prosecuted an appeal to this court—the cause having been remanded for a new trial. 50 An.

On the second trial in the lower court, the jury again found him guilty of manslaughter, and being again sentenced to the same period of imprisonment, he prosecutes a second appeal therefrom.

It is discoverable from our original opinion, and the recitals of fact which are therein extracted from the various bills of exception,

that the defence of the accused was twofold: (1) that having suddenly taken his wife in the *act of adultery* with one Delatto, in his defendant's own house and upon his bed, he was precipitated into such a state of mental excitement and fury as to have rendered him unaccountable for her homicide; (2) that having under the circumstances, fired on Delatto, his wife seized his (defendant's) hand and arms, and attempted to disarm him (she being the more powerful of the two), and called Delatto to come to her assistance, and that they would kill him, he was entitled to introduce evidence tending to establish the plea of self-defence.

It is also discoverable from our opinion that the trend of all the defendant's bills of exceptions was in the direction of these two defences; and further, that whilst the fact of having caught his wife in the act of adultery was not a justification of the defendant's homicide of his wife, yet, it was sufficient to relieve him of the charge of being technically the aggressor in the fray, and render proof of self-defence admissible.

On this question we quote the following from our opinion, viz.:

"We think there is a difference between the case of a person who, having originally no immediate cause of provocation himself, should originate a difficulty, which, in its after phases, would lead to his killing the person whom he led into it, and that of a man who, entering his own home, is there brought to face a scene calculated to throw him into a condition of frenzy, under the influence of which he commits an act which, though not legally excusable, comes near the border line of justification.

"We think the situation was such as to justify us in referring the origin of the difficulty to the wife and her paramour as the aggressors, sufficiently so to open the door to submission to a jury of the plea of 'self-defence,' when in one of the after phases of the difficulty the husband's life had been placed in danger by one of them, and, in order to save the same, he had killed the party making the killing necessary.

"We think the rigor of the rule which the court refers to should be relaxed in a case of this character, and that the matter of self-defence should have been submitted to the jury, to be by it passed upon under the whole evidence, and that the excluded testimony could legally have formed part of it."

The foregoing sufficiently indicates the reasons this court enter-

tained for having set aside the verdict of the jury and granted a new trial; and when the case went back to the lower court and the new trial was had, the question of justification was eliminated, and the testimony in support of self-defence was admitted and heard by the jury—the trial judge having given the jury instructions in his general charge relative to the law of self-defence.

I.

The first bill of excptions which attracts attention is that directed to the trial judge's refusal to allow the defendant's leading counsel to address the jury in the French language—it being therein assigned (1) that the mother tongue of every member of the jury is French; (2) the mother tongue of the judge is French; (3) the mother tongue of the defendant's counsel is French; (4) and that the district attorney understands French better than a majority of the petit jury understands English.

This request having been objected to by the district attorney, and the objection having been sustained, the court assigned as the reason for his ruling, *inter alios*, that the district attorney "did not understand the French language sufficiently well to follow the argument of counsel (for the defendant);" but that the district attorney stated to the counsel, that if he "wanted to state certain things, or parts of his argument in French, and would inform him, district attorney, in English of the meaning thereof, that he would make no objection to such proceedings."

The judge then stated that his ruling was to the effect that upon objection being made by either counsel, "the proceedings would have to be carried on in English, the language of the Constitution."

He further stated, "that up to that time all the proceeding in the trial had been carried on in English; that the jurors had all been examined in English on their *voir dire*, and answered satisfactorily; that the witnesses had been examined, and testified in English; and that no question had been raised that the jurors did not understand the English language sufficiently to sit on the case. That from the examination of the jurors on their *voir dire*, the court was satisfied that they understood the English language well enough to try the case, and nothing transpired during the whole trial to cause (him) to change that opinion."

This statement by the court is a full and complete answer to the

objections of counsel; and we are of the opinion that the ruling was correct. The only ground upon which counsel could have reasonably based his claim was, that the jury understood the English language so imperfectly they would be unable to appreciate or fully comprehend an argument in same; but as the same reason applied with equal force to the interrogation and cross-interrogation of the jurors themselves and of the witnesses, it must be necessarily assumed that their knowledge of English was sufficient for all necessary purposes.

Otherwise they could not have understood and appreciated the reading of the indictment, which is couched in English and not in French.

II.

The second bill of exceptions relates to the refusal of the judge to give to the jury the following special charge, viz.:

"When the intellectual power of a person to resist is for the time obliterated through an overwhelming violence of mental disease, he is not a responsible moral agent; but if he had power of mind enough to be conscious of what he was doing at the time the homicide occurred —if you find that the accused killed his wife, and that he could distinguish between right and wrong—he is responsible."

The judge assigns as the reason for his refusal to so charge the jury, "that even if the requested charge be good law, it had no earthly application to the facts of the case at bar, and to have charged it to the jury would have been to confuse them unnecessarily."

The judge then makes reference to a similar charge which was requested by counsel for the accused at the former trial, and the view taken of it in our opinion, and then says:

"It might be noted, *en passant*, that there was not before the jury the slightest evidence of the accused suffering at the time from any *mental disease*. He was excited at the time, naturally, but not to such an extent as not to note what transpired; for, as stated before, he testified minutely and in detail upon the subject. He did not claim that he was jealous, but did say that he never suspected his wife of wrong-doing before."

The charge requested involves the law of insanity, and inasmuch as the judge states that such a charge was wholly inapplicable to the proven facts of the case, he was right in refusing to give the charge, this court being conclusively bound to accept the judge's statement as to what the testimony was on the trial.

III.

The next bill of exceptions challenges the correctness of the following extract from the general charge, viz.:

"If you find from the evidence that the accused unlawfully killed his wife, the person described in the indictment, and that he was not justified in self-defence in doing the killing, your verdict should be guilty," etc.

Same is alleged to be incorrect in two particulars, (1) in that it trenches upon the facts adduced on the trial, and (2) that it was equivalent to instructing the jury "that the only lawful defence in cases of homicide is self-defence, and practically instructing the jury that self-defence was, in point of fact, the only defence in the case at bar, thus instructing them to exclude and reject any other defence made in the case."

The court, in its reasons, reiterates the facts of the case as they have been substantially related in other bills of exception which were reserved at the two trials, and stated, as we have previously said, that there were but two substantial defences set up by the accused, (1) justification, and (2) self-defence, and as the former had been eliminated, the latter remained practically as the only one.

He further stated that, "as a matter of fact, self-defence was the only defence set up in this case by the accused himself when he testified in the case, as will be more fully seen by reference to his testimony certified to the appellate court, in the court's reasons for refusing the requested charge on the doctrine of insanity, to which reference is here made."

The charge seems to us to have been entirely appropriate under the circumstances and situation of the case; and in our appreciation of the language in which it is couched, it does not trench upon the facts.

IV.

The next bill of exceptions relates to the action of the trial judge in preventing the leading counsel from continuing an examination of a juror on his *voir dire* which had been commenced by his associate counsel.

The bill relates that after the juror had been examined by the District Attorney, and he had been cross-examined by one of the associate counsel for the defendant, the leading counsel for the defendant "began to ask a question of the juror, and before he could

complete the question, or remotely disclose the sense, purport, relevancy or pertinency of the question, the trial judge stopped said counsel, and spoke as follows: 'This examination has gone far enough; the court is satisfied that the juror is a competent juror.' "

The response of the judge is, that when the leading counsel for the accused began to interrogate the juror, he assumed that his examination would be a continuation upon the *same line* on which his associate counsel had already interrogated him "and interrupted counsel by announcing that the examination had proceeded far enough, and that he was satisfied of the juror's competency."

That when the counsel protested against this interruption, "the court informed counsel that it was under the impression that he was about to continue the examination on the same line on which his colleague had just examined the juror, on which point it was of opinion that the examination had gone far enough; but that if the court was mistaken in its assumption, and if counsel was about to examine the juror on *other points*, he could proceed with his examination. Counsel then remarked that it was too late, that his bill was taken;" and he then challenged the juror peremptorily.

The judge then adds this statement, viz.:

"Thereafter the accused exhausted his peremptory challenges, there being at the time said challenges were exhausted eleven jurors already accepted and sworn; and the juror Philip Pitre was the only juror accepted and sworn after said peremptory challenges had been exhausted. This juror, Philip Pitre, upon the polling of the jury, after the jury returned with their verdict, upon being asked the question, 'Is guilty your verdict?' answered 'No.' It thus appears that even if the court should have abused its discretion in stopping the further examination of the juror in the matter complained of, the accused is not in a position to take advantage of it, as he has suffered no injury, the only juror forced on him voting against finding him guilty."

In our opinion, the answer of the judge to the complaint urged by counsel is complete, for the reason that the trial judge is vested with the fullest discretion in the control and management of the proceedings at the trial, and is necessarily the proper person to determine the latitude to be allowed the cross examination of the juror on his *voir dire*.

On this ground, we approve the ruling of the trial judge.

V.

The next bill of exceptions relates to the refusal of the trial judge to give to the jury the following special charge, viz.:

"The burden of proof throughout the trial is on the State, and the State must establish every fact required by the law to prove the guilt of the accused; one of these essential facts is that the accused was of sound mind and discretion at the time the homicide was committed. This fact, however, can be established by presumptive as well as by direct evidence. The law presumes every man to be of sound mind, until the contrary is shown by good and sufficient evidence. If the evi dence raises in your minds a reasonable doubt as to the sanity of the defendant at the time the homicide was committed, if you find any such homicide was committed, and such doubt reasonably and necessarily arises from the evidence, then it becomes your duty to give the benefit of the doubt to the accused, and acquit."

The judge declined to so charge the jury, because it was altogether inapplicable to the proven facts in the case.

The foregoing bill, in its entirety, is quite similar to the one which is discussed in paragraph II of this opinion, and the views we have therein expressed are strictly applicable thereto.

The foregoing are all the bills of exception we have found in the record. There was a motion for new trial and one in arrest of judgment, but as no bills of exceptions were retained to their refusal, we can not deal with them at all.

Judgment affirmed.

No. 12,896.

STATE OF LOUISIANA VS. ABRAM WIMBERLY.

The ruling of this court in State vs. Favre, No. 12,689 (50th An., not yet reported), is reiterated and affirmed.

ON APPEAL from the Eleventh Judicial District Court for the Parish of Acadia. *Dupré, J.*

M. J. Cunningham, Attorney General, and *R. Lee Garland*, District Attorney, for Plaintiff, Appellee.

State vs. Wimberly.

E. P. Veazie for Defendant and Appellant.

Submitted on briefs November 26, 1898.

Opinion handed down December 5, 1898.

The opinion of the court was delivered by

WATKINS, J. The defendant was indicted for the crime of murder, convicted of manslaughter and sentenced to seven years' imprisonment in the penitentiary; and from the verdict and sentence, he prosecutes this appeal.

The defendant's counsel rests his claim to relief on the ground that the trial judge erroneously refused to sustain his motion to quash the indictment.

We make the subjoined extract from the brief of the Attorney General as fairly stating the point at issue, viz.:

"On June 17, he filed a motion to quash the indictment on the ground that the Constitution of 1898 was unconstitutional, illegal, null and void, because it is an amendment to the Constitution of 1879, and was not adopted by the Legislature and subsequently ratified by the people, as provided in Art. 256 of the Constitution of 1879; and on the further ground, in the alternative, that the indictment is null and void, because the grand jury which found the bill was not composed of sixteen persons as provided by Act 99 of 1896, but was composed of only twelve persons, which composition was irregular and null, because Art. 117, par. 2, of the Constitution of 1898 had never become executory—the Legislature having made no provision to put same in force by providing for the drawing of juries thereunder."

The same questions were presented and decided adversely to the defendant's contention, in State vs. Favre, No. 12,897, 50 An., not yet reported.

For the reasons which are therein assigned, the ruling of the trial judge is approved.

Judgment affirmed.

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ON APPEAL from the Eleventh Judicial
Parish of Acadia. *Dupré, J.*

M. J. Cunningham, Attorney General, an
Attorney, for Plaintiff, Appellee.

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secured the payment of said note by the execution of an act of mortgage upon property in the city of Birmingham, Ala., and that subseqnently said note and mortgage were delivered to Philip Thompson, and he pledged same to the complainant as a collateral security for the loan of said sum of four thousand seven hundred dollars. That at the maturity thereof said note was not paid, and that complainant caused same to be protested as to both Moore and Thompson; and that same is due for the full amount thereof, principal and interest, and that it is the owner thereof.

That the law day of said mortgage was the day said note became due, and same having passed and the debt thereby secured not having been paid, the property described is liable for said debt, and complainant has the right to have the same to satisfy the lien created by the mortgage.

The prayer of the bill of complaint is, that the court take jurisdiction of the cause, that Moore and Thompson be made parties defendant; that it be referred to the register to ascertain and report what amount is due complainant, principal, interest and costs; "that the property be sold to pay the same, and if there be a deficiency, that personal decree be rendered therefor;" and that complainant have such other and further relief as may seem to the court meet and proper.

Of the filing of this bill due notice was given by publication; and upon the failure of either of the defendants to appear and answer or demur to the bill a decree *pro confesso* was entered against each of them, and a decree of reference was duly rendered, and thereupon a decree of sale of the mortgaged property was pronounced.

But the decree of sale contained this stipulation, viz.:

"That this decree be not executed for eighteen months unless complainant enter into bond in the sum of three thousand dollars, payable to and approved by the register, and conditioned as required by Sec. 3495 of the Code of Alabama," etc.

At this stage of the proceedings the two defendants, Moore and Thompson, voluntarily executed the following written instrument, viz.:

"PARISH OF ORLEANS, STATE OF LOUISIANA.

"*To the Hon. Thomas Cobbs, Chancellor of the Northwestern Chancery Division of the State of Alabama:*

"We, John T. Moore, Jr., and Philip Thompson, of the aforesaid parish and State, who are the defendants in a certain cause pending

in the Chancery Court of Jefferson county, Alabama, wherein the Mutual National Bank of New Orleans, La., is complainant and we are defendants, in which cause judgment has been rendered in favor of the said Mutual National Bank of New Orleans, La., against us for the sum of five thousand four hundred and ninety-four and 50-100 dollars, condemning the property conveyed by the mortgage on file in said cause to be sold to satisfy said judgment, but which decree suspends the execution of said sale for eighteen months because we were non-residents, and were not served with personal process, unless bond be given as the law directs for the sum of three thousand dollars, hereby enter our appearance to said cause, and expressly waive the giving of said bond, and consent that said sale may take place as soon as it is practicable."

Upon the production and filing of said appearance and waiver in said cause, the court entered up the following decree to sell the mortgaged property, viz.:

"In this cause it appearing to the court that the defendants John T. Moore, Jr., and Philip Thompson having in writing properly executed before a notary public, and which is on file in this court, entered their appearance in this cause, have waived the giving of the bond required by the former decree of this court, and consented that the sale of the land be made in this cause may take place as soon as practicable; it is therefore ordered * * * that the sale take place without further delay," etc.

The register proceeded thereupon to make the sale of the mortgaged property, and his report shows that same was adjudicated to the complainant at the sum and price of twenty-five hundred dollars; and said report and adjudication were subsequently approved and confirmed by a decree of the court conformably to law.

Thereupon the complainant filed a petition for a decree of reference in which it is alleged substantially that it had obtained a judgment, ordering a sale of the mortgaged property, that the proceeds of sale amounted to twenty-five hundred dollars, for which sum the defendants are entitled to a credit, less costs, etc. Complainant then alleges that the "defendants are non-residents, but that they in writing appeared in this cause, all of which appears of record in this court.

"The premises considered, petitioner respectfully requests that a decree of reference be ordered to ascertain the matters above re-

ferred to, and report the same to your Honor, and that your Honor will render a personal decree for such balance as may be reported due complainant from the defendants," etc.

The order of reference was made and the register's report showed that the amount of the balance due was three thousand two hundred and forty-two dollars and seventy-three cents.

It was upon this state of the record that the court pronounced judgment in favor of the complainant for that sum against the defendants, Moore and Thompson, personally.

On the foregoing statement it is evident that the Alabama court accepted and treated the aforesaid agreement as an appearance in said cause *then pending*, and based its subsequent decree against the defendants personally, thereon; and the question for decision by this court is whether its judgment is and was valid and jurisdictional.

We think it was manifestly so. The meaning of the phrase, "we hereby enter our appearance to said cause," means just what it says, and an appearance in a pending cause signifies an appearance *for every purpose in said cause.*

Otherwise it would be meaningless.

It was prepared, as its language and terms fully import, for use in that suit, and the defendants are conclusively bound thereby.

Judgment affirmed.

MR. JUSTICE BLANCHARD dissents.

No. 12,898.

THE STATE OF LOUISIANA VS. SAM DUCRE.

The defendant proposed to show (in order to corroborate his own testimony that he had bought the property he was charged with having stolen).

Held: That the evidence sought was hearsay.

ON APPEAL from the Sixteenth Judicial District Court for the Parish of St. Tammany. *Reid, J.*

M. J. Cunningham, Attorney General, and *D. S. Kemp*, District Attorney, for Plaintiff and Appellee.

Henry L. Garland, Jr., for Defendant and Appellant.

Argued and submitted November 26, 1898.
Opinion handed down December 5, 1898.
Rehearing refused December 19, 1898.

The opinion of the court was delivered by

BREAUX, J. The grand jury on the twenty-ninth day of January, 1898, presented an indictment to the court charging the accused, Sam Ducre, with larceny.

In June following the defendant was tried and found guilty as charged.

During the trial the defendant reserved a bill of exceptions, the grounds of which he urges here in his defence.

The facts stated in the bill of exceptions are that the son of the man whose horse was alleged to have been stolen appeared before a justice of the peace court and expressed the wish to institute a civil proceeding to recover the horse or the value of same.

The justice of the peace required security for costs, whereupon the son abandoned a civil proceeding and resorted to a criminal proceeding.

The defendant contends that the evidence sought would have corroborated his own testimony and would have enabled him to prove that he bought the horse from the son.

The defendant testified that he bought the horse charged to have been stolen from the son of the owner.

The trial judge states, as appears by the narrative of the bill of exceptions, that the accused testified that the son of the owner of the horse was in the parish. He lived near the accused, and that his attendance was easily to be procured.

The court ruled that it devolved upon the defendant to produce the son as a witness, and if he denied that he sold the horse, the testimony of the justice of the peace might be admissible to impeach him, otherwise the testimony was open to the objection that it was the testimony of a third person.

The State is the plaintiff, the son was not a party. Evidence to

prove his statements to the justice of the peace made some time previous was, in our judgment, hearsay.

Mr. Bishop, upon the subject of hearsay, says: "The person injured or the acting prosecutor is not a party, therefore his utterances out of court are hearsay." He may be called as a witness, whereupon if his testimony differs from the declarations *in pais*, they may be shown to discredit him. Bishop's New Criminal Proceeding, Vol. 1, p. 1083.

The defendant did not choose to avail himself of the right accorded under the rules of evidence, of calling the son as a witness. In the absence of even an attempt on his part to procure the testimony of this witness, we should not be justified in granting him the relief he asks.

Counsel arguing for his client urged that the statement made by the son was part of the *res gestæ*. It was not. The statement made at the time, not contemporaneous, was not part of a transaction, but a separate and distinct statement not connected with any transaction which could be brought up before the court in the manner sought.

The defendant, we have seen, testified that he had bought the property from the son of the owner. The statement of the son to the justice of the peace (showing a change in matter of procedure), as before stated, would not prove that he had made sale to the defendant of the property. If it had a tendency in that direction the evidence offered, for reasons before assigned, would not have been admissible. As relates to defendant's surprise, or that he was taken unawares, he had no reason to assume that his asserted vendor would be present at the trial as a witness for the State. His name was not endorsed on the indictment and nothing showed that it was the intention of the defendant to have him present as a witness. It was for the defendant, if he desired the testimony of this witness, to have a subpœna issued. We think the District Judge did not err in rejecting proof offered of the son's declaration. There was, as we gather, no privity between the alleged owner of the horse and his son. If the son's testimony could be admitted in evidence it must be on principles which would admit the evidence of any stranger. State vs. Maitreme, 14 An. 842. We have found no ground upon which, in our view, the verdict can be annulled.

It is ordered, adjudged and decreed that the sentence and judgment appealed from are affirmed.

No. 12,931.

STATE OF LOUISIANA VS. NICK RAMSEY.

A juror who stated on his *voir dire* that he had formed an opinion of the case, was asked by the court if he could lay it aside and decide the case according to the evidence adduced and the law as charged. He answered: "Yes, sir; I think I can do that." Pressed further as to whether he felt satisfied he could do so, replied: "I believe I could, but then I have got a fear on my mind; I have never felt I would make a competent juror." *Held:* The challenge for cause should have been sustained, differentiating previous decisions.

ON APPEAL from the Third Judicial District Court for the Parish of Claiborne. *Barksdale, J.*

M. J. Cunningham, Attorney General, *Charles B. Roberts*, District Attorney (*E. H. McClendon* of Counsel), for Plaintiff, Appellee.

J. A. Richardson and *J. W. Holbert* (*C. J. Boatner* of Counsel), for Defendant, Appellant.

Argued and submitted November 26, 1898.
Opinion handed down December 19, 1898.

The opinion of the court was delivered by

BLANCHARD, J. From a verdict against him of manslaughter and a sentence of five years and six months at hard labor, defendant appeals.

Six bills of exception to as many rulings of the trial judge appear in the record.

The first bill brings up for review that phase of the trial relating to the challenge for cause by defendant of the juror W. W. King. The challenge was overruled, King was sworn as a juror and sat on the case.

It is averred that his answers on the *voir dire* show his incompetency and that the contrary ruling is reversible error.

It is shown that after the challenge for cause was overruled defendant was powerless to exclude King from the panel because of the fact that he had, previous to the calling of King, exhausted his peremptory challenges.

The questions put to King by counsel for defendant and his answers

V.

The next bill of exceptions relates to the refusal of the trial judge to give to the jury the following special charge, viz.:

"The burden of proof throughout the trial is on the State, and the State must establish every fact required by the law to prove the guilt of the accused; one of these essential facts is that the accused was of sound mind and discretion at the time the homicide was committed. This fact, however, can be established by presumptive as well as by direct evidence. The law presumes every man to be of sound mind, until the contrary is shown by good and sufficient evidence. If the evi dence raises in your minds a reasonable doubt as to the sanity of the defendant at the time the homicide was committed, if you find any such homicide was committed, and such doubt reasonably and necessarily arises from the evidence, then it becomes your duty to give the benefit of the doubt to the accused, and acquit."

The judge declined to so charge the jury, because it was altogether inapplicable to the proven facts in the case.

The foregoing bill, in its entirety, is quite similar to the one which is discussed in paragraph II of this opinion, and the views we have therein expressed are strictly applicable thereto.

The foregoing are all the bills of exception we have found in the record. There was a motion for new trial and one in arrest of judgment, but as no bills of exceptions were retained to their refusal, we can not deal with them at all.

Judgment affirmed.

No. 12,896.

STATE OF LOUISIANA VS. ABRAM WIMBERLY.

The ruling of this court in State vs. Favre, No. 12,689 (50th An., not yet reported), is reiterated and affirmed.

ON APPEAL from the Eleventh Judicial District Court for the Parish of Acadia. *Dupré, J.*

M. J. Cunningham, Attorney General, and *R. Lee Garland*, District Attorney, for Plaintiff, Appellee.

State vs. Wimberly.

E. P. Veazie for Defendant and Appellant.

Submitted on briefs November 26, 1898.

Opinion handed down December 5, 1898.

The opinion of the court was delivered by

WATKINS, J. The defendant was indicted for the crime of murder, convicted of manslaughter and sentenced to seven years' imprisonment in the penitentiary; and from the verdict and sentence, he prosecutes this appeal.

The defendant's counsel rests his claim to relief on the ground that the trial judge erroneously refused to sustain his motion to quash the indictment.

We make the subjoined extract from the brief of the Attorney General as fairly stating the point at issue, viz.:

"On June 17, he filed a motion to quash the indictment on the ground that the Constitution of 1898 was unconstitutional, illegal, null and void, because it is an amendment to the Constitution of 1879, and was not adopted by the Legislature and subsequently ratified by the people, as provided in Art. 256 of the Constitution of 1879; and on the further ground, in the alternative, that the indictment is null and void, because the grand jury which found the bill was not composed of sixteen persons as provided by Act 99 of 1896, but was composed of only twelve persons, which composition was irregular and null, because Art. 117, par. 2, of the Constitution of 1898 had never become executory—the Legislature having made no provision to put same in force by providing for the drawing of juries thereunder."

The same questions were presented and decided adversely to the defendant's contention, in State vs. Favre, No. 12,897, 50 An., not yet reported.

For the reasons which are therein assigned, the ruling of the trial judge is approved.

Judgment affirmed.

No. 12,829.

MUTUAL NATIONAL BANK OF NEW ORLEANS VS. JOHN T. MOORE, JR., ET AL.

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A paper which has been voluntarily executed by the defendants in a suit pending and therein filed, which contains the recital that "we hereby enter our appearance to said cause," signifies that they make an appearance therein for every necessary purpose of said cause.

A personal judgment which has been pronounced in a chancery court of the State of Alabama, against a non-resident of that State, upon such an appearance therein filed, will be recognized and enforced as a valid and jurisdictional decree *in personam* against such defendants as citizens of the State of Louisiana by the courts thereof.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Joseph Brewer and *Dufour & Dufour* for Plaintiff and Appellee.

Robert G. Dugué for John T. Moore, Jr., Defendant and Appellant.

Argued and submitted November 12, 1898.
Opinion handed down December 5, 1898.

The opinion of the court was delivered by

WATKINS, J. The object of this suit is to render executory a judgment in a suit of same title which was rendered by the Chancery Court of Jefferson county, State of Alabama, and in this proceeding the plaintiff claims the benefit of that provision of the Federal Constitution which declares that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.

In the court below there was judgment rendered in plaintiff's favor, and the defendant, John T. Moore, Jr., alone prosecutes a devolutive appeal therefrom.

In this court the plaintiff and appellee has filed an answer to the appeal in which it assigns that same is frivolous, and that the judgment appealed from should be affirmed, and that ten per cent. on the amount of the judgment should be awarded in its favor for a frivolous appeal; and the defendant and appellant filed in this court as an

assignment of error that there is no ground of action stated against him. Damages for a frivolous appeal are not allowable when the appeal is only devolutive. Such an appeal does not delay the execution of the ju 'gment. C. P. 907; Berges vs. Daverde, 50 An., recently decided, and the authorities therein cited.

The assignment of error is not well taken. The answer of the defendant, John T. Moore, Jr., is a general denial, coupled with the averment that a valid, personal judgment was never obtained against him in the Alabama court; that he was never cited personally to appear and answer therein, and that he neither appeared or answered in the aforesaid cause therein, nor made any appearance therein upon which a valid judgment *could* have been therein rendered against him personally.

That for these good and sufficient reasons no good and valid judgment *has been* rendered against him; and hence he is not bound by the judgment which was therein pronounced against him personally, and which is sought to be rendered executory against him herein—he having been a citizen of the State of Louisiana at the time said suit was filed and when the judgment was rendered, and consequently a non-resident of the State of Alabama.

In the District Court, the suit was tried and decided, exclusively upon a transcript of the suit and judgment in the Alabama court; hence, in our conception, the only question that is open to discussion and decision in this court is whether the Alabama court had jurisdiction *in personam* to render *a* judgment against John T. Moore, Jr., a citizen of Louisiana.

If it was possessed of such jurisdiction, then this court will of necessity assume that everything that was done by that court in that suit was regularly and legally done, and that it is its duty to recognize same and give it force and efficacy here.

The transcript of that suit shows that the plaintiff or complainant filed a bill in the chancery court of Jefferson county, Alabama, against John T. Moore and Philip Thompson, alleging them to be non-residents of that State; and that John T. Moore, Jr., executed a promissory note on the 26th of December, 1889, to the order of himself and by him endorsed for the sum of four thousand seven hundred dollars, payable one year after date, with interest at the rate of eight per cent per annum, from date until paid.

It is therein further alleged that said Moore at the same time

secured the payment of said note by the execution of an act of mortgage upon property in the city of Birmingham, Ala., and that subseqnently said note and mortgage were delivered to Philip Thompson, and he pledged same to the complainant as a collateral security for the loan of said sum of four thousand seven hundred dollars. That at the maturity thereof said note was not paid, and that complainant caused same to be protested as to both Moore and Thompson; and that same is due for the full amount thereof, principal and interest, and that it is the owner thereof.

That the law day of said mortgage was the day said note became due, and same having passed and the debt thereby secured not having been paid, the property described is liable for said debt, and complainant has the right to have the same to satisfy the lien created by the mortgage.

The prayer of the bill of complaint is, that the court take jurisdiction of the cause, that Moore and Thompson be made parties defendant; that it be referred to the register to ascertain and report what amount is due complainant, principal, interest and costs; "that the property be sold to pay the same, and if there be a deficiency, that personal decree be rendered therefor;" and that complainant have such other and further relief as may seem to the court meet and proper.

Of the filing of this bill due notice was given by publication; and upon the failure of either of the defendants to appear and answer or demur to the bill a decree *pro confesso* was entered against each of them, and a decree of reference was duly rendered, and thereupon a decree of sale of the mortgaged property was pronounced.

But the decree of sale contained this stipulation, viz.:

"That this decree be not executed for eighteen months unless complainant enter into bond in the sum of three thousand dollars, payable to and approved by the register, and conditioned as required by Sec. 3495 of the Code of Alabama," etc.

At this stage of the proceedings the two defendants, Moore and Thompson, voluntarily executed the following written instrument, viz.:

"PARISH OF ORLEANS, STATE OF LOUISIANA.

"*To the Hon. Thomas Cobbs, Chancellor of the Northwestern Chancery Division of the State of Alabama:*

"We, John T. Moore, Jr., and Philip Thompson, of the aforesaid parish and State, who are the defendants in a certain cause pending

in the Chancery Court of Jefferson county, Alabama, wherein the Mutual National Bank of New Orleans, La., is complainant and we are defendants, in which cause judgment has been rendered in favor of the said Mutual National Bank of New Orleans, La., against us for the sum of five thousand four hundred and ninety-four and 50-100 dollars, condemning the property conveyed by the mortgage on file in said cause to be sold to satisfy said judgment, but which decree suspends the execution of said sale for eighteen months because we were non-residents, and were not served with personal process, unless bond be given as the law directs for the sum of three thousand dollars, hereby enter our appearance to said cause, and expressly waive the giving of said bond, and consent that said sale may take piace as soon as it is practicable."

Upon the production and filing of said appearance and waiver in said cause, the court entered up the following decree to sell the mortgaged property, viz.:

"In this cause it appearing to the court that the defendants John T. Moore, Jr., and Philip Thompson having in writing properly executed before a notary public, and which is on file in this court, entered their appearance in this cause, have waived the giving of the bond required by the former decree of this court, and consented that the sale of the land be made in this cause may take place as soon as practicable; it is therefore ordered * * * that the sale take place without further delay," etc.

The register proceeded thereupon to make the sale of the mortgaged property, and his report shows that same was adjudicated to the complainant at the sum and price of twenty-five hundred dollars; and said report and adjudication were subsequently approved and confirmed by a decree of the court conformably to law.

Thereupon the complainant filed a petition for a decree of reference in which it is alleged substantially that it had obtained a judgment, ordering a sale of the mortgaged property, that the proceeds of sale amounted to twenty-five hundred dollars, for which sum the defendants are entitled to a credit, less costs, etc. Complainant then alleges that the "defendants are non-residents, but that they in writing appeared in this cause, all of which appears of record in this court.

"The premises considered, petitioner respectfully requests that a decree of reference be ordered to ascertain the matters above re-

ferred to, and report the same to your Honor, and that your Honor will render a personal decree for such balance as may be reported due complainant from the defendants," etc.

The order of reference was made and the register's report showed that the amount of the balance due was three thousand two hundred and forty-two dollars and seventy-three cents.

It was upon this state of the record that the court pronounced judgment in favor of the complainant for that sum against the defendants, Moore and Thompson, personally.

On the foregoing statement it is evident that the Alabama court accepted and treated the aforesaid agreement as an appearance in said cause *then pending*, and based its subsequent decree against the defendants personally, thereon; and the question for decision by this court is whether its judgment is and was valid and jurisdictional.

We think it was manifestly so. The meaning of the phrase, "we hereby enter our appearance to said cause," means just what it says, and an appearance in a pending cause signifies an appearance *for every purpose in said cause.*

Otherwise it would be meaningless.

It was prepared, as its language and terms fully import, for use in that suit, and the defendants are conclusively bound thereby.

Judgment affirmed.

MR. JUSTICE BLANCHARD dissents.

No. 12,898.

THE STATE OF LOUISIANA VS. SAM DUCRE.

The defendant proposed to show (in order to corroborate his own testimony that he had bought the property he was charged with having stolen).

Held: That the evidence sought was hearsay.

ON APPEAL from the Sixteenth Judicial District Court for the Parish of St. Tammany. *Reid, J.*

M. J. Cunningham, Attorney General, and *D. S. Kemp*, District Attorney, for Plaintiff and Appellee.

Henry L. Garland, Jr., for Defendant and Appellant.

Argued and submitted November 26, 1898.
Opinion handed down December 5, 1898.
Rehearing refused December 19, 1898.

The opinion of the court was delivered by

BREAUX, J. The grand jury on the twenty-ninth day of January, 1898, presented an indictment to the court charging the accused, Sam Ducre, with larceny.

In June following the defendant was tried and found guilty as charged.

During the trial the defendant reserved a bill of exceptions, the grounds of which he urges here in his defence.

The facts stated in the bill of exceptions are that the son of the man whose horse was alleged to have been stolen appeared before a justice of the peace court and expressed the wish to institute a civil proceeding to recover the horse or the value of same.

The justice of the peace required security for costs, whereupon the son abandoned a civil proceeding and resorted to a criminal proceeding.

The defendant contends that the evidence sought would have corroborated his own testimony and would have enabled him to prove that he bought the horse from the son.

The defendant testified that he bought the horse charged to have been stolen from the son of the owner.

The trial judge states, as appears by the narrative of the bill of exceptions, that the accused testified that the son of the owner of the horse was in the parish. He lived near the accused, and that his attendance was easily to be procured.

The court ruled that it devolved upon the defendant to produce the son as a witness, and if he denied that he sold the horse, the testimony of the justice of the peace might be admissible to impeach him, otherwise the testimony was open to the objection that it was the testimony of a third person.

The State is the plaintiff, the son was not a party. Evidence to

prove his statements to the justice of the peace made some time previous was, in our judgment, hearsay.

Mr. Bishop, upon the subject of hearsay, says: "The person injured or the acting prosecutor is not a party, therefore his utterances out of court are hearsay." He may be called as a witness, whereupon if his testimony differs from the declarations *in pais*, they may be shown to discredit him. Bishop's New Criminal Proceeding, Vol. 1, p. 1083.

The defendant did not choose to avail himself of the right accorded under the rules of evidence, of calling the son as a witness. In the absence of even an attempt on his part to procure the testimony of this witness, we should not be justified in granting him the relief he asks.

Counsel arguing for his client urged that the statement made by the son was part of the *res gestæ*. It was not. The statement made at the time, not contemporaneous, was not part of a transaction, but a separate and distinct statement not connected with any transaction which could be brought up before the court in the manner sought.

The defendant, we have seen, testified that he had bought the property from the son of the owner. The statement of the son to the justice of the peace (showing a change in matter of procedure), as before stated, would not prove that he had made sale to the defendant of the property. If it had a tendency in that direction the evidence offered, for reasons before assigned, would not have been admissible. As relates to defendant's surprise, or that he was taken unawares, he had no reason to assume that his asserted vendor would be present at the trial as a witness for the State. His name was not endorsed on the indictment and nothing showed that it was the intention of the defendant to have him present as a witness. It was for the defendant, if he desired the testimony of this witness, to have a subpœna issued. We think the District Judge did not err in rejecting proof offered of the son's declaration. There was, as we gather, no privity between the alleged owner of the horse and his son. If the son's testimony could be admitted in evidence it must be on principles which would admit the evidence of any stranger. State vs. Maitreme, 14 An. 842. We have found no ground upon which, in our view, the verdict can be annulled.

It is ordered, adjudged and decreed that the sentence and judgment appealed from are affirmed.

No. 12,931.

STATE OF LOUISIANA VS. NICK RAMSEY.

A juror who stated on his *voir dire* that he had formed an opinion of the case, was asked by the court if he could lay it aside and decide the case according to the evidence adduced and the law as charged. He answered: "Yes, sir; I think I can do that." Pressed further as to whether he felt satisfied he could do so, replied: "I believe I could, but then I have got a fear on my mind; I have never felt I would make a competent juror." *Held:* The challenge for cause should have been sustained, differentiating previous decisions.

ON APPEAL from the Third Judicial District Court for the Parish of Claiborne. *Barksdale, J.*

M. J. Cunningham, Attorney General, *Charles B. Roberts*, District Attorney (*E. H. McClendon* of Counsel), for Plaintiff, Appellee.

J. A. Richardson and *J. W. Holbert* (*C. J. Boatner* of Counsel), for Defendant, Appellant.

Argued and submitted November 26, 1898.
Opinion handed down December 19, 1898.

The opinion of the court was delivered by

BLANCHARD, J. From a verdict against him of manslaughter and a sentence of five years and six months at hard labor, defendant appeals.

Six bills of exception to as many rulings of the trial judge appear in the record.

The first bill brings up for review that phase of the trial relating to the challenge for cause by defendant of the juror W. W. King. The challenge was overruled, King was sworn as a juror and sat on the case.

It is averred that his answers on the *voir dire* show his incompetency and that the contrary ruling is reversible error.

It is shown that after the challenge for cause was overruled defendant was powerless to exclude King from the panel because of the fact that he had, previous to the calling of King, exhausted his peremptory challenges.

The questions put to King by counsel for defendant and his answers

thereto, and those put to him by the judge and his answers thereto, on his *voir dire*, are annexed to and made part of the bill.

This examination was as follows:—

"W. W. King sworn,—

"Q. What did you say your opinion was based on, Mr. King?

"A. Well, I have talked with Mr. Shaw at different times and I also had a talk with Judge Richardson about it since this trial.

"Q. Mr. Shaw is a witness in the case and the principal prosecutor in the case is he not?

"A. I think he is.

"Q. Well, now then, have you read the statement of Mr. Kelly in the paper?

"A. Yes, sir.

"Q. And from that statement, and from the statement of Mr. Shaw, you have formed an opinion?

"A. Yes, sir.

"Q. Is that a fixed opinion at this time?

"A. No, sir, it is not.

"Q. Are you certain that it will have no weight with you if you are sworn as a juror?

"A. Well, it might have some.

"Q. You doubt your ability then to lay aside that opinion and try this man fairly and impartially according to the evidence here?

"A. Well, it might have some weight with me, but, of course, if I was sworn to lay it aside, I would do my best.

"Q. Mr. Shaw is your neighbor, is he not, Mr. King?

"A. Yes, sir."

By the court:

"Q. You state that Mr. Shaw is a witness. Do you know that he is a witness?

"A. Well, I understand that he is here on the trial, and I understood from his being here that he was one of the prosecutors.

"Q. But, as to his being a witness is what I want to know.

"A. I don't understand that he is a witness. I have never understood it that way, at least.

"Q. You say you have had some talk with Judge Richardson since the last trial?

"A. Yes, sir.

"Q. You read what purported to be Mr. Kelly's evidence in the newspaper shortly after this thing occurred?

"A. No, sir; I didn't read that.

"Q. Now, what I want to know is this: Have you any bias or prejudice either for, or against Nick Ramsey?

"A. None at all.

"Q. If you are sworn as a juror, can you lay aside the opinion that you now have and decide this case according to the evidence that will be given here before you, and according to the charge that will be given you as to the law?

"A. Yes, sir; I think I can do that.

"Q. Do you feel satisfied that you can do that, Mr. King?

"A. I believe I could; but then I have got a fear upon my mind. I have never felt that I would make a competent juror.

"Q. Well, that dread that you have is what causes you to say that your opinion might have some weight with you, possibly?

"A. Well, yes, sir."

The judge's reasons for overruling the challenge for cause are stated in the bill, thus:

"Counsel for defendant had the stenographer take down their examination of the juror tendered and the questions propounded by the court and the answers thereto, but the examination by counsel for the State is not attached. Taking Mr. King's answers all the way through to myself, and to counsel on both sides, I was satified—thoroughly satisfied—that W. W. King was a fair and impartial juror, and his sole reason for fearing that his opinion might have some weight, arose from his lack of confidence in his competency to make a good juror.

"I was satisfied he could lay his opinion aside and depend on the evidence adduced on the trial.

"Besides this, his opinion was based entirely on hearsay so far as the merits are concerned. Mr. Shaw was a witness to some little circumstances occurring after the homocide, but had no personal knowledge of the homocide, and Judge Richardson was not a witness."

It is insisted by the State that the trial judge, in holding the juror competent, is within the rule laid down by this court in such cases. We are constrained to hold otherwise.

None of the decisions relied on go to the extent here shown to bring the challenged juryman within the rule of competency.

In State vs. McGee, 36 La. Ann. 206, the juror Bell, while stating he had formed a fixed, deliberate opinion which would take strong evidence to remove, replied decisively to the questions of the court that his opinion *would* yield to the law and the evidence, that he had no bias or prejudice, and had talked to none of the witnesses; having heard only rumors. To the further inquiry if he could and would do justice by the State and the accused, if selected as a juror, answered unhesitatingly "yes I can and will do justice to the State and the accused." The juror Patton, in the same case, answered to the same effect.

Under these circumstances it was rightly adjudged they were competent jurors, and under the same state of facts we would affirm the ruling, holding the doctrine announced in State vs. Ricks, 32 La. Ann. 1101, too broadly stated, and adhering to that declared in State vs. Desmouchet, 32 La. 1241, State vs. Hornsby, 33 La. Ann. 1110, State vs. De Rance, 34 La. Ann. 186, and other decisions.

In State vs. Dugay, 35 La. Ann. 327, the jurors were properly held competent, having testified their opinions would yield to the evidence and that they would go into the jury box unhampered by the same.

They had no doubt of their own competency as jurors from the standpoint of being able to determine the case only from the evidence as adduced, and the law as expounded on the trial. Far different was the case at bar.

In State vs. Melton, 37 La. Ann. 77, the challenged jurors stated on their *voir dire* that notwithstanding the opinion formed by them they were able to render a fair and impartial verdict according to the evidence and the law.

That is not this case. If the juror King had made that answer we would hold him competent. But when asked by the Court if he was satisfied he could lay aside the opinion he had formed and decide the case according to the evidence and the law, he answered only that he *believed* he could, and coupled with it this significant and warning expression: "*but then I have a fear on my mind;* I have never felt that I would make a competent juror."

This demonstrated his disqualification; bias was plainly discernible; he himself was of the opinion he ought not to serve on the case. Why? Clearly because his mind was not free from bias.

There could be no other reason. He carried both his bias, and his belief that he was not competent as a juror, into the jury box; he went there with an opinion of the case; he had said only he *believed* he could render a verdict according to the evidence adduced on the trial and the law as expounded by the court—not that he was able to do it, or would do it. He would do his best, was the utmost he could say, to lay the opinion he had formed aside, if he was sworn to do so.

If he could lay it aside he would be a competent juror; if he could not, he would not be. *He went into the jury box in doubt himself that he could lay it aside.* This disqualified him. The opinion he had formed was based on what Shaw, one of the prosecutors, and who is said to be his neighbor, had told him about the case. He should have been excused. He evidently had much weight in the deliberations of the jury. He was prominent enough to have been chosen its foreman.

We likewise differentiate from the instant case, State vs. Dorsey, 40 La. Ann. 740; State vs. De Rance, 34 La. Ann. 186; State vs. Ford. 37 La. Ann. 443; State vs. Le Duff, 46 La. Ann. 546; State vs. Williams, 40 La. Ann. 1140.

The views above expressed render it unnecessary to pass upon the questions raised in the other bills of exception taken during the trial.

For the reasons assigned it is ordered, adjudged, and decreed that the verdict, sentence and judgment appealed from be annulled, avoided and reversed, and that this case be remanded to the court *a qua* to be proceeded with according to law.

NICHOLLS, C. J., takes no part, being absent ill.

No. 12,849.

UNION STAVE COMPANY VS. WM. L. LANGRIDGE, SHERIFF, ETC. (L. H. MARRERO, SHERIFF AND TAX COLLECTOR, SUBSTITUTED).

In an action claiming immunity from taxation under the article of the Constitutitution exempting property and capital employed in manufacturing industries, it is essential the petition should allege that the factory employs not less than five hands. Otherwise the suit is subject to dismissal on exception of no cause of action.

ON APPEAL from the Twenty-first Judicial District Court, Parish of Jefferson. *Rost, J.*

Bernard McCloskey for Plaintiff, Appellee.

Robert J. Perkins, District Attorney, for Defendant, Appellant.

Argued and submitted November 11, 1898.

Opinion handed down December 5, 1898.

The opinion of the court was delivered by

BLANCHARD, J. This is an action to declare certain property exempt from taxation, and the appeal is prosecuted by the defendant from a judgment in favor of plaintiff decreeing such exemption and perpetuating an injunction prohibiting the sale of the property for taxes.

The petition alleges the ownership of a certain lot of ground, which is described, and the averment is made that a factory is built thereon "for the manufacture of sugar and rice barrel material, viz.: staves and headings." It is further represented that the property is used exclusively for such manufacturing purpose.

The exemption is claimed under Art. 207 of the Constitution of 1879.

If the property, used for the purpose aforesaid, be exempt from taxation under this article (as to which we pass no opinion), it is clear it is not so exempt unless the factory employs not less than five hands, for such is the express requirement of the Constitution.

We have searched plaintiff's petition in vain for any allegation that its factory employs not less than five hands.

More than that, there is no proof in the record that not less than five hands are employed.

Defendant first filed an exception of no cause of action.

Subsequently, with reservation of his rights under the exception, he pleaded the general issue.

The record shows that the exception and the case on its merits were taken up for trial at the same time. The exception was overruled and judgment on the merits followed in favor of plaintiff.

The note of evidence discloses that no witnesses were put on the stand, but, in lieu thereof, it was admitted that three witnesses, who had been summoned by plaintiff, if called to the stand "would swear to the truth of the facts and allegations in plaintiff's petition contained."

The allegations of the petition being insufficient, the exception of no cause of action was well taken and should have been sustained.

Moore vs. City, 48 La. Ann. 1452; *In re* Southern Wood Man. Co., 49 La. Ann. 926.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that this suit be dismissed at plaintiff's costs in both courts.

No. 12,912.

STATE OF LOUISIANA VS. JOE HARDAWAY.

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1. Where the book containing the entry of the minutes of the court is signed by the presiding judge at the end of the term, it suffices. Not necessary that the same should be paraphed "*ne varietur*."
2. The indictment charged the murder to have been committed in 1890. Before arraignment the District Attorney moved to amend by substituting 1893 for 1890. This being allowed, it is assigned as error in this court. *Held*, the amendment was not necessary, as time is not of the essence of the offence as here charged; and if it were necessary it was permissible.
3. After trial and conviction, what is called a motion to quash the verdict and al proceedings had in the case was filed, heard and overruled. It is assigned as error here that the minutes must show presence of accused at the hearing of this motion. *Held*, presence of accused only required to be shown during arraignment, trial, charge, verdict and sentence.

APPEAL from the Fourteenth Judicial District Court, Parish of Iberville. *Talbot, J.*

M. J. Cunningham, Attorney General, and *Alex. Hébert*, District Attorney, for Plaintiff and Appellee.

Clarence S. Hébert for Defendant, Appellant.

Submitted on briefs November 12, 1898.

Opinion handed down December 5, 1898.

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The opinion of the court was delivered by

BLANCHARD, J. The defendant was indicted in the year 1898 for the murder of Jules Holland. He was tried in July, 1898, and from a verdict of guilty and a sentenee of death he prosecutes this appeal.

One bill of exceptions appears in the record. It was taken to the action of the court overruling what is called a motion to quash the verdict.

On the second day after the verdict was returned this motion to quash was filed. The ground for asking that the verdict be quashed, and all the proceedings had in the case be set aside, was that the book which purports to be the minute book of the court and in which the proceedings of the court for the year 1898 were recorded, was never paraphed "*Ne Varietur*" by the Judge. That book contained the entry of the return of the indictment for murder by the grand jury against the accused.

It is averred that the law requires District Judges to so paraph the book of minutes of their courts, and because this was not done in the instant case, it is insisted that the verdict is vitiated.

When the motion came up for trial the accused, it seems, proposed to prove that the minute book was not paraphed.

Whereupon the judge stated to his counsel that it was a fact the minutes of the court were not identified in that manner, and no evidence was necessary to show it, but that counsel could exercise his pleasure as to the introduction of evidence. He added he knew of no law requiring such paraph.

It does not appear that any evidence was, after this, offered.

The judge further stated in the bill of exceptions that the minutes of the court are duly *signed* at the end of each term by the judge.

There is no merit in the motion.

We have been referred to no law that requires the book in which the minutes of court are recorded to be paraphed "*Ne Varietur*," and we know of no such law. Nor is it customary. When the book containing the entry of the minutes is signed by the judge at the end of the term of his court, it is all, it would seem, that is necessary.

An assignment of errors alleged to be patent on the face of the record was filed in this court. Two grounds are averred therein for setting aside the verdict and sentence.

The first is, that on July 21, 1898, which was six days before the trial, on motion of the prosecuting attorney the indictment was

amended by changing the year of the commission of the crime from 1890 to 1893. That is to say, the word "three" was added to the words "eighteen hundred and ninety" as the same appeared in the indictment.

In this way, it is averred, the indictment, found in 1893, was, without warrant of law, changed, in 1898, to the great prejudice of the accused.

At the threshhold of the inquiry 'was this error,' we are met by the question whether or not this amendment of the indictment was essential or necessary?

It was not necessary if, under the indictment as returned by the grand jury, proof could have been administered that Joe Hardaway murdered Jules Holland, not, however, in 1890, but in 1893. And if such proof would, under the indictment, support the verdict of guilty as herein rendered, then the accused was not prejudiced by the District Attorney's motion to amend and the ruling of the court thereon.

Joe Hardaway was called on to answer to the murder of Jules Holland. It is immaterial, in the view of the law, whether he murdered him in the earlier year or the later year. In either case he is equally guilty. The substantive, important, material fact to be shown by the prosecution is that he murdered him at a time prior to the finding of the indictment. That being shown, but it appearing that the killing took place in 1893, whereas the indictment averred it to have been in 1890, must the jury return a verdict of not guilty? Surely not.

Or the evidence of the prosecution establishing the time of the homocide to have been 1893, when it was charged to have been in 1890, would an objection seasonably made on behalf of the accused to the reception of this evidence operate its exclusion, resulting in the acquittal then and there of the accused? Equally must this question be answered in the negative. Why? Because time is not of the essence of the offence as here charged.

Under the common law, whence came our forms and methods of criminal procedure, an objection such as that urged here would perhaps be held good, but modern statutory law has greatly modified the strictness of common law methods. Thus, R. S. 1048, in reference to the form and sufficiency of an indictment for murder, says: "In any indictment for murder * * * , it shall not be necessary

to set forth the manner in which or the means by which the death of the deceased was caused; it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased." And R. S. 1063 declares: "No indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved * * * , nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened," etc.

The next Section (1064), authorizes courts before which objection to an indictment for any formal defect apparent on the face thereof shall be taken, to cause the indictment to be forthwith amended in such particular.

This court, in State vs. Hamilton, 48 La. Ann. 1566, citing the sections of the Revised Statutes just alluded to, ruled that where an indictment furnishes a legal basis for conviction, and time is not of the essence of the crime charged, the correction of a manifestly erroneous date will be permitted.

A similar ruling was made in State vs. Pierre, 39 La. Ann. 915, and in State vs. Fontenette, 38 La. Ann. 61; see also State vs. Wallman, 31 La. Ann. 147, and 35 La. Ann. 842.

We hold, therefore, that, strictly speaking, the amendment complained of was not necessary on part of the State, and if it were, it was permissible.

It might be pertinent to add that on the day the amendment to the indictment was moved and allowed, and following the same, the accused was arraigned under the indictment as amended, without any objection thereto being raised on his behalf. And at no time during the trial did he raise any objection to the same.

The second ground set forth in the assignment of errors is that at the time the motion to quash the verdict and set aside the proceedings had in the case, heretofore referred to, was taken up for trial and tried, the accused was not present in court.

It is averred that this is shown by the minutes of that day's proceedings.

It is, perhaps, more proper to say that the minutes of the trial of the motion do not show his presence.

Was his presence in court when this motion was tried necessary?

We think not.

The personal presence of one charged with crime is not necessary or required at each and every step of his case, or when each and every proceeding is taken therein.

It is only needful that his actual presence be shown during the arraignment, trial, charge, verdict and sentence. State vs. Clark, 32 La. Ann. 560; State vs. Harris, 34 *Ib.* 121; State vs. Gonsoulin, 38 *Ib.* 460; State vs. Pierre, 39 *Ib.* 917; State vs. Green, 33 *Ib.* 1408; State vs. Dominique, 39 *Ib.* 323; State vs. White, 37 *Ib.* 173; Bishop Crim. Proc., Vol. 1, Sec. 276.

And to this might be added the requirement of his presence at trials of motions to change the *venue*, etc., when evidence is submitted.

No witnesses were sworn and gave testimony on the trial of the motion to quash in this case. So that the question of being "confronted with the witnesses against him," does not arise.

Judgment affirmed.

No. 12,909.

J. B. WEST (CHAFFE, POWELL & WEST SUBSTITUTED) VS. MRS. O. M. DEMOSS AND HUSBAND. 50 1849 51 1774

IN RE O. M. DE MOSS APPLYING FOR CERTIORARI TO THE COURT OF APPEALS, SECOND CIRCUIT OF THE STATE OF LOUISIANA. 50 1849 52 799

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1. Grounds restated upon which this court will grant its writ to review decisions of the Courts of Appeal. Art. 101 of the Constitution does not invest this court with appellate jurisdiction over the Courts of Appeal, or grant to litigants a further and additional right of appeal. The writ of review will issue only in exceptional cases, mainly to secure uniformity of jurisprudence.
2. The material or substantial variation, to the disadvantage of the wife, from the terms of the authorization of the judge pursuant to C. C. 128, does not annul the mortgage which followed, but does destroy the efficacy of the certificate of authorization, and the creditor must prove *aliunde* that the debt enured to her separate benefit.
3. Cotton purchased by husband, though the wife's name was used and she was induced to sign drafts given for the purchase price, and though the cotton was shipped in her name, held to be no part of her separate planting business, and the loss resulting can not be fastened upon her.

A. L. Slack and *Stone & Holmes* for Petitioners.

W. M. Murphy for Respondents.

Submitted on briefs September 22, 1898.
Opinion handed down November 21, 1898.
Rehearing refused December 19, 1898.

The opinion of the court was delivered by

BLANCHARD, J. This action originated in the District Court, Parish of Madison.

A decision there adverse to plaintiff was followed by appeal to the Court of Appeals, Second Circuit, where the judgment was reversed and a decree handed down in favor of the plaintiff for the amount claimed, with recognition of mortgage, etc.

Thereupon defendants applied to this court for its writ under the provisions of Art. 101 of the State Constitution, to bring the case here for review and determination.

As this practice is yet new under the present judicial system, the court takes occasion to restate its construction of the latter part of Art. 101, as laid down in its ruling denying the writ *In re* A. J. Ingersoll applying for writ of error to the Court of Appeals, First Circuit, in case of J. O. Toole vs. C. H. Minge & Co. It was there said:

"It is clearly the intention of this part of the article of the Constitution referred to that it should be entirely *discretionary* with this court, on the case as presented, to grant or withhold the writ. This is demonstrated by the fact that no particular kind or class of cases is specified as to which the application may be made. It was not intended by a resort to the power here granted to make of the Supreme Court a sort of superior court of appeals over the Circuit Courts, to take jurisdiction of, and hear and determine any and all cases that may have been decided by the latter courts in the exercise of their legitimate, constitutional jurisdiction. In other words, it was not intended that the Circuit Courts of Appeal should be made merely a stopping place for causes between one hundred dollars and two thousand dollars, on their way from the District Courts to the Supreme Court. It was, rather, intended

that the power thus lodged in the Supreme Court should be exercised only in special or extreme cases, whose peculiar circumstances as to the facts or the law governing the same, justify, in the opinion of this court, a resort to it. For example, where the Court of Appeals refuses to be guided, in a clear case, by the well-established jurisprudence as defined and laid down by this court, a case would be presented warranting this court in sending down its writ to bring up such case for review and determination. This might be necessary to enforce uniformity of jurisprudence throughout the State in the courts thereof. Other cases for other reasons may arise justifying a resort to the writ—care being always taken against its abuse, to the impairment of the dignity and power and usefulness of the courts of appeal, and protracting litigation and deferring the final enforcement of just rights."

This was followed by similar views expressed *In re* L. D. McLain applying for *certiorari* to the Court of Appeals in the case of McLain vs. Burgess, and *In re* A. J. Murff applying for the writ in Bell vs. Murff—in each of which cases the application was denied on the ground that the writ of *certiorari* or review was not given to clothe this court with appellate jurisdiction, or to effectuate a further and additional right of appeal, but to issue only in exceptional cases, mainly to secure uniformity of jurisprudence.

These views are reasserted and adhered to as the proper construction of the Article of the Constitution.

The case at bar was considered as "exceptional," at least that a *prima facie* case for the writ had been made out, and, accordingly, it was granted, the court assigning, among other reasons, the following:

"If we correctly appreciate the opinion (of the Court of Appeals) it holds the wife liable on the basis, in part at least, of certain legal propositions which do not command ready acceptance. One is that the husband, acting as the wife's agent in the cultivation of her plantation, can bind her for money procured by him for the purchase of cotton in speculations resulting in loss, with which * * * she is charged. Another is, that under Article 2435 of the Code and the decisions, of which 6th Annual, 199, is the type, the husband being insolvent, the wife separate in property, she is bound for debts made by the husband of the character of plaintiff's advances. These propositions, if we correctly appreciate them, seem to be incon-

sistent with the absolute incapacity of the wife, separate in property or not, to bind herself or to be made liable for the husband's debts—*i. e.*, those our law makes debts of the community."

Proceeding to the consideration of the merits of the controversy presented, we find the salient facts to be, that defendant, judicially separate in property from her husband, cultivated a plantation (her separate property) on her own account and in her own name. This plantation was the domicile of herself and husband and the latter acted as agent of the wife in conducting the plantation business. The husband was without means or property of his own.

The wife appeared before the District Judge stating her wish to borrow money and contract indebtedness for the use and benefit of her separate estate, and being examined by him pursuant to C. C. 127, 128, and her replies satisfying him that it was an indebtedness the law permitted her to contract, issued to her a certificate of authorization to borrow not exceeding sixteen hundred dollars and secure same by a mortgage on her separate property.

Meanwhile she had effected arrangements with the commercial firm of Chaffe, Powell & West to become her commission merchants and make advances of money and supplies to enable her to cultivate her plantation. The money she had been authorized by the judge to borrow was to be had from them, and the mortgage to secure it was to be executed in their favor.

Armed with this authorization she and her husband appeared before a notary and, declaring an indebtedness to Chaffe, Powell & West, executed two notes in their favor, one for four hundred and ninety-five dollars, the other for eleven hundred and five dollars, aggregating sixteen hundred dollars, and secured same by a special mortgage on her plantation.

The husband signed these notes and mortgage with the wife.

The mortgage recited that the indebtedness represented moneys and supplies advanced and to be advanced her during the current year to enable her to cultivate a crop on her plantation.

In point of fact it represented only moneys and supplies *to be advanced*, for the evidence shows she owed them nothing at the time.

West vs. Mrs. DeMoss and Husband.

The act of mortgage, further, recognized, in favor of Chaffe, Powell & West, the privilege accorded by law to the furnishers of supplies.

It was stipulated therein that "they do each (meaning husband and wife) agree and obligate themselves to ship to Chaffe, Powell & West for sale at their discretion * * * all the cotton either of them raise, or control, of the crop of 1891, and if they fail to so ship to said parties by the first day of February 1892 as much as one hundred and fifty bales of cotton, and an additional bale for each ten dollars advanced to her in excess of the aforesaid fixed accommodation * * * they jointly and severally agree to pay them one dollar and twenty-five cents per bale commission for such deficiency of shipment."

The open account was to bear eight per cent. interest and the commission merchants were stipulated to have "the exclusive control of and right to apply proceeds of all cotton shipped, and all payments of money or other things made to them, to the payment of any secured or unsecured indebtedness on open account or otherwise now due or that may hereafter become due them, as they may prefer, and they may, at their discretion, change such application of credits at any time before payment of all joint and several indebtedness to them."

The judge had not authorized the wife beyond borrowing the money and executing the mortgage.

This, of course, impliedly included the usual and necessary adjuncts of negotiable or other instruments to represent the indebtedness, with stipulation as to interest, and attorney's fees and costs in case of suit, etc.; and it was not obnoxious to the certificate of authorization that the recital as to recognition of the privilege of furnishers of supplies was made.

Some of the other stipulations may be passed over as immaterial, but the one quoted above, relating to imputation of payments and change af credits, must be held such a material and substantial variance from the authority given by the judge as to take this case out of the protection of C. C. 128—that is to say, when a wife is properly authorized and there has been *observance* of the authorization, she is treated *quoad* that transaction as *femme sole*—and threw upon the creditor the burden of proving that the indebtedness asserted enured to the wife's separate benefit.

The Conrad case, 29 La. An. 123.

The Berwick-Frere case, 49 La. An. 202.

The material or substantial variation, to the disadvantage of the wife, from what the judge authorized, does not annul the mortgage or other contract, as counsel for defendant insists, but does destroy the efficacy of the certificate of authorization, and the creditor must prove *aliunde* that the debt secured by the mortgage enured to her separate benefit.

The Berwick-Frere case *supra* is not to be construed as going further than this.

The law as it stood in regard to the contracts of married women previous to the act of 1855 (now C. C. 126, 127, 128) remains unimpaired, with the difference that a married woman taking the benefit of that act is placed on the same footing with a *femme sole*, her contract furnishing full proof against her, while under the general jurisprudence those who deal with a married woman are bound to see that the contract made with her enures to her benefit. Rice vs. Alexander, 15 La. An. 54.

It has never been disputed that a married woman, authorized alone by her husband, can validly contract in reference to her separate estate. Hence, it follows that when she seeks and obtains the further authorization of the judge, pursuant to the articles of the Code referred to, and in a mortgage following this authorization the terms of the latter are departed from, and stipulations are embodied in the mortgage constituting material and substantial variations from the authorization, the only result will be to do away with the effect of the authorization, leaving the creditor in the position of having dealt with a married woman authorized alone by her husband, and to stand or fall according as he may prove, or not prove, *aliunde* that the indebtedness he seeks to hold her for enured to her separate benefit.

And in an action on such a contract, where the wife stands unauthorized by the judge, but authorized by her husband, the plaintiff must show affirmatively before he can recover that the debt did enure to the separate advantage of the wife, and this is true whether she be separate in property or not.

Urquhart vs. Thomas, 24 La. Ann. 95;

Erwin vs. McCalop, 5th La. Ann. 173;

Hardin vs. Wolf, 29 La. Ann. 333;

Pascal vs. Folse, 48 La. Ann. 1230.

Holding that this creditor stands on a contract where the wife must be considered as authorized by the husband alone, the next inquiry is did the consideration of the mortgage notes enure to her advantage, or that of her separate estate.

We find that on receiving the notes Chaffe, Powell & West placed the proceeds thereof, less discount at eight per cent. and commissions at two and a half per cent., to the credit of defendant. The notes were dated February 6, 1891, and the smaller one matured December 15, 1891, the larger one January 15, 1892. They drew, each of them, eight per cent. interest from December 15, 1891.

The amount so placed to the credit of the defendant was one thousand four hundred and forty-seven dollars and eighty-seven cents.

Thereafter the notes became the property of Chaffe, Powell & West, who had discounted the same. The defendant in her planting operations absorbed the proceeds of the notes and undoubtedly the indebtedness represented by the same enured to her benefit. So the notes became an enforceable asset in the holders' hands against her and against the property she had mortgaged to secure them.

But defendant did not stop drawing on plaintiffs for money and supplies, in her planting business for that year, when the proceeds of the notes became exhausted. She continued her drafts and orders and in due time shipped the crop of cotton (eighty-six bales) raised on her plantation to Chaffe, Powell & West.

The same rule must apply to the indebtedness contracted by defendant, authorized by her husband, with her merchants after exhausting the proceeds of the notes, as was applied to the notes themselves. They can hold her only for such advances and supplies as were made to her for her separate plantation business and used legitimately therefor, thus enuring to her benefit, and for such other items of indebtedness which, not being ordered for her separate planting business, enured otherwise to her benefit, or that of her separate estate, or were such expenses as the law declares a wife must support.

We have already seen the husband was without means or property and, as a consequence, it devolved upon the wife to support the family expense.

Without going into a discussion of the voluminous evidence found in the record, suffice it to say that we are satisfied plaintiffs have made out their case, except in the particular hereinafter set forth.

The money, supplies, etc., obtained from her merchants were used by defendant in her separate business, for cultivating her crops, for maintaining her plantation, for paying her debts, for supporting her household expenses, etc., except as we shall show later, and thus, to this extent, she must be held liable therefor as for indebtedness that enured to her separate benefit. Chaffe & Sons, vs. Watts, 37 La. Ann. 326; McElvin vs. Taylor, 30 La. Ann. 552.

The eighty-six bales of cotton shipped from defendant's plantation were sold and the proceeds thereof applied to her credit. In the course of these transactions the smaller note held by plaintiffs was charged into the account, paid and satisfied and the same delivered to the maker, and the account showed a balance in favor of defendant which must be applied as a credit on the larger note.

What this true balance is, is the real point at issue, in our view of the case.

On April 2, 1894, the last statement of account was rendered by plaintiffs. It showed credits to defendant which reduced the amount due on the larger of the two mortgage notes to eight hundred and fifty-seven dollars and seventy-seven cents.

This is the amount plaintiffs claim, with eight per cent. interest from said date, and the amount for which they were awarded judgment by the court of appeals.

We do not think defendant can be held for that sum.

Certain cotton, aggregating sixty-six bales, was purchased by D. D. DeMoss, husband of defendant, and shipped plaintiffs. The basis of this purchase of cotton by DeMoss, as a venture of his own, was, we think, laid in the act of mortgage itself, as shown by an extract from same hereinbefore made.

The cotton was purchased from neighboring farms. That the wife's name was used, that the husband induced her to sign drafts given for the purchase price, that it was shipped in her name, do not, we think, make the purchases any the less those of the husband.

It was outside of the wife's separate planting business. It was a speculation by the husband, and beyond doubt plaintiffs had knowledge that small lots of cotton were from time to time being bought by DeMoss, husband, and shipped to them in the wife's name and paid for by drafts which the wife had been called on to sign. Having no credit of his own, the husband was using hers, and the evidence shows she protested to him against it.

It will not do to say the wife was making these purchases of cotton in order to fill the complement of one hundred and fifty bales she had engaged to ship plaintiffs.

An examination of the stipulation of the mortgage in this respect shows that the husband, for himself, on his own account, assumed an obligation to plaintiffs that as much as one hundred and fifty bales would be shipped them. The wife did likewise, it is true, but so it was done by one, or the other, or by both, the obligation would be fulfilled.

The wife supplied the larger portion of the requisite number of bales from her plantation; the husband *purchased* the remainder from near-by places.

The money supplied by plaintiffs, by payment of drafts and otherwise, to purchase this cotton can not be held an advance to defendant's plantation or separate business. It was money supplied to enable the husband to embark in a mere venture; it was a damage and not a benefit to the wife; it resulted in a loss of some hundreds of dollars; and, thus, there is lacking entirely the element to make it an indebtedness binding on her—*it did not enure to her benefit.*

This cotton when sold by plaintiffs was entered up to the credit of defendant, just as the money used in its purchase had been entered up to her debit.

But the cotton sold for less than the sum it cost and, hence, a loss. This loss, it is sought to make the wife bear.

It falls on the husband, not on her. It must be held as resulting from his separate and independent transactions with plaintiffs. This cotton should be charged off on her account at the same sum that it had been entered on the account as an indebtedness against her. This can be equally effectuated, however, by ascertaining the loss on it, and crediting the amount thereof on the note declared on.

Defendant's counsel figures the loss at about six hundred dollars; plaintiffs' counsel at two hundred and twenty-three dollars and six cents.

The Court of Appeals fixed it at four hundred and thirteen dollars and ninety-four cents. We will adopt its calculation and estimate as showing the true loss, and give defendant credit therefor on the note sued on as of date April 2, 1894, the time when the last credit was given her for cotton sold, and the last statement was rendered her.

For the reasons assigned it is ordered, adjudged and decreed that the judgment rendered by the District Court, and that rendered by the Court of Appeals, Second Circuit, in this cause, be set aside and annulled, and proceeding to render such judgment as should have been rendered in the first instance, it is now ordered and decreed that Mrs. Eliza Cha ffe, Executrix of the Succession of Charles Chaffe, deceased, A. C. Leigh, administrator and executor of John Powell, deceased, and J. B. West, plaintiffs herein, do have and recover of Mrs. O. M. DeMoss, defendant herein, the sum of four hundred and forty-three and 83–100 dollars, with 8 per cent. interest *per annum* thereon from April 2, 1894, until paid, together with 5 per cent thereon as attorney's fees.

It is further ordered and decreed that the special mortgage consented to by defendant on the 6th of February, 1891, before Scott Bettis, clerk of the Eighth District Court, in and for the Parish of Madison, Louisiana, and resting on the property described in plaintiffs' original petition, be recognized and enforced, and that said property be seized and sold to pay and satisfy this judgment.

It is further ordered and decreed that defendant's demand in reconvention be rejected; and that costs of the District Court and of the Court of Appeals be borne by defendant, and those of this court by the plaintiffs.

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ALLOPATHIC STATE BOARD OF MEDICAL EXAMINERS VS. AUGUSTUS C. FOWLER.

1. Parties contesting the constitutionality of a law should tender that issue in the trial court, and can not raise it as a matter of right for the first time on appeal. When so raised below new special grounds can not be urged for the first time on appeal, particularly when an examination of evidence would be needed for their decision.
2. A bill having the same title as Act No. 49 of 1894 was introduced in the Senate as Senate Bill No. 23; it was read by its title and placed upon the calendar for second reading. It was subsequently, under a suspension of the rules, taken up on second reading, read by title and referred to a committee. The committee reported its action on Senate Bill No. 23, giving the exact title of the same. The committee reported the bill favorably by substitute. The bill was read by title. On motion the substitute was adopted in lieu of the original bill, and became Senate Bill No. 90. The title of the bill reported by the committee as a substitute was identical with that of the original bill. The bill as reported was read by title. Subsequently Senate Bill No. 90, reported by the

committee, was put upon its third reading. The bill was read in full. It was then taken up for final passage; the roll was called and the bill finally passed. A motion to reconsider was made. and the motion to reconsider was laid upon the table. *Held*, that a contention that Senate Bill No. 90 should be taken and considered as an original bill, and it should have been read in the Senate three times, and on three different days, once in full, was not well founded.

3. Act No. 49 of 1894 does not violate Act 29 of the Constitution, which requires that any law enacted by the General Assembly should embrace but one object, and that shall be expressed in the title, nor does it violate the Constitution as being a special law prohibited by Art. 46 of the Constitution.
   The law is a general one, though bearing upon a special subject.
4. Whenever the pursuit of any particular occupation or profession requires for the protection of the lives or health of the general public, skill, knowledge and other personal attributes or characteristics in the person pursuing it, the General Assembly has the power and authority to have recourse to proper measures to ensure that none but persons possessing these qualifications should pursue it. A statute to that effect is not open to attack as depriving citizens of their right to earn a living. The right to practice medicine is not an absolute natural right, but a right or privilege to be exercised under conditions and limitations regulated by legislative authority.
5. The General Assembly. having the authority to require as a condition precedent to the right or privilege of any one to practise medicine in Louisiana, that he should be subjected before doing so to a prior examination as to his qualifications, and found and declared worthy and qualified, it has the right to select the particular agency to whom should be delegated that duty. Courts can not control that selection. A statute creating a Board of Medical Examiners, to be composed of physicians recommended for appointment from lists to be furnished by the Louisiana Medical Society and the Hahneman State Medical Society, to be appointed by the Governor on such recommendation, is not open to attack as discriminating in favor of the allopathic and homeopathic schools against the eclectic school of medicine. No constitutional right is given to particular individuals entertaining peculiar theories of medicine to group themselves together, and, calling themselves a special school of medicine, under a selected name, to insist that they be recognized and dealt with as such.
6. The action of the Medical Board of Examiners is not conclusive, but is subject to correction in case of abuse.
7. The recognition by the constituted authorities of another State that a person was properly qualified to practise medicine, and that the medical college whose diploma he presented as evidence of that fact was a medical college in good standing, does not carry with it a vested right in the party to practise medicine in Louisiana. Each State acts independently of the other in this matter.
8. A person who has been practising medicine as a physician for a number of years without objection is not exempt from complying with legislation of a later date, making it a condition precedent to any one's practising medicine that he should have been examined by a medical examining board and found to have the qualifications required by law for so doing.

ON APPEAL from the Twenty-first Judicial District Court for the Parish of Jefferson. *Rost. J.*

E. T. Florance and *Robt. J. Perkins* for Plaintiff, Appellee.

A. E. Billings, *Ambrose Smith* and *H. N. Gautier* for Defendant, Appellant.

Argued and submitted April 22, 1898.
Opinion handed down May 16, 1898.
Rehearing refused June 23, 1898.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiffs applied to and obtained from the District Court for the parish of Jefferson an injunction forbidding and enjoining defendant from further practising medicine in any of its departments in this State until he shall have first obtained the certificate provided for under the provisions of Act No. 49 of the General Assembly of the State of Louisiana of 1894. They also prayed that Fowler be cited, and that after due proceenings there be judgment condemning him to pay plaintiffs the sum of one hundred dollars as a penalty, and in addition thereto the sum of fifty dollars as attorney's fees and costs of court and making said injunction perpetual and absolute.

These prayers were predicated upon allegations that Fowler, who resided in the parish of Jefferson, had been for over three months prior thereto practising medicine in the State without having first obtained the certificate required by Sec. 2 of Act No. 49 of 1894. That he had repeatedly prescribed and directed for the use of other persons drugs and medicines for the treatment, cure and relief of bodily injuries, infirmities and diseases.

That said acts were in violation of the laws of this State, particularly of said Act No. 49, and Sec. 14 of said act, as amended by Act No. 13 of 1896.

That under said law, said Fowler was liable to a penalty not to exceed one hundred dollars, and to the payment of attorney's fees not to exceed fifty dollars, for said violations.

Defendant moved to dissolve the injunction for causes declared to be apparent upon the face of the papers and record and want of authority and capacity in plaintiffs, and also upon the ground that the bond and surety furnished was not good and sufficient and such as the law required.

He also excepted to plaintiff's demand on the grounds:

1. That they were without authority or capacity to institute the suit.

2. (Under reservation.) That the allegations of the petition were too vague and indefinite for him to safely answer.

3. That the allegations of the petition disclosed no cause of action.

4. That Act No. 49 of 1894 is in violation of Arts. 1, 5, 7, XI, 29 *et seq.* of the Constitution, and is therefore null and void.

5. *That Act No. 13* of 1896 is in violation of Arts. 1, 5, 7, XI, 29, 46 and 47 of the Constitution, and is therefore null and void.

The motion to dissolve and the exceptions filed were overruled.

Defendant answered, pleading first the general issue. Further answering, he denied that he had at any time violated the provisions of Act No. 49 of 1894 or the acts amendatory thereto. He specially denied that any of the provisions and prohibitions of the said laws and acts alleged were in any wise applicable to him. In the event that said acts be construed and held as a prohibition to the practice of medicine and surgery in any branch or school of medicine other than that of the allopathic or homeopathic, without a diploma from an allopathic or homeopathic institution, or without previous examination by the plaintiff's medical board of examiners, or in the event it should be held that the plaintiff's medical board of examiners are qualified and authorized to determine and pass upon the ability, competency and qualification of practitioners of such *other* branch or school of medicine, and especially of respondent, he averred that such construction and holding as regards practitioners of such *other* school of medicine, particularly as regards this respondent (holder of a diploma from a reputable institution of the Eclectic school of medicine), and as regards practitioners anterior to the said legislative enactments or laws, would, in fact, be holding and giving to said laws the unconstitutional effect of discriminating between persons engaged in the profession of medicine and surgery and would be depriving this respondent of his constitutional rights and privileges. Defendant further averred that such construction and holding as regards said laws would and does make the provisions and prohibitions thereof effectively applicable to him and thereby violates all rights, privileges and immunities guaranteed him and vested in him by the Constitution of this State and of the United States, specially as regards his privileges and immunities of citizenship and

operates as and is an unjust and illegal discrimination between citizens of different States and of the same State—is class legislation, and specially violative of the Bill of Rights of the State Constitution and of Sec. 2 and of Art. 4 of the Constitution of the United States as well as of the Fourteenth Amendment of the Constitution, and among other things in this, that it deprives respondent of his property and liberty without due process of law, and he alleged that said acts were *ultra vires*.

He averred that said Act No. 49 of 1894, and those amendatory thereof, should not and could not apply to him and could not be invoked by plaintiffs to prohibit and enjoin him from practising medicine and surgery in the State of Louisiana. That the depriving him of the rights, privileges and immunities inherent to his citizenship and the maintaining and perpetuation of the injunction which had issued, or the rendition of a judgment in favor of plaintiffs, would cause him great and irreparable injury to an amount hard to estimate, but surely in a sum far in excess of ten thousand dollars, and would be depriving him of his property and liberty without due process of law. He prayed that there be judgment in his favor and against plaintiffs, decreeing respondent entitled to practsie medicine and surgery in this State, and dissolving the injunction, and dismissing plaintiffs.

Defendant filed a supplemental answer in which he averred that he was expressly exempted from the provisions and penalties of Act No. 49. He further alleged that notwithstanding the provisions of that act he was entitled, under the Constitution and laws of the United States, to a trial by jury, and for such trial he prayed on conforming to the requirements of law relative to such trials.

The prayer for a trial by jury was refused under the provisions of Acts No. 49 of 1894 and No. 13 of 1896.

To this ruling defendant reserved a bill of exceptions.

The District Court rendered judgment in favor of the plaintiffs, making the injunction perpetual and decreeing that defendant be enjoined from practising medicine in any of its departments until he should have received the certificate required by Sec. 2 of Act No. 49 of the acts of 1894. It further condemned defendant to pay a fine of one hundred dollars, and, in addition, fifty dollars for attorney's fees and costs. On February 5, 1898, defendants applied for and obtained a suspensive appeal from the judgments of

the court overruling his exceptions, and from the final judgment in the case.

In the Supreme Court defendant assigned as error of law and cause of nullity of the judgment appealed from that Act No. 49 of 1894, known and designated throughout its parliamentary progress as Senate Bill No. 90, did not receive the readings on three different days in each house of the General Assembly, as required by the mandatory provisions of Art. 37 of the Constitution, but was passed by the Senate in disregard and violation thereof; all of which was shown by reference to the constitutional and official record and journals of the Senate. That Act No. 13 of 1898 was unconstitutional, for the reason that it only purports to amend and re-enact Secs. 14 and 19 of said Act No. 49 of 1894; that same is not self-operative or enforceable, but is entirely dependent upon the provisions of said Act No. 49 in its entirety for legal validity and effectiveness; that being based upon an outgrowth of and inseparable from said Act No. 49, which is null and void, said Act No. 13 is of and by itself without legal force or vigor.

OPINION.

Appellant attacked in this court the constitutionality of Act No. 49 of 1894 on the ground that in its passage Art. 37 of the Constitution was not complied with. He had attacked its constitutionality in the District Court, but upon other grounds. In *State of Louisiana vs. Widow De St. Romes, 26 An. 754*, we held that the constitutionality of a law would not be considered where an issue to that effect has not been raised in the case below. The same rule applies to cases where special grounds of unconstitutionality are set up for the first time in this court, and particularly those where an examination of evidence would be needed for a decision of the question submitted. We have, however, examined the Journal of the Senate proceedings for the year 1884, and find that an act was introduced in the Senate on the sixth day of the session by Mr. Avery, having the same title as that which Act No. 49 of 1894 now bears. It was introduced as *Senate Bill No. 23*, read by its title, and placed upon the calendar for second reading. On the seventh day it was taken up under a suspension of the rules on its second reading, read by title, and referred to the Committee on Health, Quarantine, Drainage and Charitable Institutions. On the eighteenth day that

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c three times and on three different days, once in full.

Article 29 of the Constitution requires that every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in its title. As Senate Bill No. 23 was reported back favorably by the committee under the same title which it had when sent to it, it is very evident that the body of the act as presented to it, must have been found by it conformable to the requirements of Art. 29. That is to say its provisions must have been considered as embracing but one object, and that object was expressed by its title. When the committee reported back the bill under the identical title, it is clear that if any changes in the bill had been made in committee, they must have been of a character such as in the opinion of the committee were germane to and consistent with the provisions in the

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as there is nothing to show to the con-
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e Constitution, and fell properly
of Senate Bill No. 90 (Act No.
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alike, and germane to each
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ut, but the old bill with imma-
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odified by it (but not to an extent sufficient to
utside of its original title) and that the committee
thought proper to designate the bill so reported back, a
itute" for the original bill, that that fact should make it other
han the original bill amended or revised, or made over to make it conform as a whole to amendments already adopted. We find no ground for saying that Act No. 49 of 1894 was not passed in conformity with Act 37 of the Constitution.

Appellant's next contention is that Act No. 49 of 1894 is violative of Art. 29 of the Constitution in that it embraces more than one object, and that not expressed in its title.

An article corresponding with our Art. 29 is to be found in the constitutions of a number of our sister States and has been the subject of repeated judicial decisions. The decisions are substantially alike. The Supreme Court of South Dakota, in State vs. Morgan (48 N. W. 316), has reviewed very fully the jurisprudence on the subject, quoting very freely from the opinions of different courts. From among those quotations we make use of the following:

The Supreme Court of Michigan, in People vs. Mahoney (13 Mich. 494), said: "The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together in one bill subjects diverse in their nature and having no necessary connection with a view to combine in their favor the advocates of all and thus secure the passage of several measures, no one of which could succeed upon its own

merits, was one both corruptive of the legislator and dangerous to the State. It was scarcely more so, however, than another practice also intended to be remedied by this provision, by which through dextrous management clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. This course was not designed to embarrass legislalation by multiplying the number of bills, but it was intended to put an end to vicious legislation which was little better than a fraud on the public and to require that in every case the proposed measure should stand upon its own merits. Judge Gardiner, of New York, says "that the purpose was that neither the members of the Legislature nor the public should be misled by the title. Insurance Co. vs. Mayer, 8 N. Y. 214. Judge Cole, of Wisconsin, says "that the design and purpose of the provision was obviously to prevent the mischief of uniting together in the same bill various objects which had no necessary connection with each other, and in order to guard the Legislature and the community affected by the law against surprise and imposition." Durkee vs. City of Janesville, 26 Wisconsin, 697. The Supreme Court of Iowa says: "The intention of the provision of the Constitution was to prevent the union in the same act of incongruous matter and of objects having no connection, no relation, and with this it was designed to prevent surprise in legislation by having matter of one nature embraced in a bill whose title expressed another. State vs. Judge, 2 Iowa, 280; State vs. Silver, 9 Nevada, 227. And similar expressions may be found in many reported cases. St Louis vs. Tiéfel, 42 Mo. 578; Mayer vs. State, 4 Ga. 38; Davis vs. State, 7 Md. 151. Judge Cooley in his work on Constitutional Limitations says: "It may therefore be assumed as settled that the purpose of these provisions was first to prevent "hodgepodge," or "log rolling" legislation, second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles gave no intimation and which might, therefore, be overlooked and carelessly and unintentionally adopted; and third, to fairly apprise the people through such publication of legislative proceedings as is usually made of the subjects of legislation that are being considered in order that they may have opportunity of being heard thereon by petition or otherwise if they so desire. The Dakota Court, taking up itself a discussion of this ques-

tion, said: "It will thus be seen that thecourts with great unanimity enforce the constitutional provisions in all cases falling within the mischiefs intended to be remedied. Upon a critical examination of these cases, however, it will be seen that while it is necessary to construe this provision so as to prevent the evils intended to be met, yet it is desirable to avoid the opposite extreme so as not to embarrass the Legislature in the legitimate exercise of its powers and compel a needless multiplication of bills designed to meet the same object. The court says in the case of State vs. Miller, 45 Mo. 497: "The courts in all the States where a like or similar provision exists have given it a liberal interpretation and have endeavored to construe it so as not to limit or cripple legislative enactments any further than what was necessary by the absolute requirements of the law." The objections to an act upon the ground that it embraced more than one subject and that it was not sufficiently expressed in its title should be grave, and the conflict between the statute and Constitution plain and manifest, before courts would be justified in declaring it unconstitutional and void. The constitutional clause under consideration is that no law shall embrace more than one subject, which shall be expressed in its title. In some of the State Constitutions the word "object" has been used instead of "subject." In the construction of this clause, the courts have used the words as synonymous, which strictly speaking is not so. The "subject" of a statute is a matter of public or private concern for which the law is enacted; the "object" is the aim or purpose of the enactment.

The constitutional requirement in our Constitution is addressed to the subject. This subject must be single. The provisions of the act must all relate directly to the same subject, have a natural connection, and not be foreign to the subject as stated in the title. The title must state the subject of the act, for the information, not only of the Legislature, but of the public generally. When the title of a legislative act expresses a single subject or purpose which is single, all matters which are naturally and reasonably connected with it, and all measures which will or may facilitate the accomplishment of the purpose so stated, are germane to its title. There is no constitutional restriction as to the scope or magnitude of the single subject of a legislative act. It has been held that an act to establish the government of the State embraces but a single subject or object, yet it includes all its institutions, all its statutes. In Bowman vs. Cockrill,

6 Kas. 311. the court says: "The unity of such an act covering the multiform concerns of a commonwealth is the congruity of all the details of 'one stupendous whole' of one government. That is the grand subject of such a statute or system of laws; it is equally the object of all its varied titles of chapters and sections, Such is an act creating municipal corporations. Such a statute creates the corporate entity, invests it with and regulates the exercise of the necessary legislative, taxing, judicial and police powers. It embraces but one subject. The separate provisions granting, defining and regulating these powers are but parts of a whole and essential to make a whole—a municipality. Harris vs. People, 59 N. Y. 599; Mentclair vs. Ramsdell, 107 U. S. 147; Sup. Ct. Rep. 39; Grover vs. Trustees, 45 N. J. Law, 399. One act may define all the crimes and provide the procedure in prosecutions. Each crime is distinct; the practice is distinct; but all the provisions of such act are congruous parts of a larger subject, which is an entirety. State vs. Brassfield, 81 Mo. 151, 161. Whatever may be the scope of an act It can embrace but one subject, and all its provisions must relate to that subject. They must be parts of it, incident to it, or in some reasonable sense auxiliary to the object in view. This constitutional requirement is addressed to the subject, not to the details of the act. That subject must be expressed in the title. The subject must be single. The provisions to accomplish the object involved in that subject may be multifarious. It is not enough that the act embraces but one subject and that all its parts are germane, but the title must express the subject, and comprehensively enough to include all the provisions in the body of the act. The title need not index all the details of the act. It is sufficient if the language used in the title on a fair construction indicates the purpose of the Legislature, so that making every reasonable intendment in favor of the act it may be said that the subject of the law is expressed in the title. As said by the Supreme Court of Illinois in the case of Johnson vs. People, 88 Ill. 436, the Constitution does not require that the subject of the bill shall be specifically and exactly expressed in the title; hence we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required. The Constitution authorizes one subject and any number of matters, provided they have any natural or logical connection with each other in legislation."

The title of Act No. 49 of 1894 is:

"AN ACT

to regulate the practice of medicine, surgery and midwifery, to create State Boards of Medical Examiners and to regulate the fees and emoluments thereof; to prevent the practice of medicine, surgery and midwifery by unauthorized persons, and to provide for the trial and punishment of violators of the provisions of this act by fine or imprisonment, or both, and to repeal all laws or parts of laws in conflict or inconsistent with this act."

Defendant's contention on the subject of the unconstitutionality of the act as violative of Art. 29 of the Constitution is thus stated by his counsel in their brief:

"Title Act No. 49 embraces more than one object. The creating of a 'Board of Medical Examiners' is not the regulating of board's authority and power; *to create* is not to authorize and empower." To prevent the practice by unauthorized persons and to create the Medical Board and to define and provide for the punishment of a crime have nothing in common with the regulation of the practice of medicine.

To prevent and to create and to punish are entirely different objects from that to *regulate*. To regulate implies that the business or profession may be carried on subject to established methods. To create is to establish; to give birth; to put into existence. *To prevent* is to *prohibit* the business or profession to be engaged in or carried on entirely or partially. The purposes are incongruous.

Section 2 of the act recognizes two distinct schools of medicine with Board of Examiners for each, ignoring the Eclectic School or system, which is opposed to the homeopathic and allopathic systems.

Section 5, Act. 49. Provides fer fees of Board of Health and returns by Clerk of Court.

Section 9. For recording certificates by clerks of District Courts and fixes fees and duties of Board of Health.

Section 10. Provides for duty of *Board of Health* in regard to publishing physicians' names.

Section 12. For penalty by imprisonment and fine *in re* to itinerant vendors.

Section 13. Changes rules of evidence in violation of Constitution, *Art. 46*.

Section 17. Provides for exceptions *in re* physicians.

Section 18. Provides certain duties of the board.

Section 19. Apply to liability of the State.

None of these provisions are susceptible of being reasonably construed as a regulation of the practice of medicine in that they provide for matters distinct from the practice of medicine. Some whereof are not germane to the subject matter. Act No. 49, as amended, and its title prescribes for two classes of people; for those authorized to practise medicine and those *unauthorized*—two distinct and dissimilar classes, as distinct and unlike as two objects can be.

The generality of the title of an act is no objection, provided, only, that it be fully sufficient to give absolute notice of the subjects of the legislation, and its provisions unmistakably germane; but though the title and the law may both refer to the same general subjects, yet if the title uses a term which describes a totally different branch of the subject from that dealt with in the body of the act, the act is void for that reason. For example, to entitle an act "to regulate the traffic in intoxicating liquors," and then in the body of the act to *prohibit* such traffic, is not complying with the constitutional requirements. (*In re* Hauck, 38 N. W. 269.)"

Testing the title of Act No. 49 and the provisions contained in the body of the act by the views expressed in the opinions of the different courts from which we have quoted (which are in accor- with those entertained by this court, and which have been heretofore announced in our decisions) we are of the opinion that the attack made by defendant upon the constitutionality of that act is not well founded. The object of an act is single, though the instrumentalities which the General Assembly may deem necessary to carry it into successful operation may be many and of different kinds. Subsidiary details which are enacted as means for carrying into effect the purpose of the act do not create a plurality of objects in it. It has been constantly held that the constitutional provision permits an announcement of the object of an act in general terms, and in order to facilitate legislation, that a very liberal construction should be given to all matters which are pertinent or germane to the subject of the enactment.

"The object of an act expressed in the title includes not only all matters which are constituent parts of it, but all matters directly incidental to it. *Plankroad vs. Hannaman, 22 Ind. 484; City of St. Louis vs. Green, 7 Mo. App. 468; Canal Co. vs. Bright, 8 Colorado, 144; 6 Pac. Rep. 142; English vs. State, 7 Texas App. 171.*

"An act to regulate specific business may prescribe penalties for violation of the act. *Insurance Co. vs. Commissioners*, 70 Mich. 485 (38 N. W. 474); *Weil vs. State*, 46 Ohio, St. 450 (21 N. E. 643); *Sykes vs. People*. 127 Ill. 177 (19 N. E. 705); *State vs. Stunkle*, 41 Kas. 457 (21 Pac. 675).

"A statute embracing only one general subject indibated by its title is constitutional, no matter how fully it may enter into the details of that subject. Turnpike Co. vs. Fletcher, 104 Ind. 97 (2 N. E. 243); Canal Co. vs. Bright, 8 Colorado, 104; People vs. Goddard, 8 Colorado, 432 (7 Pac. 301)."

The act in question has but one single object, the protection of the public from the consequences of the practising of medicine in its different branches by unskilled and incompetent persons. The singleness of that object is not broken by the designation in the title of the act of certain branches of medicine as being intended to fall under, and as falling under the provisions of the act. These branches are, in fact, but fractional parts going to make up the whole subject matter at which the act is openly and publicly aimed, or so much of it as the General Assembly considered dangerous. Lucky vs. Police Jury, 46 An. 686. The various sections of the act have all direct relation to the enforcement of the purpose announced by the act. The moment that they have been found to bear legal relation to the same our inquiries cease and our duty ends, for it is the province of the Legislature and not the courts to determine which are the best and wisest methods which should be adopted for accomplishing the desired end. State *ex rel.* Mouton vs. Judge, 49 An. 1537; State vs. Slaughterhouse and Refrigerating Company, 46 An. 1034.

The claim that Act No. 49 is unconstitutional because it is a special law which is prohibited from being enacted by the General Assembly, under Art. 46 of the Constitution, is not well founded. A law upon a special subject is not necessarily a special law. The law in question is a general law, though bearing upon a special subject.

The attack upon the constitutionality of Act No. 13 of 1896 rests principally upon the belief that defendants would succeed in this suit in having Act No. 49 of 1894 declared null and of no effect. In that event it was argued that the latter act would fall with it, inasmuch as it was merely an act amendatory of the former and dependent for its own existence upon that which it sought to amend.

The opinion we have expressed as to the constitutionality of Act No. 49 of 1894 disposes of the question from that standpoint. We find nothing in the title or body of Act No. 13 of 1896 which would justify us in declaring it unconstitutional as violative of Act No. 29 of the Constitution. State vs. Slaughterhouse and Refrigerating Company, 46 An. 1032; State *ex rel.* Mouton vs. Judge, 49 An. 1537.

The appellant, in arguing upon his contention of the unconstitutionality of *Act No. 49 of 1894* as being violative of Arts. 1, 5, 7, 11, 30 *et seq.* of the Constitution, does not come down to specific objections to the law as being antagonistic to any one of the articles, but claims that certain general constitutional principles are deducible from them to which the provisions of Act No. 49 are directly opposed. "He maintains that every citizen has the constitutional right to obtain a livelihood; that the Legislature is without power to cut any one off from doing so by statute; that the prescribing for and alleviation of the sufferings of the sick is a praiseworthy and lawful occupation which the General Assembly can not prohibit a person from pursuing, especially under the guise of mere regulation; that the *Eclectic School of Medicine* is as much entitled to legal recognition as are the *Allopathic and Homeopathic Schools;* that the Legislature has no legal right to ignore it or discriminate against it in favor of the other schools; that it has no right to force a person who is proficient and skilful as a practitioner in the Electic School to have his qualifications examined into and passed upon by examining boards composed entirely of Allopathic and Homeopathic physicians; that when a person's qualifications as a physician have been tested by the laws of another State, and he has been pronounced qualified and admitted by the constituted authorities thereof to practise medicine in that State, as holding a diploma from a reputable medical institution, he has acquired a vested right to practise, which follows and protects him in the exercise of his profession in the other States of the Union. That, if a person with such a diploma and so recognized as qualified, removes to another State, and there practises medicine for some time as a physician, his right to further do so can not be taken away from him by a statute subsequently passed, as it would deprive him of his property or right to make a lawful living without due process of law; that the Legislature was without power to stop him in his practice, and make further continuance dependent upon his obtain-

ing and exhibiting a certificate of qualification from a medical board of examiners; that the Legislature was without power to constitute the pursuing of a worthy and praiseworthy calling a misdemeanor." There can be no question of the right of every citizen to earn a living. Any statute attempting in general terms to prohibit a person from doing so would be utterly null and void.

There is a very great difference, however, between so radical and sweeping a prohibition and a prohibition extending either absolutely or conditionally to certain specified pursuits which the legislative branch of the government, as guardians of the public good and general welfare, should declare dangerous to the community, and necessary for that reason to be either entirely suppressed or exercised only under certain circumstances, conditions and limitations.

Article 2626 of the Civil Code declares that "the first law of society being that the general interest shall be preferred to that of individuals, every individual who possesses under the protection of the law any particular property is tacitly subjected to the obligation of yielding it to the community whenever it becomes necessary for the general use." The same principle finds expression in Art. 491 of the Civil Code, which declares, relatively to the ownership of property, that perfect ownership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner, provided it is not used in any way prohibited by law or ordinances. The necessity of subordinating individual rights of one person to the extent necessary for the protection of the rights of others is announced also in Arts. 666 and 667 of the Code. Whenever the pursuit of any particular occupation or profession requires for the protectition of the lives or health of the general public, skill, integrity, knowledge or other personal attributes or characteristics in the person pursuing it, the General Assembly has the power and the authority to have recourse to proper measures to ensure that none but persons possessing these qualifications should pursue the calling. We find this right constantly put in force by the general as well as the State governments. Masters of boats, engineers, mates, pilots, attorneys at law, and others are required as conditions precedent to pursuing their respective business or profession to have their qualifications tested. The medical profession, upon whose skill is so much dependent the lives and health of others, is and should be as much subject, if not more, to legislative

control in this matter as are the occupations above mentioned. There is no more natural, absolute right in a person to practise medicine or surgery than there is to practise law. What is claimed to be a natural or absolute right is nothing more than a privilege or a right upon conditions. The Legislature of this State has not attempted to suppress or prohibit the practise of medicine or surgery, nor to prohibit any particular person from practising as physician or surgeon. The field is open to every one possessing the necessary qualifications for that purpose; these qualifications to be passed upon by public agencies provided by the Legislature. The General Assembly having the undoubted right to attach as a condition precedent to the privilege or right of any one to practise medicine in this State that he should be subjected before doing so to a prior examination as to his qualifications and found and declared worthy and qualified, it has as a consequence the right to select the particular agencies to which should be delegated the right and duty of testing those qualifications. It can not resolve itself into an examining board, and must, of necessity, act through delegated authority. Courts can not control the selection of these agencies by the General Assembly. The Legislature has not dealt with the Eclectic School of Medicine and discriminated against it; it has simply selected as examiners, as it had the constitutional right to do, boards of examiners composed of physicians recommended for appointment by two certain named medical societies and appointed by the Governor on such recommendation. It has required that a person before practising medicine in the State should present to the boards mentioned a diploma from a medical college in good standing, but it has not attempted to declare and fix what constituted a medical college, nor what particular colleges, nor classes of colleges were to be considered as "medical colleges in good standing." There must, of necessity, be some tribunal to which should be left the decision of those questions primarily, at least. The fact that in some particular instance a board should have improperly rejected an application made it for the issuing of a certificate to practise might possibly give rise in case of abuse to a right of action for correction, but the possibility of such misconduct would certainly not go to the extent of rendering unconstitutional the law under which the board was created.

We know of no constitutional right given to particular persons

who, entertaining peculiar theories of medicine, group themselves together and call themselves a special school of medicine, under a selected name, to be recognized as and dealt with as such. An indefinite number of schools of medicine might claim recognition, with no fixed ascertained standard to pass upon their pretensions. Plaintiff's claim that recognition of his qualifications by the constituted authorities of another State, under a decision by them that the medical college whose diploma he presented was a medical college in good standing, carries with it a vested right in him to practise in this State, has no legal basis on which to rest. The laws of other States in respect to this matter and the action of local officers under those laws have no force in themselves in this State. Each State acts independently of the others in matters of this character. Attorneys practising law in other States under diplomas from institutions recognized there as having authority to grant them are not entitled simply by reason of that fact to practise law in Louisiana. There is no reason why the rule should be different as to physicians.

The claim made that defendant was protected from legislation, making it obligatory upon him, before continuing to further practise his profession in Louisiana, to procure a certificate from the medical boards organized under the act of 1894, because he had been for several years in active practice, without objection, before the passage of the law, is not tenable. The fact that the Legislature had not, before the year 1894, considered the practice of medicine by persons not possessing qualifications fixed by a legal standard, a matter productive of sufficient mischief or injury as to call for the enactment of a statute, did not prevent it from passing one when, in its opinion, such a law had become necessary. We are not called upon to say what defendant's rights would have been had he, before the present law was passed, been expressly authorized to practise, through compliance by him with the provisions of a prior existing law granting such right. That question does not arise in this case, for it is not claimed that defendant occupied such a position or *status* under our prior law.

Defendant's contention that the General Assembly was without authority to constitute as a misdemeanor the pursuit of any legitimate and proper calling is answered by the fact that it is not the pursuit of the calling which is prohibited and made criminal, but the pursuit of the same by unauthorized persons. The General Assem-

bly having the authority to attach prior conditions to the practice of medicine, was vested with the right to enforce enactments on that subject by prescribiag penalties for violations of the same, either by fine, by imprisonment or by civil remedies.

The right to practise medicine being conditioned by law upon the prior obtaining of a certificate from a medical board, under Act No. 49 of 1894, plaintiffs were clearly authorized, when they had reason to believe that defendant was violating the law in this respect, to test the facts of the case through injunction. Whether or not the injunction taken out would be justified would depend upon the facts as disclosed by the evidence. The right to practise being dependent upon a condition precedent, it was defendant's duty, when his right was called in question, to show that he was acting under legal authority.

Coming to the merits of the case, we find the issue before us a very limited one. We are not called on to say whether the college whose diploma defendant holds is "a medical college in good standing" or not, nor to say whether defendant has, in point of fact, the qualifications necessary to entitle him to obtain a diploma from "a medical college in good standing." Those questions are not closed by the judgment below, and they will remain open for examination and decision hereafter by the medical boards organized under Act No. 49 of 1894. The question befor us is simply whether defendant prior to the issuing of the injunction which issued herein was practicing medicine in the parish of Jefferson before obtaining the certificate required by Sec. 2 of Act No. 49 of 1894, and if so, whether he was justified in so doing as falling under any of the exceptions provided for in the act.

We think it is conceded that defendant was so practising medicine without a certificate. Independently of this, however, the evidence and the line of defence set up both establish this fact. The evidence fails to show defendant to be protected by any of the exceptions of the act. Under these conditions, the law attacked being constitutional, its provisions control the case and the judgment must be affirmed. We note in the minutes of the Medical State Board, offered in evidence herein, an entry to the effect that "Dr. Fowler, from Gretna, had diploma from fraudulent college, and was denied the right to go before the board." In respect to this matter we think it not amiss for us to say that there exists no authority in any one to prevent the

defendant from going before the board by a prejudgment that the diploma under which he claims to be entitled to practise is not from a "medical college in good standing," but a fraudulent college.

It is the duty of the Medical Board to receive and pass upon all applications made to it on evidence submitted to them in each case.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

No. 13,003.

SALVADOR MAFFALETTA VS. JACQUES WILDENSTEIN. IN RE JACQUES WILDENSTEIN, APPLYING FOR CERTIORARI OR WRIT OF REVIEW TO THE COURT OF APPEALS, THIRD CIRCUIT, STATE OF LOUISIANA.

Property was sold at a tax sale.

A vendor had sold the property with full warranty for a stipulated sum.

Subsequently the property was sold for taxes assessed against the vender.

The vendees brought an action in warranty against his vendor on the ground that he had been evicted from the property, demanding the restitution of the purchase price.

The Court of Appeal rendered judgment awarding him the amount claimed.

The defence of the vendor was that no eviction had taken place. In his application for writ of *certiorari* the vendor alleged "that while alleging eviction he (the vendee) fails to prove that he had ever been evicted by any alleged purchaser of the property."

Held—Not a case for granting the writ.

Foster and *Broussard* for Petitioner.

Submitted December 5, 1898.

Opinion handed down December 19, 1898.

The opinion of the court was delivered by.

WATKINS, J. On the 6th of March, 1896, Wildenstein sold to Maffaletta a lot in the town of Jeanerette, with full warranty, for the price of $360, of which $200 was paid in cash on the day of sale, and for the residue two $80 notes were executed.

On the 11th of July, 1896, said property was sold for the unpaid taxes of 1895, assessed against Wildenstein, and adjudicated to A. J. Maumhs for the price of $13.61, and the tax collector made him a

title in due form; and Maumus made a title to the original vendee, Maffaletta.

On this stats of facts Maffaletta instituted an action of warranty against his vendor, Wildenstein, on the averment that he had been evicted and dispossessed of the property by means of the tax sale; and demanded the restitution of the entire price, $360.

In his answer the defendant resisted the suit mainly upon the ground that no eviction had taken place, and the district judge so held; but, on appeal to the Circuit Court, his judgment was reversed and plaintiff awarded the entire sum demanded.

In the petition of relator this averment is made, viz.: "That while alleging his eviction, he fails *to prove he has ever been* evicted by any alleged purchaser of the property."

This is not a case for the granting of the preliminary writ of error, or review. Constitution 1898, Art. 101.

Writ refused.

No. 12,876.

PUGH & MCKOIN VS. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY. IN RE PUGHH & MCKOIN APPLYING FOR CERTIORARI OR WRIT OF REVIEW TO THE COURT OF APPEALS, SECOND CIRCUIT.

Newton & Vaughan for Petitioners.

Hudson, Potts & Bernstein for Defendant Railway Company.

Submitted June 18, 1898.

Opinion handed down December 2, 1898.

The opinion of the court was delivered by

WATKINS, J. In our opinion this application presents an alleged erroneous ruling of the Court of Appeals upon a question of fact not examinable under Art. 101 of the Constitution. The writ applied for is therefore refused.

INDEX.

ACCOUNTS.

Reiterated that it is the fund to be distributed, and not that of the claim of the complaining creditor, shall determine the jurisdiction of this court.

Where creditors, recognized on a receiver's account, are opposed, it is incumbent on such creditors to adduce the proof necessary to substantiate their claims, and failing in this they will be stricken from the account.

After the judgment amending and homologating the account has become final and the funds have been disbursed by the receiver, pursuant to its mandate, this court, under the facts here presented, will not reverse and remand in order to permit opportunity to complaining creditors to appear and approve their claims.

Pelican Saw-mill and Manufacturing Co., p. 404.

ACTIONS.

In a suit to make the defendant the purchaser of property from insolvent debtors, liable on the ground, the defendant aided the debtors in defrauding their creditors, the price paid by him must have the weight given to it in the revocatory action.

If the price is adequate the sale will not be set aside because the debtors applied the price to pay one of the creditors, though the purchaser may have been informed of that intended application of the price.

The revocatory action is the remedy under our law for creditors seeking relief against sales or other dispositions of the debtor's property in fraud of creditors. Civil Code, Arts. 1970, 1978, 1982, 1989, *et seq*.

***Bank vs. Aarons-Mendelsohn Co., Ltd., p.* 1047.**

Several creditors of a common debtor may join as plaintiffs in a revocatory action to annul acts of the debtor and others done in fraud of their rights, and may make parties defendant in such action all who are charged with complicity in the collusion.

ACTIONS—*Continued.*

While the claims of such creditors may not be cumulated for jurisdictional purposes, where, under the averments of the petition, a moneyed judgment is claimed against defendants largely in excess of the minimum jurisdictional limit of this court, the appeal will be maintained.

The law reprobates all unfair preferences by which an insolvent debtor seeks to give one creditor an advantage over another.

And the fact that the machinery of the law and the courts is used as a cloak to effectuate the fraudulent purpose aggravates the offending.

Marx et als. vs. Meyer Bros. et al., p. 1230.

The object of this action is to remove a cloud, a fictitious incumbrance, a simulated mortgage, appearing on the public records against certain real property standing in the name of an insolvent.

It is not an action directed against either the person or property of the insolvent, but a proceeding directed against the apparent incumbrance. One or more of the parties defendant being strangers to the insolvent proceedings and without interest therein, plaintiffs can not be forced to litigate the questions arising with him, or them, in the *concurso* or insolvent proceedings, but may bring an independent action and make all persons in interest parties thereto, including the syndic of the insolvent estate.

Baldwin & Co. vs. Cappel, p. 315.

The right of action for damages *ex delicto*, under Art. 2315, C. C., does not survive in favor of the children of age.

The right survives in favor of the minor children, or widow of the deceased. The descriptive words of the article do not include the heirs of age. The right is personal and limited to those indicated by the statute.

The right given to the minor, in whose behalf it (the right to damages) is not claimed or exercised during minority, abates after her majority.

The right is attached to the person and is not heritable. Affirming Hermann vs. Railroad Company, 11 An. 5; Hubgh vs. Railroad Company, 6 An. 496; Walton vs. Booth, 34 An. 913; Chivers vs. Rogers, 50 An. 57.

Huberwald et als. vs. Railroad Company, p. 477.

ADMINISTRATION.

The succession owed no debt. The appointment of an administrator would only be productive of delay and expense in the settlement of the succession and would not effect more than can be done by the heirs in the matter of the partition. The judgment of the District Court, rejecting the application of one to be appointed administrator, is affirmed.

The administrator is not a necessary party to the final liquidation.

Succession of Graves, p. 435.

Any party in interest may obtain the judgment homologating the account of the executor.

The affidavit of the executor to the correctness of the account suffices for the judgment of homologation. C. C. 1172, 1173; 29 An. 521, 827; 21 An. 511.

The judgment of homologation, when final, precludes subsequent oppositions, and entitles the parties placed on the account to the distribution fixed by the account and judgment. C. C., Art. 1065; 12 La. 121; 4 An. 450; 1 Hennen's Digest, p. 759, No. 2.

Reserving enough to cover oppositions, the executor may be required, when the account is homologated, to pay the amounts to the parties placed on the account as entitled to such amounts.

Succession of Rabasse, p. 746.

ADMINISTRATOR.

The administrator of the wife's separate estate is without authority to have community property sold, particularly as it does not appear that it was for the purpose of paying debts of the community.

The settlement of the wife's estate (different from the husband's) does not involve a settlement of the community; and therefore the executor of her estate is without warrant for assuming control of property held in community.

The heirs had not been notified, and do not appear to have consented to the sale of the community interest inherited by them from their father's estate.

Succession of Fernandez and De La Rosa, p. 564.

It being alleged by an opponent, claiming appointment as administrator of a succession by preference, that a prior applicant

ADMINISTRATOR—*Continued.*

therefor has been illegally and prematurely appointed, and that the order of appointment and the letters of administration thereunder issued are absolutely null and void and *ultra vires*, no right or title can absolutely vest in the appointee so long as such opposition remains undisposed of.

As, under the law, no suspensive appeal can be taken by an opponent claiming appointment as administrator from an adverse judgment, radical defects and illegal proceedings of the court in respect thereto are open to examination by the Supreme Court in the exercise of its supervisory jurisdiction.

Ex rel. Moore vs. Judge, p. 683.

AMICABLE COMPOUNDERS.

Amicable compounders are judicial appointees who are selected by the parties to a litigation over partnership and like matters; but once they have been appointed and qualified, and one or more of them resign and others are appointed in their stead, it will be assumed that such appointments were authorized unless the contrary clearly appears.

Goldman vs. Goldman, p. 29.

APPEAL.

When the record of appeal or the petition of the litigant is suffered to be filed or the cause heard, and it is then ascertained that by inadvertence the record or petition is not properly stamped, or the stamps defectively canceled, if the litigant tenders the requisite stamps properly canceled, the offer should be accepted and the suit not dismissed. 37 An. 573; 46 An. 1208; 43 An. 883; Stamp Act No. 136 of 1880.

State ex rel. Andrieu vs. Judge, p. 113.

A sentence imposing a fine for violation of a municipal ordinance was sought to be appealed from, alleging the illegality and unconstitutionality of the fine.

It appearing that the judgment in question has been acquiesced in and the fine imposed paid without qualification or protest, the writ of *mandamus* to compel the granting of the appeal is denied.

State ex rel. Perilloux vs. Magistrate, p. 388.

APPEAL—*Continued.*

Plaintiff's debt and attachment were placed at issue by the averments of the interventions. This debt exceeded the amount necessary to give this court jurisdiction. Therefore, as regards the plaintiff, the suit and all of its incidents are subject to an appeal here. It matters not that the sum claimed by intervenors is below the appealable amount.

Newman & Baer vs. Levy, p. 323.

Motion was made to dismiss the appeal on the ground that the order dismissing the writ of attachment was interlocutory and did not work irreparable injury.

That the appeal should not be heard prior to an appeal on the merits of the cause.

Held: The judgment was in nature final enough to sustain an appeal, and that an appeal may be taken from an interlocutory order which dissolves an attachment and releases plaintiff's grasp on the property attached.

Unquestionably plaintiff has the right to be heard on appeal in matter of the decree dissolving the attachment.

The only question is prematurity, *vel non;* there being a necessity, if the attachment issued properly, of preserving a right exposed to loss, the appeal is not premature.

Bayne & Onorato vs. Cusimano, p. 361.

There is no legislative authority to try appeal cases in the District Court before juries. The right to trial by jury is given in civil cases before courts exercising original and not appellate jurisdiction.

The issue regarding the improper division of the amount into three different suits was not before the Supreme Court, it not having been raised before the District Court.

Ex rel. Neyland vs. Judge, p. 445.

The State is entitled to an appeal from a ruling of the trial judge on a motion in arrest of judgment, sustaining the motion and setting aside the verdict. The order annulling the verdict was in character final, and if erroneous, caused injury.

State vs. French, p. 461.

There were substantially two decrees, and in consequence, properly. two appeal bonds were furnished instead of one.

APPEAL—*Continued.*

Nothing in the law required the applicants to join in one bond of appeal.

The erroneous substitution of "or" to "and" in the condition of the bond was not cause to dismiss. There was a substantial compliance with the forms required.

Beckham vs. Hutchinson, p. 765.

The Supreme Court does not anticipate on a motion to dismiss, the issues which the appellant proposes to submit to it. On a trial of the merits it can announce certain issues as not having been properly brought up on appeal, and others as having no merit. Appeals are frequently dismissed after hearing when it would be improper to dismiss them on a motion *in limine*. Brown vs. Land Company, 49 An. 1780; Saw-mill Manufacturing Company in Liquidation, 48 An. 715.

Where the matter before the Supreme Court is an appeal by a creditor of a succession, which is still under administration, from a refusal by the District Court to order the administrator or executor to file an account, the appellate jurisdiction of the court is tested by the value of the succession, not the amount of the claim of the creditor asking the account. It is the right to the account, and not the effect of the account, which is the matter in dispute. 35 An. 19; 38 An. 244; 48 An. 418.

Under our law the right of the heirs to be recognized and put in possession is not dependent upon or deferred until the executor files his account; they may require or waive. Code of Practice, Art. 1003, *et seq.;* Civil Code, Art. 1671; Revised Statutes, Sec. 3678; Succession of Fisk, 3 An. 707.

When the heirs have been recognized and put in possession the creditors of the succession can not require the executor to file an account, but must seek payment of their debts from the heirs. Succession of Duffy, 795.

An appeal lodged in the Supreme Court should be dismissed when it has been made to appear that the appeal bond furnished by appellant was set aside in the lower court for want of sufficient security, but with the right reserved to file a new bond within a fixed delay, and such reserved right was never exercised.

Stewart vs. Cattle Company, p. 845.

APPEAL—*Continued.*

The extended return day for the filing of the transcript of appeal occurring on a *dies non*, the appellant is entitled to the whole of the next day to file same, or to apply for an additional extension—the extended return day not having occurred in term time.

Bank vs. Mendelsohn, p. 1047.

No appeal lies to the Supreme Court from a verdict and sentence condemning the defendant to pay a fine of ten dollars, or in the alternative suffer imprisonment in the parish jail for a period of ten days.

State vs. Hand, p. 1076.

The writ of sequestration which issued in the case covered property the value of which the judge of the District Court, after hearing evidence, fixed at less than two thousand dollars.

All parties interested acquiesced in the value as fixed. An appeal will not lie to this court for want of jurisdiction from an order permitting the defendant to bond property when its value is less than two thousand dollars.

A writ of *certiorari* issued in aid of the application for a writ of *mandamus* does not present other issues than those raised in the application for the *mandamus*.

State ex rel. Supply Co. vs. Judge and Douglass, p. 1168.

Questions of fact occurring in the course of the trial in the court below, and which are therein assigned as error by counsel for the accused, are not examinable in the Supreme Court.

State vs. Williams, p. 1322.

ASSESSMENT.

A tax assessed against money in possession of the liquidators of an insolvent bank is neither illegal nor unconstitutional, as it comes within the designation of both the Constitution and revenue law as property which is subject to taxation.

Ex rel. St. Amand vs. Bank, p. 696.

Where there is doubt, an appeal will not be dismissed. If a bond be not sufficient for the suspensive appeal taken, it yet remains good for the devolutive appeal.

ASSESSMENT—*Continued.*

A distinction is to be drawn between suits to correct an assessment, and suits which go to the inherent validity of an assessment and to the legality of the tax based thereon.

Those of the first class must be instituted within the time fixed by the statute; those of the latter class are not subject to such time limit.

Railroad and Steamship Co. vs. Sheriff et als., p. 737.

A perfectly correct assessment by no means carries with it as a necessary result the validity of subsequent proceedings made in the enforcement of the tax assessed in the name of the party assessed. Hood vs. City of New Orleans, 49 An. 1461; Hodding vs. City, 48 An. 982; Hoyle vs. Southern Athletic Club, 48 An. 879.

Notice of assessments as having been made is something other than notice of delinquency, and of an intention of selling the property assessed on failure to pay the taxes within a specified time. They are distinct matters touching different steps in the enforcement of taxes.

Article 210 of the Constitution requiring that notice should be given to the taxpayer contemplated that reasonably diligent steps should be taken to make the notice effectual.

Notice of delinquency and notices of a proposed intention to sell the assessed property should the taxes be not paid within a specified time placed in a letter mailed at New Orleans, the place of assessment, and directed to the party assessed as living at New Orleans, is insufficient, where the party assessed had been living in Europe and had died there many years before the assessment —when her succession had also been opened in the District Court for Orleans, and her heir had been recognized and ordered to be placed in possession, and when the property had all the time been in possessionof a tenant who could have given information of the facts of the case.

Where a defendant in a petitory action is evicted from land which he has purchased at a tax sale he should recover from the owner evicting him, the taxes which he has paid on the land. Walsh vs. Harang, 48 An. 984. Genella vs. Vincent, 956.

Once an assessment has been completed and the roll has been deposited in the clerk's office and a copy thereof delivered to the

ASSESSMENT—*Continued.*

tax collector for the collection of taxes, neither the correctness of the levy nor the assessment can be tested in a proceeding contradictorily with the tax collector alone.

Railway Company vs. Sheriff, Tax Collector, et als., p. 1054.

ATTACHMENT.

Suit having been commenced against several non-resident defendants by attachment and the garnishment of resident commission merchants, as stakeholders, a judgment pronounced against them upon traverse of their answers will be reversed if the evidence substantially shows that they have paid and satisfied the plaintiff's demand. *Tribbette vs. Grim et al., p.* 236.

ATTORNEY.

The attorney, not his client, is responsible for (alleged) defamatory utterances of the former in the course of the trial of the latter's cause. R. S. 123.

Monroe vs. Lumber Company et als., p. 142.

BILLS OF EXCEPTION.

No bill of exceptions was reserved necessary to attest the supposed error. There was no error apparent on the face of the record. In the absence of any bill of exceptions or assignment of error of any sort, or error apparent on the face of the papers, the verdict and decision of the trial court are not reviewable.

State vs. Rogers, p. 759.

BUILDING ASSOCIATIONS.

A building association to whom one of its stockholders is indebted for stock subscription, and also on a note secured by mortgage, can not be forced by a junior mortgagee to impute partial payments made by the debtor upon the mortgage debt when under the contract between the parties they were to be imputed to the stock indebtedness. Richard vs. Building and Loan Association, 49 An. 484.

Bank vs. Hyams, p. 1110.

CERTIORARI.

Prohibition or *certiorari* is not a proper remedy where relief can be reached through appeal. 47 An. 1062.

Ex rel. Rozier vs. Judge, p. 19.

CERTIORARI—*Continued.*

Judgment was rendered on appeal by the Court of Appeals. No question of jurisdiction in the pleading or in argument was raised. Want of jurisdiction was suggested the first time on application for rehearing, which was overruled.

Under *certiorari* or prohibition this court can correct proceedings in progress, but after the proceedings are ended writs go to the execution of the judgments. C. P. 847, 853; 5 R. 37.

Ex rel. Bank vs. Judges, p. 26.

This court on application for a writ of *certiorari* does not try the merits, but confines itself to inquiring whether or not the inferior tribunal kept within its jurisdiction and proceeded regularly.

In the order the respondent court returns the exceptions and the answers were filed in the justice of the peace court; the respondent court properly held that the relator had waived jurisdiction *ratione personæ* in the magistrate's court.

Matters not regularly appearing of record were not before the court, and could not, therefore, traverse the return made.

Ex rel. Atkins & Wideman vs. Judge et al., p. 55.

The preponderance of authority establish that *certiorari* lies if notice is not given to parties before adjudicating upon their rights.

State ex rel. Griffith vs. Reed & Kennedy, p. 170.

The relatrix having set out as grounds for relief by *certiorari* that the respondent judge had not passed upon a plea to the jurisdiction and other pleas in the course of his decision of a cause pending before him, and the proof made by his return shows that he had in point of fact passed upon and decided said pleas, said relief will be refused.

Ex rel. Forstall vs. Judge, p. 659.

Discretionary with this court, on the case as presented, to grant or withhold the writ of *certiorari*, or review, contemplated by the latter clause of Art. 101 of the Constitution of 1898.

Not intended by the power there granted to make of the Supreme Court a sort of superior court of appeals over the Circuit Courts, to take jurisdiction of, and hear and determine any and all cases decided by the latter courts.

Nor that the Courts of Appeal should be made merely a stopping place for causes on their way from the District Courts to the Supreme Court. It was, rather, the intention that the power thus lodged in the Supreme Court should be exercised only in special or extreme cases, whose peculiar circumstances, as to facts or law, justify, in the opinion of this court, a resort to it. *In re Ingersoll, Applying for Writ, p.* 748.

1. The power to review by writ of *certiorari* the decisions of the Court of Appeals was conferred on this court mainly to secure uniformity of jurisprudence, and to authorize such review when the question decided by the Court of Appeals was one of law and public importance. The provision in the Constitution of 1898, conferring on this court this power to issue writs of *certiorari*, is given in the terms of the acts of Congress of March 3, 1891, authorizing the Supreme Court of the United States to review by *certiorari* the decisions of the Circuit Courts of Appeals, and the jurisprudence of the Supreme Court of the United States, under the act of 1891, furnishes a guide for us in the exercise of this new jurisdiction. Constitution of 1898, Art. 101; Act of March 3, 1891; 26 Statutes, p. 828, Sec. 6; 141 U. S., p. 583; 144 U. S., p. 47; 162 U. S., p. 435; 165 U. S., p. 448.
2. The writ will not issue to review decisions of mere questions of fact. *In re Murff Applying for Writ of Error, p.* 998.

The writ of *certiorari* under Art. 101 of the Constitution of 1898 will not issue to review decisions of the Courts of Appeal of mere questions of fact, See *In re* A. J. Murff praying for the writ, 50 An., not reported.

In re McLain et al., p. 999.

Certiorari, under Constitution, Art. 101, will not issue to review decisions of Court of Appeals as to question of fact. (*In re* Ingersoll, 50 An., 748; *In re* McLain, 50 An., 999; *In re* Murff, 50 An. 998.

Applicants to Supreme Court for *certiorari* under Art. 101 of the Constitution from decisions of Courts of Appeal, should assign their particular grounds of complaint, and specify wherein, in their view, the decisions sought to be reviewed depart from the jurisprudence of the State. *Henkle vs. Bussey, p.* 1135.

CERTIORARI—*Continued.*

Property was sold at a tax sale.

A vendor had sold the property with full warranty for a stipulated sum.

Subsequently the property was sold for taxes assessed against the vendor.

The vendees brought an action in warranty against his vendor on the ground that he had been evicted from the property, demanding the restitution of the purchase price.

The Court of Appeal rendered judgment awarding him the amount claimed.

The defence of the vendor was that no eviction had taken place. In his application for writ of *certiorari* the vendor alleged "that while alleging eviction he (the vendee) fails to prove that he had ever been evicted by any alleged purchaser of the property."

Held: Not a case for granting the writ.

Maffaletta vs. Wildenstein, p. 1377.

CERTIORARI AND PROHIBITION.

A district judge having granted and made a writ of *mandamus* against a justice of the peace peremptory, commanding him to grant a writ of injunction against the consummation of an execution sale, because the defendant had not been notified of the proceedings antecedent to trial and judgment, same will not be disturbed or inquired into by means of *certiorari* and prohibition, if same appear to have been regular and jurisdictional.

Ex rel. Moyse Brothers vs. Judge et al., p. 492.

CESSIO BONORUM.

The cession by the debtor to his creditors, operating on all his property, that subject to privileges and mortgages as on that not encumbered, vests in the creditors the right of possession of all such property, to be held, sold, and proceeds applied by the syndic of the creditors to the payment of the debts of the ceding debtor, all rights of the mortgage and privileged creditors being preserved in the proceeds. Revised Statutes, Secs. 1790, 1791, 1816; Civil Code, Arts. 2170, 2176, *et seq.*; 1 Hennen's Digest, p. 689. Nos. 11, 13, 15.

Hence, the possession by the sheriff of the debtor's property, under writs in suits pending, is divested by the cession, the property

CITATION—*Continued.*

transfered to the syndic, the suit is arrested in its further progress, and the right to release on bond in sequestration suits given to plaintiff ceases, when, prior to his application to bond, the defendant makes a cession to his creditors. *Ibid.*; 1 Martin, 207; 4 Martin, 264; 12 Martin, 666; 14 An. 648; 12 Martin, 32; 8 Rob. 172.

Ex rel. Simmons & Cohn vs. Judge, p. 621.

CITATION.

To be legal and valid citation must be addressed to the company or corporation, and not to the president of the same.

The lack of a legal and valid citation is such a radical defect in the proceedings that it can be reached and corrected by *certiorari* exercised under the supervisory jurisdiction of the Supreme Court at any stage of proceedings.

Ex rel. Telephone Exchange Company vs. Judge et al., p. 671.

A sheriff's return disclosing that service of citation and writs of attachment and sequestration were made by handing copies thereof to a curator *ad hoc*, the same is illegal and void because they do not conform to the positive requirements of the Code of Practice; and as those formalities stand in lieu of citation to a non-resident, and must be strictly complied with on pain of nullity, the suit must be dismissed and the writs dissolved, because the jurisdiction of the court did not attach.

A party sued as an absentee and non-resident of the State, and her property attached and sequestered, may be subjected to the jurisdiction of the court during the pendency of the suit by personally serving her with a citation, and thereupon a personal judgment may be rendered against her for the amount of the debt demanded.

But this service of citation does not possess the retrospective effect of curing a defective service of writs of attachment and sequestration to which the curator *ad hoc* had excepted prior thereto

Elder & Davis vs. Ludeling, p.. 1077.

CITY ORDINANCES.

Proceedings directed against parties for violations of city ordinances should be in the name of the city, not that of the State.

State vs. Faber, 952.

CIVIL DISTRICT COURT.

Upon the organization of the Civil District Court for the Parish of Orleans created by the Constitution of 1879 all causes pending in the then existing Civil Courts for that parish were directed by the Constitution to be transferred to the *new* Civil District Court.

This invited legislative action to effectuate more fully the constitutional intendment. But none was taken. This failure resulted, *ex necessitate rei*, in remitting the method of removal to such regulations as the new courts might prescribe, or such orders pertinent thereto, as they might make, guided by the light of precedent and jurisprudence.

Hence, the supersession of the new courts did not *ipso facto* operate a transfer of the causes pending in the old courts to the new, nor were the records of the suits to be considered as of right, or in fact, filed, *eo instanti*, in the new courts.

Something was required to be done by the parties in interest in the pending causes to bring about their transfer, and until this was done the jurisdiction of the superseding court did not attach.

Without such action, the papers, or the record of a cause, remained in the hands of the city officials, appointed to their safe keeping, without preserving after the long lapse of time, as in this case, the status of a pending suit.

The instant case remained thus without action for its transfer for seventeen years, and meanwhile three of the four original parties to the suit had died, and the record was lost. Effort is now made to transfer, revive and substitute the record. This is met by the plea of prescription—Held: The cause must be considered as having been abandoned and practically discontinued, and the attempt now made is viewed as tantamount to the bringing of the action anew after discontinuance, and the prescriptions applicable to such action are considered as having not been interrupted. C. C., 3519-3551. *Raymond et als. vs. Conery*, p. 155.

CLERKS OF COURT.

Clerks of the District Court throughout the State, the parish of Orleans excepted, are authorized by Act No. 106 of 1880 and Act No. 43 of 1882 in the absence of the District Judge from the parish, or in case of his recusation, to order the execution of writs and to confirm testamentary executors.

McNeely vs. McNeely, p. 823.

COMMUNITY OF ACQUETS AND GAINS.

Items of different accounts were taken to form a total in the final account.

They are not separate and distinct from the total acknowledged in the final account, and could not be allowed without charging the same item twice.

The last total was correct.

The husband or his heirs, who claim an amount, which went to the purchase of community property, must establish satisfactorily that the price was paid out by his separate fund.

An amount received by the husband, a few days prior to his death, not shown to have been retained (as charged) by the widow, was not deducted, as due by her, or by the community.

The claim had been rejected on opposition to a provisional account.

Succession of Lyons, p. 50.

CONFEDERATE STATES.

Contracts made during the late war in one of the Confederate States, payable in Confederate money, will be enforced in the Supreme Court, when the value of same, as compared with lawful money of the United States at the time and place of contract is ascertained by proof.

An executory contract, made in 1862 in Louisiana, for the future delivery of cotton to the Confederate States government, for and in consideration of Confederate States bonds, to be furnished thereafter, does not evidence a complete sale; only a promise of sale which entitled the promissee to sue for a specific performance, or damages for the non-fulfilment of the contract.

White et als. vs. White, p. 104.

CONSTITUTION.

Where the legality or constitutionality of a municipal ordinance imposing a fine is not attacked, this court can not, through an appeal, inquire into the legality of the proceedings taken or the correctness of the judgment rendered.

State vs. Hohn, p. 432.

Whatever be the view concerning the gravity of the offence against a State law, the very fact that the Legislature authorizes the towns and cities of the State to deal with the same subject by ordinances indicates that to the legislative mind the act also

CONSTITUTION—*Continued.*

properly constitutes one of those petty offences which are regarded os local injuries.

The public welfare requiring the maintenance of peace and good order, as well as of careful sanitary regulations in towns and cities, renders summary proceedings in many cases a necessity; and no occasion is presented for the inauguration of the revolution that must follow the announcement of the doctrine that a jury trial is an indispensable prerequisite.

The provisions of Art. 92 of the Constitution of 1879, which confer upon municipalities within the State cognizance of cases arising under police regulations, authorize the enactment by the Legislature of laws enabling them, by appropriate ordinances, to put same in force; and they constitute an exception to the general rule announced in Art. 7 thereof, which guarantees to an accused person the right of trial by jury—notwithstanding the offences appear to be identically the same.

City vs. Holly and Wife, p. 627.

Taxpayers have a standing in court to contest upon proper charges the validity of a municipal ordinance or contract executed under it, whenever its enforcement may increase the burden of taxation. Handy vs. New Orleans, 39 An. 107.

Article 51 of the Constitution, which declares that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher or teacher thereof as such, and no preference shall ever be given to, nor any discrimination against any church, sect or creed of religion, or any form of religious faith or worship, nor shall any appropriation be made for private, charitable or benevolent purposes to any person or community; *provided*, this shall not apply to the State asylums for the insane and deaf and dumb and blind, and the Charity Haspital, and public charitable institutions conducted under State authorty," refers to appropriations made by the General Assembly, and to moneys taken from the State treasury, not to appropriations made by the common councils of cities, or to moneys taken from the city treasuries.

Article 56 of the Constitution prohibits the loaning, pledging or granting of any fund of the political corporations of the State to

CONSTITUTION—*Continued.*

any person or persons, association or corporation, public or private. To the extent that any appropriation made by a city council in favor of a charitable association of the city exceeds in amount the precise legal equivalent rendered by the particular institution which is to receive it for the support of just such persons as the city itself would be legally chargeable with, the appropriation evidences a donation and a gift, and by reason of that fact it is beyond the power of the council to make it under Art. 56 of the Constitution. Appropriations to charitable associations granted from a general sense by the council of the laudable objects and purposes of those institutions, but having no fixed, certain, established consideration for the same, are at best remunerative donations for possible anticipated future benefits, and not being based upon contract express or implied are *ultra vires*.

The twenty-first and twenty-fourth sections of the charter of the city of New Orleans, defining the duties of the city comptroller and treasurer, did not contemplate that an appropriation by the City Council should *per se* justify the withdrawal of the amount of the same from the city treasurer. They obviously intended that each claim presented under an appropriation should be subjected to examination and auditing, and should be based upon affirmatively shown exact legal consideration.

Ex rel. Orr vs. City, p. 880.

The provision in Art. 117 of the Constitution that the District Court shall hold continuous sessions of ten months, the judge sitting alternately in each parish of the district as the public interest may require, is operative of its own force without legislation.

State ex rel. Murray vs. Judge, p. 985.

CONTEMPT OF COURT.

See *Mandamus*.

CONTRACTS.

A factor holding as collateral security for the payment of the ultimate balance to be due him on his factor's account the negotiable note of his customer, bearing interest after maturity, and secured by mortgage on his plantation, must be prepared to

surrender the collateral when the account is closed, and payment of the amount due is tendered him by the debtor.

If such collateral note has been transferred by the creditor before its maturity to a third person, and by reason of such fact the factor can not surrender it, he will be responsible to the maker of the note for any amount over and above that due on the account (payment of which has been so tendered) which he was forced to pay to the third holder of the note.

When such a collateral note had been given to a factor to secure a specific debt the latter can not refuse to surrender the same when the debtor tenders payment of the debt which it secures, by reason of alleged indebtedness of the customer upon unliquidated and disputed claims arising from other separate and distinct contracts.

A creditor who in bad faith retards or prevents the execution of a contract to do can not claim from the debtor damages for the non-execution of the contract. C. C. 1934, par. 4.

Where the execution of a contract has been rendered impossible in its entirety by reason of a fortuitous event not preceded by some fault of the debtor, the creditor can not exact damages for non-execution. C. C. 1933.

If the contract to do consists of successive obligations to be performed at different times, the non-execution by the debtor of one of these successive oblightions by reason of a fortuitous event not preceded by some fault of the debtor withdraws from the creditor the right to exact damages for the non-execution of that particular obligation. C. C. 1898.

A contract between a factor and a planter by which the latter binds himself to ship his crop to the factor, who is authorized to to charge two and a half per cent. commission on sales of the same, does not justify the factor in charging two and a half per cent. commission on the amount of the bounty paid by the government to the planter in the crop. The bounty does not represent sales made by the factor.

In a contract between a planter and the owner of a refinery, the planter engaged to grind for a number of years the cane upon his plantation, at his own sugar house, to there convert it into syrup and then to convey it the refinery through pipes purchased and laid down at its own expense by the refinery, the

CONTRACTS—*Continued.*

refinery engaging to convert the syrup into sugar at a fixed price per pound. During the second year of the contract a fire destroyed the planter's sugar house, placing it out of his power to comply further with his obligations. The contract contained a clause that the planter should at the end of the contract, purchase the pipes at their value. *Held:* That the refinery owners in thus assuming the deterioration of the pipes during the contract did so in view of continuing benefits to itself to result from it, and, being deprived of those benefits by the fire, the court would give the refinery the benefit of the highest estimate placed upon the value of the pipes sustainable under the evidence.

Romero & Bayard vs. Newman, p. 80.

The owner contracting with two partners for the erection of a building will not be deemed to discharge one of the contractors simply because they dissolve their partnership, and the owner makes one of the payments to the partners charged by the dissolution with the completion of the building contracts of the firm and authorized by the other partner to receive such payment. Novation is never presumed and the discharge of neither of the contractors can be inferred from the owner's action. Civil Code, Arts. 2185, 2186, 2290, 2192 *et seq.*

Nor will the consent of the owner in such case to the abandonment by one of the contractors be inferred, no such consent having been asked or granted and both contractors remaining bound to the owner.

The contract of suretyship will not be deemed avoided under the stipulation of notice to the sureties of any act of the building firm for whose performance of their contract the sureties bind themselves, because the sureties are not apprised of the dissolution of the building firm, the firm remaining bound as before the dissolutien for the fulfilment of their contract, and notice having been given of the subsequent abandonment by the firm of their contract work. Building and Homestead Association vs. Deposit Company, No. 2, 307.

After being *in mora* by written demand, followed by the filing of a suit to rescind, the offer to execute by the obligor of a contract comes too late.

Charges in defendant's answer of violation of the terms of the con-

CONTRACTS—*Continued*.

tract by plaintiff, and basing thereon reconventional demand for rescission and for damages, is inconsistent with offer to perform made previously. One seeking relief through rescission of a contract must offer to restore his adversary to the sitution he was in at the time the contract was entered into.

Clover vs. Gottlieb, p. 568.

If in the attempted performance of a commutative contract to transport sugar cane from the field to the factory and pay the purchase price for cane agreed upon, the cane becomes sour and unfit for use by a "freeze," to which the cane was exposed owing to deficient means of transportation, the purchaser was bound to furnish, he must bear the loss resulting from the freezing temperature.

Delahoussaye vs. Sugar Factory, Limited. p. 544.

A contract which contains a stipulation to the effect that the obligor guarantees the trade of his laborers and lessees to the tenant of his storehouse, so far as he is able to control the same, is not an agreement to coerce the laborers and lessees to purchase goods from the proprietor of the store. Hence such a contract is not *contra bonus mores.*

Dionne vs. Refining and Planting Association, p. 690.

A sugar refinery company entered into contracts with its customers, being sugar planters (among others with plaintiff), by which the planters agreed to sell and deliver to the company, on cars or switch nearest their respective plantations, their crops of sugar cane, and the company bound itself to purchase and receive said crops to pay all railroad freights delivered under the contracts, and to pay cash to the planters at the rate of ninety cents per ton (less freight) of the price for each cent of the price of prime yellow clari ed sugar, according to official quotation of price.

Plaintiff's plantation being near the refinery, his particular contract was modified so as to permit him to deliver his crop at the refinery with his own carts, the refinery company agreeing to pay him twenty cents per ton more—*Held:* That the freight rate was not a mere deduction from a charge upon an otherwise fixed price for the cane per ton. It was one of the two factors upon which the company fixed the price itself. The price itself

CONTRACTS—*Continued.*

agreed upon was what would remain after deduction of a fixed rate of freight conventionally agreed upon between the parties from the second variable or sliding factor.

The agreement of the company with the plaintiff was that he should receive twenty cents net more than the other planters.

Le Bourgeois vs. Gramercy Co., Ltd. p. 813.

Plaintiff's witnesses sustained his claim, under the contract for services rendered during three months on Washington street. The report of one of defendant's officers, and a certificate issued thereon, showed that all needful repairs had been made up to within a few days prior to the end of those three months.

Held: That this claim was properly allowed by the District Court.

Plaintiff failed to show full compliance with the contract for two of the months claimed, and the preponderance of proof sustain defendant's claim of failure of plaintiff to comply with his contract as to these months.

Held: That plaintiff's claim for these months was properly rejected.

Interest is due, from the time the debt became due and exigible as against a municipal corporation; if it have in its treasury the amount provided for its payment.

Paving and Improvement Company vs. City, p. 1173.

CONTRACT OF FERRIAGE.

In a contract for ferriage, safe transportation is not merely an incident of the contract, but it is its very direct object. When the obligor fails to perform that obligation the obligee is entitled to damages just as the obligee is entitled to damages for inexecution of any other contract unless the obligor can offer just and legal reasons for non-execution. He who claims the execution of an obligation must prove it. On the other hand, he who contends he is exonerated must prove the fact which has produced the extinction of the obligation. The very fact itself of the non-execution of a contract carries with it the presumption of a "contractual fault" from which the obligor has thrown upon him the *onus* of freeing himself.

Where a person having paid for a ticket for ferriage has, on invitation of the employees of the ferry company, passed out upon an iron bridge leading to the ferry-boat, and while standing thereon

CONTRACT OF FERRIAGE——*Continued.*

it broke, precipitating her into the river, it is not for the passenger to prove that the breaking was due to the negligence of the company, but upon the company to establish affirmatively a state of facts which would release it from responsibility.

Patton vs. Pickles, p. 857.

CORPORATIONS.

There was not a partnership liability of stockholders even if, as contended by plaintiff, the corporations of which the defendants were stockholders was a defective and illegal corporation, for the reason that the plaintiffs had notice of the stipulation to secure limited liability of the stockholders and contracted their debt with reference to the limited liability of three of the defendant stockholders.

Plaintiffs carried defendants policitation into effect and received actual benefits therefrom.

The law points out no special form of acceptance of a policitation.

Performance of the condition upon which the offer is made and benefits derived from the transaction are acceptance enough, and concludes the one accepting from recovering more than the limited liability proposed when the proposal was made, and to which no objection was ever made by plaintiffs while it was being carried out.

Sentell vs. Hewitt et als., p. 3.

All the stockholders of a corporation having executed a full, complete and perfect act of ratification of an adjudication at public auction, same relieves the sale of any and all the alleged illegalities in the proceedings leading up to same, such as want of authority in the board of directors to direct a sale to be made, and that the adjudication was at a price less than a stockholders' meeting had previously authorized to be accepted therefor.

Mineral Spring Co., Ltd., vs. DeBautte, p. 1281.

A stock subscription by which the corporation in the full exercise of its functions was organized can not be repudiated by some of the shareholders, and the corporation thrown into the hands of a receiver, merely and only on the ground taken by the dissatisfied shareholders that the subscription was illegal, the subscrip-

tion having been approved by all of them, and the full amount of which the corporation retains.

The appointment of a receiver for a corporation will not be made with no allegations of mismanagement, improper application of funds or other acts of corporate maladministration, and only on the general allegation of the shareholders seeking the appointment, that they apprehend exposure in the future, if the corporation is not wound up, to liabilities not contemplated when they became shareholders. High on Receivers, Secs. 17, 11, 24, 288, 293.

Mulqueeney et als. vs. Shaw et als., *p.* 1060.

COURTS.

The amount realized fram a sale of the property under foreclosure proceedings had been paid out to creditors with the consent of all concerned. There remained in the hands of the sheriff for distribution an amount less thon the lower limit of the court's jurisdiction, and the claim of the opponent was also less than that limit. The court had no jurisdiction.

Kline vs. Succession of Murphey, *p.* 518.

The authority of a judge *ad hoc* over the judgment which he had rendered does not end with his signature to the judgment. So long as he has not resigned nor vacated the position in some legal way, and the case is before the court which made the appointment, he retains control over it. The cause in a limited sense may be considered terminated, but for many purposes it remains a pending suit until finally disposed of (Brown vs. Pontchartrain Land Company, 49 An. 1779; State *ex rel.* Ludeling vs. Judge, 39 An. 794).

He is the proper person to take cognizance of an application to have defendant in injunction, who has violated the injunotion, ruled into court for and punished for contempt.

Ex rel. Morgan vs. Judge and Lumber Company, *p.* 807.

COURT OF APPEALS.

The judgment of the Court of Appeals does not become final by the lapse of ten days after the adjournment when there is pending and undisposed of a rule for a new trial seasonably taken by the

COURT OF APPEALS—*Continued.*

party cast. C. P., Arts. 546, 558; Act No. 100 of 1896; 35 An. 1104.

Ex rel. Hall vs. Judges, p. 409.

An irregularity or want of notice of a rule for new trial is unimportant when the testimony brought up on the appeal supports the judgment sought to be set aside on the new trial.

Sealy vs. Hall et als., p. 412.

The decree of a court of appeals does not become final by the mere disagreement of the court arising on the application for a rehearing.

One of the judges was of the opinion that the judgment handed down was erroneous, the other judge that it was not erroneous.

Where two judges can not concur for any reason in regard to their decree, the court shall select a district judge to sit in the case to determine with the other members of the court, after having considered the merits of the controversy, whether the judgment should become final by refusal to grant a rehearing, or whether it should be reversed, or whether other disposition should be made of the case.

There was no ground for decision in the matter involved.

Ex rel Thrower vs. Judges, p. 644.

Grounds restated upon which this court will grant its writ to review decisions of the Courts of Appeal. Article 101 of the Constitution does not invest this court with appellate jurisdiction over the Courts of Appeals, or grant to litigants a further and additional right of appeal. The writ of review will issue only in exceptional cases, mainly to secure uniformity of jurisprudence.

West vs. De Moss, p. 1349.

CRIMINAL LAW.

This court, not informed of the evidence adduced on behalf of the defence, must necessarily rely upon the statement of the trial judge that testimony for the State offered in rebuttal is of that character,

Not the province of this court to reverse juries in criminal causes on questions of fact.

State vs. Moreau et als., p. 8.

Act No. 59 of 1896 held not to violate the constitutional provision which requires every law enacted to embrace but one object and to express the same in its title.

The rule of criminal evidence requires the prosecution to establish the guilt of the accused by legal and sufficient evidence to the satisfaction of jury beyond a reasonable doubt. It does not go further and require a *preponderance of* testimony.

The jury being exclusive judges of the facts in a criminal prosecution may, as their judgment indicates, give effect to the testimony of certain of the witnesses and disregard that of others.

State vs. Bazile, p. 21.

Where a party proceeded against by information filed in open court has pleaded to the said information and gone to trial, and is convicted, and on his appeal the verdict of the jury and judgment are set aside and the case remanded for further proceedings, it is too late for him to urge for the first time in arrest of judgment after a second conviction, that the information had been filed without the consent of the court first obtained.

The defendant by pleading to an information waives the objection that the said information was filed without leave of court first obtained.

State vs. Gibson and Dillon, p. 23.

On an indictment against three the grand jury's action "not found" as to two, and "a true bill" as to the other, may be endorsed on the back of the bill, and neither that endorsement nor the title, "The State vs. M. C. *et als.*," placed on the back of the bill by the prosecuting office, when he preferred it, affords any cause of complaint to the accused.

State vs. Aucoin, p. 49.

The duty of retreat of one assaulted with intent to take his life or do him bodily harm is not unqualified. There is no obligation of such retreat when, from the suddenness or violence of the attack, retreat would endanger the life of the person assaulted. 1 Archbold Criminal Law, p. 791; State vs. Chandler, 5 An. 490; State vs. Spears, 46 An. 1524.

State vs. Robinson, p. 92.

CRIMINAL LAW—*Continued.*

When the accused does not choose to testify, it is not error on the part of the judge to charge the jury that he is not bound to testify, and that his not having testified must not be construed against him.

The admonition by the judge to the jury was not a comment on the fact. It was a compliance with the language of the statute, and, although not requested by the accused, it was not reversible error to instruct them not to interpret his silence against himself.

State vs. Johnson, *p.* 138.

A *venire* drawn in the absence of two members of the jury commission will not be set aside, it appearing that the absent members had notice of the time and place for the drawing.

The *proces verbal* of the drawing of a *venire* may be supplemented by the certificate of the clerk, made as required by the statute, showing that the absent commissioners had been duly notified. It need not be incorporated in the *proces verbal* of the drawing of the *venire*.

The suggestions of the District Judge in matter of the clerk's certificate were proper, and offer no ground for objection.

The *proces verbal* written by the deputy clerk, under the control and direction of the clerk, is not an irregularity for which a *venire* should be quashed.

The date for the drawing of the *venire* was sufficiently shown, and in time to notify all concerned.

The requested instruction to the jury was sufficiently clear to make it proper to ininstruct the jury that "concealment after the act, without previous preparation, is not necessarily proof of intent."

The trial judge should, in all trials for murder, instruct the jury under Art. 785 of the Revised Statutes that they may find the prisoner guilty of manslaughter. State vs. Brown, 41 An. 411, and State vs. Jones, 46 An. 1395.

It was a misdirection in matter relating exclusively to a murder trial in which the court is specially required to inform the jury that four verdicts might be found.

State vs. Thomas, *p.* 148.

The power to grant a change of venue is, in great part, confided to

CRIMINAL LAW—*Continued.*

the District Court. His refusal to change the *venire* will not be reversed unless it be clearly shown that it was erroneous.

An objection to the manner of drawing a *venire* can not be successfully made by one under accusation, unless made on the first day of the week for which the *venire* was drawn.

A motion to annul and set aside the *venire* made by a defendant in one case can not be made available by another defendant in another case. State vs. Courtney, 28 An. 794; State vs. McCoy, 29 An. 593; State vs. Washington, 33 An. 897.

State vs. Brittin, *p.* 261.

Where it appears that there is no reasonable certainty or probability of procuring the attendance of an absent witness at the next term of the court, the denial of a motion for continuance will not be disturbed.

Where an absent witness subpœnaed for defence, had testified on preliminary examination to a certain state of facts and could not, if present at the trial, have testified to the averments of facts set up in the motion for continuance without impeaching his own previous testimony, it is proper to conclude that were the witness present his evidence would be substantially the same as that on the preliminary examination, and as this was strongly against the accused, the latter was not prejudiced by his absence.

The State was entitled to offer the testimony of the absent witness, taken at the preliminary examination, on proof that he had left the parish, and that his whereabouts and residence were unknown.

To justify relief to the accused, isolated passages of the trial judge's charge to the jury, objected to, must amount to a positive misstatement of the law. *State vs. Timberlake*, *p.* 308.

A bill of indictment having been returned against the accused, two days later he was arranged thereunder, and, without any reservation, pleaded not guilty and elected to be tried by jury. Subsequently, on the day fixed for trial, he files a motion to quash on the ground of error and irregularity in the organization of the Grand Jury.

Held: The motion to quash can not be entertained after a plea to the indictment has been entered. *State vs. Dartez*, *p.* 322.

CRIMINAL LAW—*Continued.*

Not a fatal irregularity to wait until panel is completed before administering oath to jurors, even though there be an adjournment over night, where those accepted as jurors on the incomplete panel are kept in the custody of the sheriff and properly instructed not to speak of case, etc. Signature of witness to his deposition, taken at the preliminary examination before the judge, not required; nor that the testimony at such examination be taken down by the judge himself, if done under his supervision; nor is it necessary that it be formally certified to by the judge, or clerk of court.

A witness can not be crossed-examined as to a fact collateral and irrelevant to the issue merely for the purprse of contradicting him by other evidence if he should deny it, thereby to discredit his testimony.

A witness can not be contradicted without first laying a foundation therefor by calling his attention to the time, place and circumstances, as well as to the parties to whom the alleged statement was made, and thus giving him the opportunity of denying or explaining. And the doctrine holds good though the witness be absent or dead, and his previously taken deposition is offered. And it makes no difference that the contradictory statement was made after the deposition was taken, or, if made before, was not known to the accused or his counsel.

It is for the court, not the jury, to decide what is and is not admissible as evidence, and to pass upon the sufficiency and effect of testimony offered to lay the foundation for the production and admission of testimony relating to the merits of the case, taken at a previous trial, by a witness absent at the subsequent trial.

Before evidence of threats on parties deceased can be introduced, there must be a showing of an overt act or hostile demonstration.

An accused person not going upon the stand as a witness is entitled to have the jury instructed that his declination of the privilege gives rise to no inference against him. And if he goes on the stand, the jury may properly be charged that in weighing his testimony they may take into account the fact of interest in the result of the trial.

State vs. Wiggins, *p.* 330.

CRIMINAL LAW—*Continued.*

Our statutes prescribe a penalty for "assault with intent to commit rape," but none for "assault with attempt to commit rape."
A verdict, therefore, returned for "assault with attempt to commit rape," on an indictment for rape, and a sentence, based thereon, of fifteen years at hard labor under Act 59 of 1896, prescribing a penalty of not exceeding twenty years for assault with intent to commit rape, can not be sustained.

State vs. Hearsey, p. 378.

A motion to quash an indictment on the ground that the grand jury who presented it was illegal, because they were not drawn and organized on the first day of the term as fixed by law, comes too late if not filed on the first day of the term; and same will be overruled, unless exceptional circumstances are stated showing clearly that a compliance with the law in this respect was impracticable.

State vs. Hebert, Jr., and Landry, p. 401.

A provocation which would not naturally cause instant resentment, but which would have to be thought or brooded over after its commission in order to produce rage or anger is not in contemplation of law a provocation sufficient to reduce an intentional killing from murder to manslaughter.
The use of the words "ordinary man" in the charge given by the judge is in no sense prejudicial to the accused.
It frequently happens that a witness contradicts himself for want of proper application of the questions asked him. Where there is a difference between counsel as to what the answers made *were* the court is authorized to give the witness an opportunity to set himself right. State vs. Wiggins, 45 An. 416.
The District Attorney having propounded to the defendant then on the stand a certain question, his counsel objected that it had been several times asked and answered *in the negative* and should not be asked anew. The District Attorney contended that it had been answered in the *affirmative*. The court overruled the objection, stating "it seemed that this witness has answered this question both ways, and the court will permit the attorney to ask the question again, so as to finally determine this matter." Counsel of defendant objected to this statement and reserved a bill on the ground that "it was a comment on

CRIMINAL LAW—*Continued.*

the evidence." The court stated to the jury that it was not intended as a comment on the evidence, but merely as a reason for permifting the question to be asked and that they should pay no attention to the statement.

The object of the question propounded by the State was through an affirmative answer given by the defendant to hold the case down to one of "*murder.*" The effort was unsuccessful, the jury having returned a verdict of "manslaughter." *Held*, that while it is the duty of district judges to carefully abstain from any expression of opinion or comment upon the facts of a criminal case not only in their charge to the jury, but in their rulings in the presence of the jury upon the admissibility of evidence, and to avoid, as far as possible, at all times, both in their language and in their conduct and actions, saying or doing anything from which the jury might draw any conclusion as to their view of the case before them, the statement of the judge in this particular case furnished no legal ground for reversal.

State vs. Walker, p. 420.

A statement made by sureties of an accused person who failed to make an appearance as required by his bond, and whose bond had in consequence of said default been forfeited, that "they even proposed to produce their principal," is not the formal surrender of a principal required by Sec. 1033 of the Revised Statutes. The court affirms State vs. Martin, 49 An. 752.

Where the crime with which a person stands charged is a felony, his attorney is without authority to waive his arraignment in his absence. State vs. Meekins, 41 An. 543; State vs. Jones, 70 Iowa, 505; Younger us. State, 2 West Va. 579; 98 Am. D. 791; Bishop's New Criminal Procedure, Vol. I, par. 268; People vs. Redinger, 55 Cal. 298; American and English Encyclopedia of Law, title "Criminal Procedure," p. 762.

State vs. McMichael, p. 428.

An indictment for the larceny of one bale of cotton in the lint may be amended during the trial, to conform to the testimony the cotton was in the seed. Revised Statutes, Sec. 1047.

State vs. Jacobs et als., p. 447.

Cotton raised on shares between the plantation owner and the laborer

CRIMINAL LAW—*Continued.*

until the shares are allotted is properly charged in an indictment for larceny as the property of the owner of the plantation. Wharton Criminal Law, Vol. 2, Secs. 16, 27.

State vs. Jacobs et als., p. 447.

The constitutional guarantee that the defendant in a criminal prosecution shall enjoy. the right to defend himself and to have the assistance of counsel is not an empty formality, but an inestimable privilege; and counsel should be allowed reasonable time to prepare the defence.

State vs. Pool, p. 449.

A confession obtained by a deputy sheriff, under duress, is altogether inadmissible as evidence against an accused person.

Staté vs. Albert, p. 481.

This court has no jurisdiction to review the facts on which the verdict in a criminal cause rests.

A juror can not be heard to impeach his own verdict. Nor can this be done indirectly through a third person testifying to remarks made by a juror after the verdict.

The law and motives of public policy alike excludes such testimony.

State vs. Corcoran, p. 453.

The allegation that the verdict was contrary to the law and the evidence does not present of itself question for review or appeal.

Where there was no ground to suspect (thoug alleged) thst the jury had been improperly influenced, the verdict and sentence must remain as returned.

Communications between the jurors and the officor in whose charge they were affords no ground for a new trial, where it does not appear that prejudice resulted.

The terms of the indictment technically charged the offence and brought the case within the provisions of the statute.

The omission of the words "in the peace of the State" did not vitiate the indictment.

State vs. Robinson, p. 455.

The verdict was not responsive to the charge. It was a special verdict. If the jury chooses to designate the crime found by name, it should be defined by name having a meaning in criminal law,

CRIMINAL LAW—*Continued.*

or defined in plain words covering all the essential ingredients of the crime.

No judgment can be pronounced on a partial verdict which fails to find the criminal intent, where intent is an essential iugredient of the crime.

In a special or partial verdict of the jury's selection, all the facts necessary to constitute the crime must be clearly stated. If the jury determines to leave out part of the language charged in the information, they should be particular not to omit essentials to constitute the crime.

A verdict "guilty of wounding less than *mayhem*" is not responsive to an information charging that the occused has "feloniously, wilfully and maliciously inflicted a wound less than *mayhem*," and is not legal.

The court adheres to the decision in State vs. Bellard, 50 An. 594; and State vs. Hearsey, 50 An. 373, overruling contrary views.

State vs. French, *p.* 461.

The rule of law aequires that the confession of an accused person, sought to be admitted to the jury, shall have been made voluntary, without the appliances of hope, menace or fear by any other person.

And whether it was so made or not is to be determined upon consideration, among other things, of the circumstances under which it was made.

The rule is not that, in order to render a statement admissible, the proof must be adequate to esiablish that it was voluntarily made; but it is that it must be sufficient to establish that *the making* of the statement was voluntary.

State vs. Auguste et als., *p.* 488.

Where a juror on cross-examination on his *voir dire* shows a slight inclination to bias against the accused, but on final examination by the court says emphatically that the impression derived from the merest hearsay statements will not influence him, he is competeut; besides, the accused did not exhaust his challenges, and his case in consequence was not prejudiced by the ruling.

This court will not review the refusal to grant a new trial upon the alleged want of sufficient evidence to convict.

CRIMINAL LAW—*Continued.*

The jury returned a verdict under the direction of the court *a qua*. Nothing of record brings to light that the jury, as asserted, disregarded the charge of the judge and brought a verdict contrary to the charge. The question of resistance which the alleged victim should have offered, as well as question of corroboration of the prosecuting witness and asserted victim, were questions of fact for the jury finally to determine and are not revisable on appeal.

Merely cumulative evidence, or evidence to impeach a witness alleged to have been recently discovered, is not ground for a new trial.

State vs. Bailey, p. 533.

The testimony of the dangerous character of the deceased, when admissible in support of self-defence urged by the accused, must be restricted to the general reputation of the deceased for peace and quietness; hence, testimony of particular acts of violence of the deceased are properly excluded. 3 Rice on Evidence, Secs. 482, 476.

Nor can the State be deemed to have opened the door for the admission of testimony of such particular acts of violence merely because on re-examination the witness who has testified to such acts on cross-examination is asked by the prosecuting officer "if he had ever heard the deceased had hurt anybody?" 1 Greenleaf, Sec. 468.

Instructions requested which by implication assume that the accused had established his defence are properly refused.

The opinion of a witness whether the cuts in the clothing of the deceased indicated he had been stabbed while erect confronting the accused, or when he had fallen in the arms of the testifying witness, can not be deemed expert testimony.

When the charge is full as to the law of self-defence instructing as to the danger to life or limb that will justify killing; the obligation of the party assailed to retreat; when retreat is not required, and as to the other phases of the law deemed pertinent, the verdict of the jury will not be set aside because of the refusal of special charges covered by the general charge. 19 An. 264; 37 An. 77; 35 An. 970; 38 An. 200.

State vs. Fontenot, p. 537.

CRIMINAL LAW—*Continued.*

The examination of bystanders at the time of the commission of an offence claimed in the bill of exceptions "to characterize the act," under investigation are not, at least as a general rule, admissible as "*res gestæ*," and in this case were properly excluded. Roscoe on Criminal Evidence, p. 22; 39 An. 470; 48 An. 1407.

The verdict of "striking with intent to kill" will not support the sentence for striking with a dangerous weapon with intent to kill. R. S., Secs. 790, 791, etc.; Act No. 44 of 1890.

Under the charge for striking with a dangerous weapon with intent to kill and murder, the jury can not convict of assault. Acts Nos. 43 and 44 of 1890; R. S. 790, 791 *et al.*; 48 An. 1061.

In an indictment for striking with a dangerous weapon with intent to kill, it suffices that the intent is qualified by the words "wilfully, maliciously and of his malice aforethought." 33 An. 921; 36 An. 336.

State vs. Bellard, p. 594.

With testimony before the jury tending to show the accused, charged with larceny, was found in possession of the property recently stolen and failed to account for that possession, it would be erraneous to charge the general rule that to convict on circumstantial evidence alone, the evidence must consist with the guilt, and exclude any reasonable theory of innocence, without charging also that the law presumes guilt from one circumstance—i. *e.*, the possession of property recently stolen and no account by the accused for that possession. Roscoe, Criminal Evidence, p, 18; 1 Greenleaf on Evidence, Sec. 34.

The court again affirms that requested instructions not a full exposition of the law applicable to the case, but requiring explanation and qualification, are properly refused. 35 An. 769, 775; 36 An. 84; Thompson on Juries, Sec. 23.

The charge will not be deemed to trench on the facts which announcing to the jury a legal presumption on which they can act, is qualified by the caution, if the fact is proved, giving rise to the presumption. Const., Art. 168; Revised Statutes, Sec. 991.

State vs. Kelly, p. 597.

The court again affirm that testimony of threats of violence by the deceased against the accused, without proof of overt acts to

carry the threats into execution, is inadmissible. Wharton's Criminal Evidence, Secs, 757, notes; 35 An. 71; 37 An. 443, 489.

State vs. Hickey, *p.* 600.

The verdict of guility of shooting with intent to kill, on an indictment for shooting with a dangerous weapon with intent to kill and murder, necessarily implies shooting with a dangerous weapon charged in the indictment, and the express words not in the verdict, are supplied by the implication. State vs. Smith, 38 An. 479; 34 An. 529; 1 Bishop's Criminal Procedure, Sec. 1005.

The verdict is to be deemed a conviction for the offence of shooting with intent to kill included in the offence the indictment charges. Acts No. 43 and No. 44 of 1890; 49 An. 1011.

State vs. O'Leary, *p.* 641.

A letter written by a prisoner while in jail, and without being closed or sealed, and handed to another prisoner to be sealed and mailed to a witness of the writer, is competent evidence against the accused, notwithstanding same may have been surreptitiously read by the person to whom it had been entrusted, and thereafter handed to a deputy sheriff, instead of being mailed.

That proceeding can not be classed as an unreasonable search and seizure in a constitutional sense.

A single declaration uttered during the progress of the trial by the father of the deceased, apparently hostile to the accused, and which was at once repressed by the judge, can not be viewed as having unduly influenced the verdict of the jury against the accused.

State vs. Renaud, *p.* 662.

Accused were indicted by a grand jury composed of twelve, under the provisions of Art. 117 of new Constitution, and convicted by a petit jury of twelve, of whom less than the whole number concurred, under the provisions of Art. 116. The crime was burglary committed before adoption of Constitution of 1898. The defence was made that these provisions of the Constitution were *ex post facto* as applied to past offences, and that accused could be indicted only by a grand jury composed of sixteen, and convicted only by a concurrence of all twelve of the petit jury. *Held*, the

provisions referred to operate changes in the method of procedure only, relate to the remedy and are in no sense *ex post facto* in character, and that Arts. 116 and 117 of the Constitution are self-operative.

State vs. Caldwell, p. 666.

A demand on the part of the defendant's counsel that the prosecuting witness be qualified touching her competency comes too late after she has been sworn in chief and her interrogation actually commenced.

It is not the right of counsel for an accused to require the testimony of a witness upon cross-examination to be reduced to writing. The law limits that right to testimony which appertains to some question of law raised on a bill of exception and to be decided by the Supreme Court.

State vs. Downs, p. 694.

The nine hundred and seventh section of the Revised Statutes making it an offence for any presidents, cashiers or others in the service of chartered banks "to knowingly and wilfully embezzle or convert to his own use the funds of the bank furnishes a complete definition of crime; embezzlement has a technical meaning; without addition is of common use, and the violation of trust or duty, the incident of embezzlement, is implied in the section by the relation it implies, if not states, between the president or cashier and the funds of the bank. Revised Statutes of the United States, Secs. 5209, 5471, 5475, 4596; Second Archbold, p. 560; 120 U. S. 334; 156 U. S. 429; 107 U. S. 866.

It suffices that an indictment for an offence fully defined by the statute follows the words of the statute. 1 Bishop Criminal Procedure, Sec. 356; Wharton, C. L. 1st, Secs. 334, 362: 32 An. 572; 107 U. S. 669.

This section, though from a legislative act of 1821, when all banks in this State existed under special charters, can not be restricted to such banks but extends to all banks whether holding their franchises under special legislative act or under the general law for the creation of corporations, especially in view of the fact that since 1855 the offence has been part of the crimes code of the State extending to embezzlements by presidents and others the service of all chartered banks. Acts 1855, No. 120,

Sec. 83; Pierce & King's Revisory Legislation of 1852, p. 192, Sec. 48; Act No. 166 of 1855; Revised Statutes, 1870, Sec. 907.

When the charge is that the good character of the accused is testimony to be weighed and considered with all other evidence, and to have the weight to which the jury conceives it entitled, it is not error to refuse further special instructions asked on behalf of the accused that propose to instruct only as to the tendency of character, testimony to benefit the accused under hypothetical phases of the testimony; if special instructions are given they must cover the whole law on the point, and the jury instructed that testimony of the accused is unavailing against positive testimony of guilt. 3 Rice, p. 607, Sec. 378; 1 Bishop Crim. Procedure, Sec 489; Thompson on Jury Trials, Sec. 4244; 4 Mason, p. 510.

When the charge is accurate and complete as to the presumption of innocence and its effect as evidence, the conviction will not be set aside because the court in the course of its explanation on another point, *i. e.*, reasonable doubt, stated the jury are not to go beyond the testimony to seek for doubts, must confine themselves to the testimony and not resort to extraneous doubts or circumstances.

The tendency of all authority is to sustain instructions that substantially embody the law applicable to the case, though not in the precise words of the statute or in the frame requested on behalf of the accused, and it is equally clear that repetition of that already substantially charged can not be exacted. 41 An. 677, 605; 37 An. 619; 35 An. 1180, 1058; 37 An. 51.

Instructions asked on behalf of the accused requiring qualifications are properly refused. 35 An. 769, 775.

In explaining "embezzlement" used in this section, it is not error to illustrate the offence for the court to refer to the used methods of proof of general acceptance, nor can such illustrations be understood as changing the statutory embezzlement with which the accused is charged. The cashier of a bank is, in legal contemplation, the custodian of its funds. The Section 907 of the Revised Statutes was designated to punish embezzlements of the president, cashier or others in the service of the bank, whether or not legally charged with the custody of the bank's funds, hence the instruction, reasonably construed, was not

CRIMINAL LAW—*Continued.*

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dure only, relate to the remedy ·d must not be shown.
facto in character, and that A· ·se in explaining the intent to
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State vs. Nicholls, p. 699.

·of 1890 is not unconstitutional on the ground that under its
·arms one not guilty of an offence might be convicted.

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dered which would convict an innocent person whose act of carrying arms for legitimate purposes the statute never intended to denounce.

The word "wilful" contained in the title of an act, but not contained in the body of the statute, was not an illegality rendering it proper or lawful to annul and avoid the statute. The court may refuse to receive a verdict not responsive to the charge.

A verdict finding the accused guilty, following the language of the statute, is not defective.

The information charged the defendant with shooting with a dangerous weapon to kill and murder.

The verdict returned that the accused was guilty of shooting "with intent to kill."

Under Act 44 of 1890 an offence of the same generic class is the offence with which he is charged.

"Whatever conveys the idea to the common understanding will

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ishop, Sec. 1005, 4th Edition.
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The court correctly refused this charge, which asked under the facts stated, not a reduction of the crime from murder to manslaughter, but a "justification" of the husband's acts entitling him to an "acquittal." A husband who, detecting his wife at his own home, in the act of adultery, kills her on the spot, provoked by the wrong, though not guilty of "murder," does not stand "justified in his act. The homicide is manslaughter."

Where a husband, on entering his home and finding his wife in the act of adultery, shoots at the wife's paramour, or at her, or at both indiscriminately, whereupon the wife, under the evidence, seizes and holds her husband by the arm, informing the paramour that she had done so, and calling on him to come and they would kill him, the court should permit the husband to introduce testimony as to the relative strength of his wife and himself, in order to lay the foundation for a reasonable belief on his part that his life was placed in danger by her act, and for the purpose of justifying as in "self-defence" his cutting her to detach her hold. The fact that the husband did not stand "justified" in his original act of shooting at the wife and her paramour did not cut him off under the circumstances stated from invoking the doctrine of "self-defence," when in one of the after phases of the difficulty his life became endangered by the act of the wife. The doctrine of "aggressorship" in re-

CRIMINAL LAW—*Continued.*

erroneous that in the prosecutions under that section the actual custody of the money by the accused must not be shown.

Nor will the verdict be set aside because in explaining the intent to constitute the offence of "wilfully and knowingly" embezzling and converting the funds of the bank, the trial judge stated in effect that the embezzlement was the fraudulent appropriation of another's property; that the intent of the accused to appropriate to his own use must have existed at the time of the appropriation charged to constitute the offence; that "an act was wilfully done when done without reasonable belief it was lawful;" these and similar expressions of the trial judge announcing with reasonable accuracy the criminal intent essential to the crime.

The refusal to allow a challenge for cause is no ground to set aside the verdict when the juror did not serve and the jury is completed without exhausting the peremptory challenges of the accused. 35 An. 315; 38 An. 480; 43 An. 365.

State vs. Nicholls, p. 699.

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"Whatever conveys the idea to the common understanding will

CRIMINAL LAW—*Continued.*

suffice, and all fair intendment of the verdict will be made to support it." Bishop, Sec. 1005, 4th Edition.

State vs. Keasley, p. 761.

Defendant indicted for the murder of his wife asked the following charge:

"If the jury find from the evidence that the accused discovered his wife in such a position with Delatte as to convince any reasonable man that they were in the act of adultery, and that he was so incensed and outraged by the sight that he lost all control of his reason, and acting under the overpowering influence produced by the sight of his shame and humiliation, he then and there drew his pistol and fired, and after his pistol was empty, he immediately drew a razor and inflicted a wound upon his wife, from which she died, the accused is not responsible for his acts, and the jury must acquit."

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CRIMINAL LAW—*Continued.*

spect generally to that of "self-defence" should be relaxed in a case of this character.

When a party seeks to have a principle of law applied in a special charge to the jury, he must present such a statement of facts, as a predicate, as would make the principle of law invoked legally applicable under the evidence to the particular case.

State vs. Cancienne, p. 847.

When the statement of facts recited in a bill of exception by counsel differs from that asserted by the court, that of the court is controlling.

Where a district judge after a full trial is satisfied that the testimony sought to be made the basis of a new trial would not alter the result at a second trial, even if admitted, either because the testimony was otherwise so strong against the accused as would make such particular testimony clearly unavailing, or because he knew the witnesses who were proposed to be put upon the stand, and was convinced they would not be believed, or because of similar reasons his opportunities for acting advisedly, justly and properly are so superior to those of the Supreme Court that it would not be warranted it substituting its judgment for his in the premises, except in very clear cases.

State vs. Prade, p. 915.

Though the law has not imposed upon courts the duty of informing accused parties that they are entitled to counsel, and asking them whether they desire that counsel should be assigned to them, it has become almost universally the practice for them to do so *ex proprio motu*.

While the fact that a prisoner does not ask the court to assign counsel to him, and he chooses to appear by himself, and he is convicted, does not entitle him to a new trial because of his *want* of counsel (State vs. Kelly, 25 An. 382), it is none the less a fact to be considered in connection with others for the purpose of ascertaining whether in any particular case he has been accorded the full opportunities for defence which it is the duty of the State to extend to its people, even those who may be ultimately and deservedly found guilty of crime.

The right to move for a new trial is guaranteed to the defendant in the smallest civil cases. In criminal cases the same right exists,

CRIMINAL LAW—*Continued.*

as also the additional right of moving in arrest of judgment for defects apparent on the face of the record. These rights may be waived by the parties, but they can not be denied by the courts. The law contemplates the giving of reasonable opportunity for preparation and examination. To refuse a reasonable time for the exercise of a right is tantamount to a denial of the right itself. State vs. Gardner, 10 An. 25.

State vs. Rollins, *p.* 925.

To review a decision on appeal in a criminal case, a case must be so brought before the court by bill of exceptions as to disclose the error, unless the error is patent.

There was no bill of exceptions and no error patent on the face of the papers.

State vs. Harris, *p.* 989.

Evidence showing that deceased and the accused lived alternately in concubinage with the same woman in whose presence the killing occurred, was received over objection of defendant that same was irrelevant. *Held:* Competent for prosecution to prove a motive for the crime.

The fact that a witness for the State was once himself under suspicion, and even arrest, in connection with the homocide, is no ground for the exclusion of his testimony. Even though an accomplice, he would still be competent as a witness, that fact affecting the credibility, not the admissibility, of his evidence.

The charge of the trial judge, or portions thereof deemed prejudicial, should be objected to at the time given, or before the jury retires for deliberation, and a bill of exceptions seasonably reserved. If this be not done, subsequent objections will not be noticed, except in the clearest instances of gross and palpable error patent upon the face of a written charge coming up in the record, and of undoubted prejudice to the accused,

State vs. Reed, *p.* 990.

The minority of one of the jurors will not avail to set aside their verdict when no objection was made or questions asked on that point when the juror was tendered and accepted by the accused, nor does it make any difference in the application of this rule that neither accused or his counsel knew of the juror's minority

CRIMINAL LAW—*Continued.*

when he was tendered. 8 Rob. 590; 13 An. 276; 26 An. 384; 35 An. 975; 43 An. 370.

State vs. Button, p. 1071.

Where a party accused of crime having been tried and found guilty, has appealed and succeeded in having the verdict and judgment against him set aside for erroneous instructions given to the jury, it is ordinarily too late for him, on the return of the case to the trial court, to move to quash the indictment against him. He would have to present a very strong exceptional case to warrant a departure from this rule.

Ordinarily, such a motion should be made before pleading to the indictment.

Objections to a *venire* should properly be urged by motion to set it aside instead of by a motion to quash indictments presented by the grand jury selected and empaneled from its members. State vs. Britton, 50 An. 261.

Where defendant in a criminal case, represented by counsel, seeks to justify tardiness in moving to quash the indictment against him on the ground that the facts therein urged were not known before the motion was made, it should be shown that his counsel, as well as himself, was ignorant of the facts.

State vs. Robertson, p. 1101.

The overruling by the District Court of a challenge for cause of a juror tendered to the accused for acceptance does not furnish ground for reversal of verdict and sentence, when the accused has not, at the time when the jury has been completed, exhausted his peremptory challenges.

A witness, Benoit, was permitted by the court, over defendant's objection, to testify that he was engaged by the accused to assist him in driving cattle, and started with him under such employment; that while so engaged, the latter made a proposition to him that they should steal a drove; that on witness declaring he could not do so, accused replied that that was nothing; that they could buy a few head and pick up some along the road; that he (the accused) had been carrying on that business for the last six years; that he had once cleared four thousand dollars in four months in that way; that witness at once left the service of the

CRIMINAL LAW—*Continued.*

accused, and both returned to witness' house, where the two parted; that on parting with witness, accused said, he would go and meet one Bell, and they would gather a drove. Defendant's ground of objection was that the conversation in question was not made at the time of the taking of the cattle for which he stood charged with larceny, and for which he was then on trial and did not form part of the *res gestæ* having been made prior to the date of the alleged offence, and that said statements attributed to him were not admissions on his part of guilt of the offence with which he was charged. The court admitted the testimony not to show a distinct crime, but to show intent, knowledge and system, and to show the admissions and statements made by accused as to the character of the business in which he was engaged. The court declared that the evidence showed a great similarity in the way the cattle alleged to have been stolen were taken, with that detailed in Benoit's testimony.

The ruling of the District Court was correct.

The testimony detailed a proposition made by the accused to the witness, then in his employ driving cattle, to join him in stealing cattle in a certain way, which proposition was followed very shortly afterward by accused being charged with having stolen cattle in his possession taken in the way which the proposition suggested they should be taken. The evidence was pertinent, relevant and admissible to show intent, and to give character to the nature of the defendant's possession of the cattle held by him It showed an admitted premeditated plan to steal cattle generarlly, followed almost immediately by his having stolen cattle in his possession.

The sheriff who arrested the accused testified that the accused when arrested "looked like a man who had been up all night, as if he had no sleep; his leggings were all wet and muddy."

Defendant objected to the answer, but the court permitted it to stand. The court stated the answer was elicited by the defence in the cross-examination of the sheriff, and was not in reply to a question of the District Attorney.

That it was petinent for the State to show as a corroborative link in the State's evidence the condition and general appearance of the accused on that morning. Defendant objected that "the witness was submitting his opinion, not facts, to the jury. The

CRIMINAL LAW—*Continued.*

general rule is that witnesses must state facts and not opinion, but the rule is subject to many exceptions, and under the facts of this particular case the answer was properly permitted to stand.

A District Attorney is not justified in his argument to the jury in calling attention to the fact that the accused had not testified in his own behalf. His doing so is reversible error, which is not cured by the court's telling the jury "that the right of an accused to testify was a privilege accorded to him which he had a right to exercise or not, as he saw fit; and that if he testified he subjected himself to all the rules which applied to other witnesses, and that his failure not to testify if he choose not to do so was not to be construed for or against him;" and by the District Attorney's stating to the jury that the instruction given them by the court was the law.

State vs. Marceaux et al., p. 1187.

1. The mere appearance of accused at same term of court, after his appearance bond has been forfeited, does not entitle him to have the judgment of forfeiture set aside, or satisfaction thereof entered.
2. Nor does his arrest under a second *capias* and his being in the custody of the court before its adjournment for the term, or his having given a second bond to secure his further appearance, entitle him or his sureties to this satisfaction.
3. But the final disposition of the case by his subsequent trial and conviction, or acquittal, before collection of the judgment of forfeiture is had, entitles him or his sureties to have satisfaction of the judgment of forfeiture entered on proper proceedings taken therefor.

State vs. Martin, p. 1157.

The only point presented on appeal related to evidence of a fact that did not afford ground to reverse the verdict.

State vs. Hopkins, p. 1171.

The *proces verbal* of the finding of a coroner's jury is competent evidence to show the fact of a homicide having been committed, but the recitals of fact therein contained can not go to the jury. They are objectionable as hearsay testimony.

State vs. Tate, p. 1183.

CRIMINAL LAW—*Continued.*

On the trial of an accused upon a charge of hog stealing, testimony tending to show that the hog had been killed by the accused and its carcass secreted, and that he subsequently sent another person to cut it in pieces and carry them to his house, is admissible because it indicates a felonious asportation of the property after the theft had been first begun, by the taking of the *living* hog and the concealment of its carcass after it had been killed.

State vs. Bazile, p. 1184.

An oath lawfully taken is the essential thing to be charged in an indictment for perjury; and in case perjury is assigned on a non-judicial oath it is insufficient to maintain a prosecution if the person who administered the oath was not legally authorized to administer that particular oath.

State vs. Theriot, p. 1187.

With no bill of exceptions, assignment of errors or error on the face of the record, this court has no power to review the sentence for crime.

State vs. Harper, p. 1213.

The right of trial by jury is a substantial right which is not to be denied as to offences which had been committed at the date that the law was adopted. The provision in the Constitution of 1898 providing for the trial of criminal cases, not necessarily punishable at hard labor by the court, without a jury, is *ex post facto* in its application to offences committed before the Constitution was adopted.

State ex rel. Sherburne vs. Judge, p. 1247.

The appeal in a criminal case will not be dismissed *in limine* upon motion made to that effect on the ground that appellant reserved no bills of exception; that no assignment of error had been made, and no error was patent upon the face of the record. If the appeal was regularly taken the court will take cognizance of the cause and deal with it from the record. Brown vs. Land Co., 49 An. 1779.

Where the minutes of the court which show that an appeal had been taken on the 26th of February on behalf of the State in

CRIMINAL LAW—*Continued.*

presence of the accused and his counsel is charged to be untrue and the cause being remanded for evidence on that point, appellee shows by parol testimony, introduced without objection, that no order of appeal was granted on the 26th, either in the presence of the parties or otherwise, he can not complain that by the testimony of the clerk and the District Judge it should be shown that the entry should have been made as for an appeal granted on the 23d of February. The more regular course to have been pursued was for the court to have ordered the minutes to have been amended and corrected and made to conform to the facts. As the law does not require that the accused, or his counsel, or either of them, should be present in court when the State takes an appeal from an adverse ruling, an erroneous statement that they were so present is an immaterial circumstance. *State vs. Wyatt, p.* 1301.

The record showing that the accused was indicted on the 17th of February, 1897; that he was arraigned on the 23d of August, 1897, pleading not guilty; that on the 26th of August the cause was continued to the next term of court; that on the 23d of February, 1898, he filed a motion to quash the indictment, on the ground that the *venire* was drawn at a place other than the court house, and that defendant was up to that time ignorant of that fact. *Held:* That the court erred in sustaining the motion. The motion to quash having been made by defendant after pleading to the merits, was too late in the absence of an affirmative showing that neither the accused himself nor his counsel was ignorant of the facts when defendant pleaded. State vs. Britin, 50 An. 277; State vs. Strickland, 41 An. 514; State vs. Robertson, 50 An. 92; State vs. Sterling, 41 An. 681; State vs. Henderson, 13 An. 490; State vs. Bazile, 38 An. 545; State vs. Hancks, 38 An, 469; State vs. Toups, 44 An. 904.

The circumstance that counsel may have acquired knowledge of the facts touching the *venire* at a time prior to his employment by defendant, and when he was not aware that the latter was charged with crime, does not have tha effect of making such knowledge any the less (when he became employed) the knowledge of the accused in determining whether the motion to quash was filed tardily or not. State vs. Strickland, 41 An. 514; State vs. Frank M. Robertson, 50 An. 92. *State vs. Wyatt, p.* 1302.

CRIMINAL LAW—*Continued.*

Before what purports to be the confession of an accused person can be introduced in evidence against him, it should have been shown to have been freely and voluntarily made and not brought about by fear on his part, or inducements held out to him.

The mere fact itself that the confession was made while under arrest or imprisonment to the officer of the law arresting him or holding him in custody does not take from it the character of a free and voluntary confession.

A prisoner's confession to the officer arresting him or holding him in custody, will not be rejected merely because it was made in answer to a question which assumed his guilt.

The mere fact of the intoxication of the prisoner (not amounting to mania), at the time of his making a confession to the officer arresting him or having him in custody, does not exclude the confession. Confession, however, produced by intoxication, is a fact for the jury tending to discredit a confession.

Confessions made by prisoners to parties arresting them or holding them in custody should be closely scrutinized by the courts to make certain that instrumentalities intended merely for the vindication of the law should not be converted into engines of oppression and wrong.

State vs. Berry, *p.* 1309.

It is not error of the trial judge to refuse permission to counsel for the accused, to address his argument to the jury in the French language on the ground that it was their mother tongue, the jurors having been examined on their *voir dire* and cross-examined in the English language and without objection on the part of the accused, and all the witnesses for the State and for the defence having been interrogated and cross-interrogated in English.

It is not error of the trial judge to exercise control of counsel for the accused with regard to the extent of his cross-examination of a juror on his *voir dire*, if same be reasonably exercised.

If in point of fact the discretion of the trial judge has been erroneously exercised in this regard, the accused has no ground of complaint if the record discloses that he was not thereby compelled to take on the panel an obnoxious juror who voted in favor of his conviction during the deliberations of the jury.

State vs. Cancienne, *p.* 1324.

CRIMINAL LAW—*Continued.*

The defendant proposed to show (in order to corroborate his own testimony that he had bought the property he was charged with having stolen). *Held:* That the evidence sought was hearsay.

State vs. Ducre, p. 1336.

A juror who stated on his *voir dire* that he had formed an opinion of the case was asked by the court if he could lay it aside and decide the case according to the evidence adduced and the law as charged. He answered: "Yes, sir; I think I can do that." Pressed further as to whether he felt satisfied he could do so, replied: "I believe I could, but then I have got a fear on my mind; I have never felt I would make a competent juror." *Held:* The challenge for cause should have been sustained, differentiating previous decisions.

State vs. Ramsay, p. 1339.

Where the book containing the entry of the minutes of the court is signed by the presiding judge at the end of the term it suffices. Not necessary that the same should be paraphed "*ne varietur.*"

The indictment charged the murder to have been committed in 1890. Before arraignment the District Attorney moved to amend by substituting 1893 for 1890. This being allowed, it is assigned as error in this court. *Held:* The amendment was not necessary, as time is not of the essence of the offence as here charged; and if it were necessary it was permissible.

After trial and conviction, what is called a motion to quash the verdict and all proceedings had in the case was filed, heard and overruled. It is assigned as error here that the minutes must show presence of accused at the hearing of this motion, *Held:* Presence of accused only required to be shown during arraignment, trial, charge, verdict and sentence.

State vs. Hardaway, p. 1345.

DAMAGES.

The right of action which survives in favor of certain designated persons as beneficiaries, for the recovery of damages for personal injuries to a deceased, perishes with the deceased claimant, notwithstanding suit has been filed and put at issue by an answer.

An action for damages for personal injuries arising *ex delicto* does not

DAMAGES—*Continued.*

survive the death of the claimant, in case it results from the injury inflicted.

The general rule is, as established by the Civil Code and Code of Practice, that an action does not abate by the death of the plaintiff after answer filed; but the right of action for the recovery of damages to an injured person who dies from the effect of the injuries received survives only upon the express terms of the act of 1894, and in favor of the beneficiaries therein designated, and its provisions must be construed strictly.

Chivers vs. Roger, p. 57.

An owner is responsible for personal injuries inflicted by his wagon when engaged on his business, and which are occasioned by the want of care or negligence of the driver, his employee.

The law of the road is to keep to the right, and city ordinances in New Orleans require it. But where the right or lower side of the street was not in proper condition for the safe and easy passage of vehicles and the upper side was, and it appearing that it was usual for vehicles to use the upper side whether going toward or from the river: Held—the fact fact that plaintiff's vehicle (going from the river) was on the left or upper side of the street at the time of the collision does not militate against his case.

Layacano vs. Jurgens, p. 441.

The civil courts have the power to decide questions of damages though it involves the interpretation of a criminal statute.

To make an officer liable, acting within the scope of his authority as an officer, it must be shown that he greatly abused his authority; that such a mistake was made as a person of ordinary care and intelligence might make, will not amount to such an abuse.

Lecourt vs. Gaster, p. 521.

Action sounding in dmages for malicious prosecution.

Dismissed by court below on exception of no cause of action, on the ground that the ruling of the committing magistrate, remanding the accused, or placing him under bond, for trial before the District Court instead of discharging him, was evidence of *probable cause*, and this appearing from the petition it precluded recovery.

Reversed and remanded, the court holding that the commitment to appear for trial is but *prima facie* evidence of *the existence* of probable cause.

Whaling vs. Wells, p. 562.

DAMAGES—*Continued.*

SEE NEGLIGENCE.

The item of damages set forth may be covered by one amount alleged.

A gross sum may be claimed embracing each item. Hernsheim vs. Levy, 32 An. 340.

The court considered the question of actual, pecuniary loss, and the different causes constituting damages, and all injury to business and credit.

In view of the limited business of the defendants and their failure to do anything toward minimizing damages, that they might in part have minimized, the court materially reduced the amount of damages allowed each defendant.

Bickham & Son vs. Hutchinson & Bailey, p. 765.

DIVORCE.

Charges of adultery, under the circumstances of this case, set forth by the wife against her husband as a ground for judgment of divorce, do of themaelves constitute a defamation.

The charges had been abandoned by the wife and her suit dismissed without prejudice to the husband's reconventional demand for a separation from bed and board.

In that condition the defendant having failed to sustain his demand in reconvention by other than plaintiff's allegations, they were not alone grounds or cause for a judgment of separation.

Excesses, cruel treatment and outrages of the wife form a legal ground for separation, but no acts of ill treatment *after* suit has been brought are alone and of themselves cause for a judgment of separation.

Statements of the wife (made to a committee appointed by a secret order of which the husband is a member, with the purpose of re-establishing pleasant relations between spouses) can not be taken of themselves as a manifestation on her part (notified as she was to appear and make a statement) of deliberate intention to wantonly injure her husband and publicly defame his character.

Wellman, Wife, vs. Wellman, Husband, p. 114.

DONATION.

The prohibition of our Code of donations *inter vivos* of all the prop-

DONATION—*Continued.*

erty of the donor, leaving him destitute, is not removed by the promise or engagement of the donee to support the donor during life. Civil Code, Art. 1497; 11 Rob. 302; 12 An. 204.

Beaulieu vs. Monin, p. 782.

The power of the owner to dispose of his property by donations *inter vivos* or *mortis causa* is limited by the number of his children living when he dies, hence called forced heirs, and the disposable portion when he leaves a daughter and the children of two deceased daughters, grandchildren being counted in place of their deceased parent, is one-third; the other two-thirds is the *legitime* of the forced heirs. C. C., Arts. 1493, 1495.

This disposable portion is ascertained by adding to the property the deceased leaves at his death the value of all property he has disposed of by donations *inter vivos*, deducting his debts, and the residue determining the disposable portion according to the number of his children, fixes also their *legitime* as his forced heirs. C. C., Arts. 1505, 1506.

Whether forced heirship is ownership in its full sense, of which the heir is seized of right, as applied to property embracing the *legitime* in the hands of third persons holding under alienations by the donors to whom the property has passed by the donations, nominal sales or similar acts of the deceased donor to the prejudice of his forced heirs, it is clear that by his death the right of action is vested in them to reduce or set aside such acts that impair their *legitime*, and to recover it from third persons holding under transfers from the donees. C. C., Arts. 1493, 1495, 1504, 1517; Code Napoleon, Arts. 930, 2444; 2 Troplong, p. 127, Secs. 736, 741; p. 287, Sec. 903; p. 292 *et seq.*; 2 Mourlon, p. 292, Sec. 593; p. 311, Secs. 620, 621; 3 Boilleux, commenting on Art. 920, Code Napoleon.

This right of action of the forced heir passes to his heirs and assigns. C. C., Art 1504; Code Napoleon, Art. 930; 12 Laurent, p. 185, Sec. 139; 3 Boilleux, Comentaire sur Art. 920, Napoleon Code; 2 Mourlon, pp. 311, 313, 623; 12 An. 465.

This suit of the heir of the forced heir is not the revocatory action, but one of "reduction" or "revendication" to preserve or recover the *legitime*, of which he can not be deprived by the donation or similar acts by the deceased donor, and to which

DONATION—*Continued.*

no alienation by the donees can convey title. C. C., Art. 1517; C. N., Art. 930; 6 Martin, 529; 12 An. 401; 32 An. 753.

Cox et al. vs. Von Ahlefeldt, et als. p. 1266.

DYING DECLARATIONS.

Where a deceased person, at the time of his being wounded, states to a witness that he could not live much longer and that he was bound to die, his declarations made under such circumstances are admissible in favor of an accused as a dying declaration.

There is no rule of practice or of law requiring that a dying declaration should be made all at one time, without interruption or turning aside to other matters.

A failure on the part of the witness to whom the statement was made to have heard, or to have remembered all the conversation which may have taken place at the time between the deceased and other parties, does not do away with the fact that the witness heard everything and remembered everything that was said to him or in reference to that particular subject when he was present.

Rules of evidence relative to the admissibility of dying declarations are not to be as rigorously applied when the fact itself of their having been made has been satisfactorily established, and they are in favor of the accused as when they are sought to be urged against him.

The fact that the declaration was elicited by questions asked the deceased by the witness, instead of being a volunteered statement, does not render it inadmissible.

State vs. Ashworth, p. 94.

ENDORSEMENT.

While the fact of knowledge of an endorsee that a note he discounts is an accommodation note is no defence against it if taken for value *bona fide*, before maturity, where such a note is given for a special object, which is abandoned, and afterward, in fraud of the maker, it is negotiated, and the endorsee knows or has reason to believe such fraud, his participation in its commission bars his recovery.

This applies with all the more force to instruments non-negotiable in character, for, not being negotiable, greater cantion is required of the purchaser. *Estate of Littell, p.* 299.

EVIDENCE.

Act 84 of 1894 is constitutional and valid to the extent that it provides that the State may coerce the trial of the cause by making the admission that if the witness named in the affidavit for a continuance were present he would testify to the truth of the statement contained therein.

State vs. Lee, p. 9.

Heirs of dead wife are sued to make responsible for a community debt property inherited by them, which had belonged to the community. Novation is pleaded in this, that surviving husband had, after death of wife, given his own notes for the antecedent community indebtedness, represented by notes, which had been surrendered to him, subsequently sued on and judgment recovered against him. He is called as witness by heirs to prove novation, and was asked whether he individually, or the heirs, owed the notes first given (those of the community), or any part of them. Objection made and sustained that this called for the opinion of the witness.

Held, he should have been permitted to answer, and if his reply was in the negative, to explain why no, by giving the facts which lead in his view to extinguishment.

Studebaker Bros. Mfg. Co. vs. Endone, Tutor. et al., p. 674.

EXPROPRIATION.

Our expropriation laws authorize the taking of the fee, if necessary, for public purposes; but if the public needs do not require it and a less estate will meet the public wants, the fee can not be taken. 32 An. 471; 49 An. 1278.

In expropriation proccedings for a right of way for a railroad company the court should not limit the right of way to the corporate life of the plaintiff. The right once granted becomes part of the property of the company and necessary to the continued exercise of the franchise. The property of the corporation may be seized, sold or disposed of in various ways, and is not lost by the death of the corporation. *Non constant* that the road would belong to the plaintiff at the termination of its charter.

In expropriation proceedings the question of the value of the land, or of the use of the land, to be taken, is distinct and separate from the question of damages. In questioning witnesses with

EXPROPRIATION—*Continued.*

the view of ascertaining the value of the land, the questions asked should be so framed as not to blend damages and inconveniences with value in attempting to fix value.

The value of the land itself is the amount for which it would sell at private sale as part and parcel of defendant's plantation without reference to its being taken for a railroad or for railroad purposes.

R. R. Co. vs. Mrs. Hinds and Husband, *p.* 781.

FOREIGN HEIRS.

The parties designated by Act No. 130 of 1894 as those to be charged under its provisions with a succession or inheritance tax are foreign heirs and legatees.

The words personal goods in the first clause of Art. XI of the treaty, entered into on the 27th of October, 1795, and proclaimed on the 2d of August, 1796, between the United States and Spain, refer to and cover *movable* property only. Real estate or immovable property is referred to and dealt with in the treaty only in its third clause.

The only action taken by the two governments in respect to real estate, or immovable property, was to deal with and provide for the consequences of the special case, where foreigners in either country should be prohibited from inheriting immovable property. The effect of this limited action is to leave Act No. 130 of 1894 (unless unconstitutional) operative upon immovable property as against foreign heirs and legatees, except to the extent that it is controlled and limited under the third clause of the treaty, under the condition of affairs therein specially anticipated and provided for.

Act No. 130 of 1894 is an act raising revenue and appropriating money, and should, under Art. 35 of the Constitution, have originated in the House of Representatives. Having originated in the Senate it is decreed unconstitutional.

There is nothing in the language of Act No. 130 of 1894 making the payment of a succession or inheritance tax by foreigners a condition precedent to a right of inheritance. The law permits the foreigner to inherit, but, having inherited, charges him with the tax. Succession of Paragoud, 13 An. 367; Succession of Rabasse, 49 An. 1405.

Succession of Sala, *p.* 1009.

FRAUD—WEIGHT OF EVIDENCE.

While fraud is never to be presumed, courts of justice "recognize the cunning concealment in which it shrouds its devious practices, and the difficulty of tracing it by direct proof."

Hence, they are warranted in giving due weight to all circumstances indicating its existence, and when such circumstances and the reasonable inferences, deductions and conclusions to be drawn from facts proven are of a character to force conviction on the mind. they are justified in finding fraud.

Simon Gregory et al. vs. H. & C. Newman et als., p. 338.

The writ of prohibition to restrain proceedings claimed to be a violation of the suspensive appeal will not issue when the judgment from which the appeal is taken is affirmed.

Ex rel. Schminke vs. Judge, p. 345.

GARNISHMENT.

Attempted seizure by garnishment process of rights of judgment debtor under an existing contract. Unsatisfactory answers of garnishees and rule to traverse.

Because the interest of judgment debtor could not be definitely determined at trial below, *non constat* that there may not be an eventual right or interest in or flowing from the contract, which is still in force and operation, accruing or to accrue to the debtor at the time of termination thereof and then ascertainable, which may be made available under the seizure.

Instead, therefore, of decreeing against plaintiff and releasing garnishees, final disposition of case should have been postponed until termination of contract, with reservation of plaintiffs' rights under the seizure.

Fay & Egan Company vs. Saw and Planing Mills, Limited, p. 205.

Garnishment proceedings taken out in a case after and under final judgment therein, in one sense may be said to be incidental to the main suit as they are based thereon, but they are separate and distinct proceedings with new parties, and must be dealt with as such; they are not brought before the Supreme Court through an appeal taken from the judgment in the main suit.

Bank vs. Hyams, p. 1110.

GRAND JURY.

A grand jury without having heard witnesses may return an indictment into court.

The grand jury may prefer charges founded upon the knowledge of members of the body.

The District Attorney can not be examined on a motion to quash for the purpose of proving by him that the indictment had been preferred without evidence of guilt of the accused.

State vs. Richard, p. 210.

HUSBAND AND WIFE.

The testimony of the husband that his wife's father gave her the rents of his lands cultivated by the husband, and his testimony of the value of the rents, will not suffice to establish as against his creditors the debt of the husband for paraphernal funds; the proof must be clear that the husband received the money or property of the wife. C. C., Arts. 2383, 2390; 11 La. 458; 6 Robinson, 36; 2 H. D., 508, No. 4.

The surviving spouse, in his settlement with the heirs of the deceased wife for her share of the community property, is entitled to a credit for the community debt paid by him. C. C., Arts. 584, 585; 3 An. 497, Succession of Bringier; 4 An. 389.

H. & C. Newman vs. Cooper et als, p. 397.

The separate creditor of either spouse can not, after dissolution of the community, deal with an undivided interest of his debtor in any specific piece of property belonging to the community, proceed against it by direct seizure, sell it and apply its proceeds to payment of his debt.

His proper course is to force by appropriate proceedings a final settlement and liquidation of the community, and then to subject, by process of law, the interest of his debtor thus found to the satisfaction of his claim.

A wife, owning by inheritance an undivided half of a plantation, purchases during the marriage from her co-heirs their intersets. The interest so purchased fell into the community of acquets and gains, unless declared and shown to be purchased for her separate account with paraphernal funds.

A husband, who, afier dissolution of the community by death of the wife, pays out of his own funds debts of the community, becomes subrogated to the rights of the creditors so paid.

HUSBAND AND WIFE—*Continned.*

Against his claim for reimbursement of the debts thus paid—he having the administration of the property—prescription does not run until a liquidation and settlement of the community.

Where the separate property of the wife during her lifetime is administered by the husband, the debts incurred in such administration, such as expenses of cultivating a plantation, are community debts, and the revenues assets of the community.

Pior, Tutor, vs. Giddens et als., p. 216.

There are cases where the court is justified in inferring that improvements put up by a husband on his separate estate, during marriage, and paid for during marriage, and individual or separate debts paid for during marriage, were paid through funds belonging to his separate estate, but the facts of cases of that character must be exceptional. Succession of McClelland, 14 An. 763; Succession of Boyer, 36 An. 509; Succession of Webre, 49 An. 1496.

Buildings and improvemenis placed by a husband on his separate property during marriage and paid for with community funds do not become the property of the community—they belong to the husband, but payments so made give rise to a charge against his separate estate in favor of the community. The separate estate can not be charged with the cost of such improvements, but only with the amount that such improvements enhance the value of the property. Succession of Boyer, 33 An. 509.

The fees of attorney and all costs of the settlement of the succession of the husband, and consequent settlement of the community, are due by the succession and the community in proportion to the interest of each. Costs for the special benefit of one or the other are chargeable to that one. Succession of Webre, 49 An. 1491.

Sims, Wife, vs. Billington, Wife, p. 968.

The material or substantial variation, to the disadvantage of the wife, from the terms of the authorization of the judge pursuant to C. C. 128, does not annul the mortgage which followed, but does destroy the efficacy of the certificate of authorization, and the creditor must prove *aliunde* that the debt enured to her separate benefit.

HUSBAND AND WIFE—*Continued.*

Cotton purchased by husband, though the wife's name was used and she was induced to sign drafts given for the purchase price, and though the cotton was shipped in her name, held to be no part of her separate planting business, and the loss resulting can not be fastened upon her.

West vs. De Moss and Husband, p. 1349.

HEIRS.

Clerks of the District Courts throughout the State of Louisiana, the parish of Orleans excepted, are authorized by Act No. 106 of 1880, and Act No. 43 of 1882, in the absence of the District Judge from the parish, or in case of his recusation, to order the execution of wills and to confirm testamentary executors.

Creditors and legatees of a succession accepted under benefit of an inventory are at liberty, if the beneficiary heir does not come forward within the legal delay to claim the administration of succession for himself, to have the succession placed under administration in other hands. C. C., Arts. 1034, 1035, 1036, 1041, 1047, 1058, 1101.

The executor appointed by the will of the deceased, though not given seizin, properly takes charge of and administers the succession under such circumstances, assuming that the tutrix of a minor forced heir would have had, on a contest, a preference over him.

The powers, duties and responsibilities of testimony executcrs in Louisiana under existing law, run closely to those of curators and aministrators. Parties in interest have the right to exact security at their hands for the faitful performance of their duties. C. C., Arts. 1670, 1673; McGee vs. McGee, 41 An. 660.

Article 1607 of the Civil Code, which declares that "when at the death of the testator there are heirs to whom a certain proportion of the property is reserved by law, these heirs are seized of right by his death of all the effects of the succession, and the universal legatee is bound to demand of them the delivery of the effects included in the testament," whatever be its scope or interpretation, was not intended to apyly to a case where a succession is accepted under benefit of inventory by a minor heir, and where its property has never been placed in the actual possesion of a testamentary executor, who by the will was made the universal legatee of the deceased. Bird vs. Jones, 5 An. 548.

When a universal legatee is himself the testamentary executor appointed by the will, and on his petition and prayer the will has been probated and ordered executed, and the executor has qualified and taken possession of the property of the succession, there is no basis for the contention that the fruits and revenues, of the thing or things which were "legally" bequeathed to him, belong to the heir, pending the administration.

The application by the person created universal legatee and testamentary executor by last will and testament for an order probating and executing the will, confirming him as executor and placing him in possession under the will as legatee, is a sufficient demand for the delivery of his legacy to cut off the possibility of the fruits and revenues of the things "legally" bequeathed to the universal legatee enuring thereafter to the benefit of the forced heir.

The taking possession during administration by a universal legatee of the property bequeathed to him by the will (the universal legatee being also testamentary executor) does not have the effect, *ipso facto*, of closing the succession and discharging the executor. Succession of Sterry, 38 An. 854; Succession of Francez, 49 An. 1732.

The "*legitime*" is due in Louisiana under a *status* of heirship, though forced heirs are sometimes alluded to as and assimilated to creditors. The forced heir may by claiming as such, as an heir under benefit of inventory, escape direct personal liability for the debts and charges of the succession, but in fixing the reserve the law has not ordered it to be established regardless of payment of the succession debts and charges out of the property of the succession, though certain charges are excluded by express provision of law, as, for instance, commissions of executorship and costs of delivery. C. C., Arts. 1632, 1687.

Costs and attorney's fees incurred by the executors in defending an action brought by a forced heir to set aside the will in its entirety as a nullity and chargeable against the succession, so also are costs incurred in the general settlement of the succession, also reasonable fees for services of attorneys, necessary for that purpose. Funeral expenses and expenses of last illness are also chargeable to the succession.

An executor who is also universal legatee, who takes possession *ex*

HEIRS—*Continued.*

parte of all the property of the succession, and deals with it as his own, with knowledge of the existence of a minor forced heir, is chargeable with the rent of the portion of the succession which vested legally in the minor forced heir. Being charged with rent and accorded revenues the expenses incurred in the cultivation and administration of the plantation, including overseer's wages and ordinary incidental repairing of buildings and clearing of land, are at his cost. The rights and obligations of the parties relative to permanent improvements placed upon the property by the universal legatee, having to be considered from the standpoint of the parties being undivided joint owners of the plantation, these rights and obligations should properly be determined in an action of partition, not on opposition to the account.

McNeely vs. McNeely and Succession, p. 823.

The heir accepting the succession unconditionally may be compelled to give security for the debts of the succession, or submit to an administration of the property of the deceased. Civil Code, Arts 1004, 1005 *et seq.*

Nor is the creditors right, in this respect, defeated by the *ex parte* order, recognizing the widow and heirs of the deceased, and putting them in possession of the succession property.

Succession of Bray, p. 1209.

ILLEGAL SEIZURE.

The constable who, without any writ, takes into his possession property against the will and protest of the owner, makes himself and his bondsmen liable in damages, nor will it make any difference that the constable acted on the strength of the note of the owner the constable supposed erroneously authorized the taking of the property.

While this court is not inclined to sanction damages for wrongful conduct out of proportion to the injury of which plaintiff complains, yet, in a suit of this character the court will, in the assessment of the damages, give an amount calculated to mark the judicial condemnation of wrongful conduct for which redress is sought.

Ader vs. Foley and Brennan, p. 1262.

INCORPORATED TOWNS OR CITIES.

Under the Act No. 105 of 1892, providing for the annexation of adjacent lands to the area of incorporated towns or cities, the council of the city has no power to order the election preliminary to any proposed enlargement of the city limits, unless the petition for annexation is before the council from one-third in number and value of the property owners residing within the territory proposed to be added to the city or town. The owner of property within the area to be added to the town or city has the right to enjoin the execution of the ordinance of the council directing the election prescribed by the statute, when the ordinance is adopted without the fulfilment of the conditions exacted by the Act No. 105 of 1892 as requisite to authorize the ordinance and election.

Layton vs. Mayor and Council et als., p. 121.

INJUNCTION.

Only actual damages allowed against the defendant in injunction.

Ludeling vs. Sheriff et al., p. 118.

When an injury is reparable an injunction restraining it may be dissolved on bond.

An order dissolving on bond an injunction not working irreparable injury is not appealable.

The plaintiff may be entitled to damages, for which the bond was given. As to defendants, there is no question of specific performance. C. C. 1926.

Oil Company vs. Leathers et al., p. 134.

In case, by the term of a criminal or a *quasi* criminal statute, it is made the mandatory duty of the Attorney General to enjoin persons from violating its provisions, such injunction can not be suspended upon the defendant furnishing bond. That would be, in effect, granting to the defendant leave to continne its violation *pendente lite*.

State vs. Crozier, p. 245.

The jurisprudence of the State has recognized the right of a plaintiff in injunction when the injunction taden out at his instance has been permitted to be bonded by the defendant, and he has been refused a suspensive appeal from such order to bond, to test the

HEIRS—*Continued.*

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INJUNCTION—*Continued.*

correctness of the district judge's ruling on the character and results of the act enjoined by calling into exercise in his behalf the supervisory powers of the Supreme Court, under an application for a *mandamus* to the judge to grant the appeal asked for. The position of the parties, and the scope of the issues presented to the court for decision under such circumstances are discussed in Puckette vs. Hicks, 39 An. 901; State *ex rel.* Violett vs. Judge, 46 An. 81, 82; State *ex rel.* Lehrman vs. Judge, 46 An. 163, *et seq.* For the purpose of a decision, as to whether the act prohibited was one such as would work plaintiff an irreparable injury, the allegations of the petition for injunction are to be taken as true, with the limitation that this extends to and covers only allegations well pleaded, not to conclusions of law, nor matters of mere evidence pleaded therein. An allegation that the act restrained, if permitted, would occasion irreparable injury, is a mere inference and deduction from the acts and facts charged, the verity and soundness of which the the Supreme Court can review. Crescent City Stock, etc., vs. Police, 39 An. 1194, 1195, 1196.

The issue presented to the court (though in a different form) is substantially the same as that which it would have to pass on, had the suspensive appeal asked for been granted, and had the appellee moved to dismiss the appeal on the face of the papers, on the ground that it should not have been granted, as it was from an interlocutory decree working no irreparable injury. Villavaso vs. Barthet, 30 An. 417.

Ev rel. Oil Mills Co. vs. Judge and Leathers, p. 266.

The injunction against a partner of a commercial firm had the effect of enjoining the partnership.

The partnership, though not made a party defendant, save to the extent that the partner enjoined may have represented the firm, had a right of action to recover damages occasioned by the injunction.

The date the injunction was sued out is not the date from which prescription of claims for damages caused by continuing acts begins to run.

The prescription begins to run from the time the damage was committed by the continuing acts, and not from the date of the injunction.

INJUNCTION—*Continued.*

The sap-wood of a tree circled and deadened loses value after a time, The injunction prevented their removal after they had been deadened, and in consequence, after years, caused loss in value. The sap rot is deducted in commerce.

Drews vs. Williams, p. 579.

The general rule is that injunctions should not be dissolved on the *ex parte* application of defendant, and the writ of *certiorari* will issue to reinstate the injunction when dissolved on such *ex parte* application without any hearing of the plaintiff.

State ex rel. Van Halen vs. Judge, p. 642.

The petition for an injunctien did not set forth the facts needful to show that relator was entitled to an injunction, and therefore *mandamus* did not issue to compel the District Judge to grant the writ of injunction for which the relator applied.

The relator was a party to a suit to authorize his wife and in effect testified in the suit that he had no claim on the property.

After judgment he was without right to an injunction to prevent the execution of the judgment in which it was decided contradictorily with him that the one in whose favor the judgment was pronounced had the right of possession.

State ex rel. Kenner vs. Judge, p. 995.

Parties disregarding orders of injunction do so at their peril and subject themselves to punishment for contempt, unless they establish that the act enjoined was one which it was beyond the power of the court to restrain.

State ex rel. Fowler vs. Judge, p. 1006.

INSOLVENCY.

A creditor may oppose a fraudulcnt surrender any time from its first appearance in court down to within ten days next following the meeting of creditors.

The statute which declares that a creditor who proposes to charge fraud against his debtor shall do so within the ten days next following the meeting of creditors, fixes only the limit of time beyond which he may not do so.

Cappel vs. Creditors, p. 318.

INSOLVENCY—*Continued.*

An insolvent debtor can not give in payment to one creditor, to the prejudice of the other creditors, any other thing than the sum of money due.

No distinction is recognized between a voluntary conveyance of property in fraud of creditors and such an alienation disguised under the forms of judicial proceedings.

Any machination or contrivance by which a fraudulent preference is sought to be given will be set aside and annulled.

Neither the law nor the courts are to be used as instruments to work injustice. To attempt this is to aggravate the offending.

An attachment instigated by a debtor to give a favored creditor an advantage will be declared void and of no effect as to complaining creditors, but maintained as between the fraudulent debtor and favored creditor.

Great weight given to opinion of trial judge, who saw and heard the witnesses, in determining questions of fact tending to prove fraud.

Newman vs. Baer & Levy, p. 323.

INSURANCE.

The policy sufficiently identified the property of the mortgagee (named) as the property insured. And, in this respect, the claim that mortgagee's right to recover was not sustained by proof, was rejected.

On the second ground urged by relator in defence, against mortgagee's claim—*Held:* That the insured continued as party to the contract after the mortgagee was made payee of the policy, and the relation between the insurer and insured remained unchanged.

The insurer, by violating the contract, vitiated the policy.

Failure to observe substantial conditions precedent will discharge the insurer.

Building and Loan Association vs. Insurance Company, p. 1243.

In case a loss is occasioned by the fall of a building through the owners' failure to protect and keep same in a secure condition, he must repair the same, and not the insurance company, in the absence of clear proof that such loss is covered by its risk.

Alter vs. Insurance Company, p. 1316.

INTERDICTION.

Mental infirmities are infinite in degree. The law intervenes in behalf of a person when the malady affecting his intelligence prevents him from governing his person and his property.

These are the tests, and one may be interdicted although he is not always devoid of all power to reason.

The condition in this case makes manifest habitual mental alienation and the consequent necessity of appointing a curator to safeguard defendant's person and property.

To protect every right of the interdict and soothe his condition as much as possible is the object of the law in authorizing interdiction.

Calderon vs. Martin, p. 1153

INTERVENTION.

The intervenor's action did not raise foreign issues; it did not change the character of plaintiff's action, and was not revocatory; therefore, the motion to dismiss was overruled.

Separate, independent agreements of which no one knows anything save the creditor and the debtor can not affect third persons, and can not be taken as an absolute basis for prescription.

Boagni vs. Wartelle, p. 128.

JUDGMENT.

A final judgment should be read in open court.

While it is not necessary that the judgment shall recite that it was read in open court, if the judgment does not so recite, it should affirmatively appear by proper entry in the minutes.

For the purpose of the trial of the rule to dissolve the injunction, the averments of the petition were taken as confessed. By them it appears that the judgment was not read in open court. In the absence of any evidence of record, showing compliance with Act 543, C. P., in regard to reading the judgment in open court, the court holds that the question is jurisdictional, and that there can be no valid judgment without reading it as required, and entry in minutes also showing that it has been signed. It must appear that the act of reading and signing the judgment was in open court and not at chambers.

Woodlief vs Logan, p. 438.

JUDGMENT—*Continued.*

A judgment and execution sale which are founded upon a citation and writ of attachment which have never been served in any manner upon the defendant, temporarily absent, will be held void in the exercise of the supervisory power of the Supreme Court, by the writ of *certiorari*.

Ex rel. Ford vs. Justice, p. 459.

As to this defendant the suit was dismissed on an excdption of no cause of action. Subsequently, through inadvertence, a judgment was signed against this defendant. The court *a qua* afterward signed the judgment it was intended to sign in the first place. The error was complained of, both in the petition for writ of *certiorari* and in answer to the appeal. It was manifestly an error; the judgment against the Pullman Car Company, based upon the error, was of no value whatever.

Arney vs. Pullman Car Co., p. 648.

All testimany offered by defendant in support of his plea in reconvention having been ruled out, the jury should have been instructed there was no evidence before them touching such demand, and that as to same they should return a verdict as of non-suit.

The verdict having been silent as to such demand in reconvention, it was error on part of the trial judgs to incorporate in the final judgment drawn up and signed by him a decree rejecting it. There should have been dismissal as in case of non-suit merely.

Where the averments of an answer and plea in reconvention sufficiently show that the violation of the contract complained of was an *active* one, no formal putting in default was necessary.

The averments af the reconventional demand, in respect of the damages claimed, held to be sufficiently definite and precise to admit evidence in support thereof. Error in its exclusion.

Solomon vs. Gardiner et al., p. 1293.

A paper which has been voluntarily executed by the defendants in a suit pending and therein filed, which contains the recital that "we hereby enter our appearance to said cause," signifies that they make an appearance therein for every necessary purpose of said cause.

A personal judgment which has been pronounced in a Chancery

JUDGMENT—*Continued.*

Court of the State of Alabama, against a non-resident of that State, upon such an appearance therein filed, will be recognized and enforced as a valid and jurisdictional decree *in personam* against such defendants as citizens of the State of Louisiana by the courts thereof.

National Bank vs. Moore et al., *p.* 1332.

JURISDICTION.

When plaintiff's claim does not exceed two thousand dollars, and the value of the property involved in the contract sought to be annulled is greater than that amount, inasmuch as in such action the judgment can only affect the complaining creditor and the debtor to the amount of the former's claim, the appellute jurisdiction is tested by reference to the amount of plaintiff's claim.

But when plaintiff's claim exceeds two thousand dollars, and the value of the property, the sale of which is sought to be annulled as fraudulent, is *less than two thousand dollars*, the creditor can not recover an amount larger than the value of the property; that is the only amount at issue, and by it the court's jurisdiction is determined.

State ex rel. Newman vs. Judges, *p.* 126.

Jurisdiction sustained—right of possession of certain premises being at issue, with oath of plaintiff that this right is worth more than two thousand dollars, and that he would be damaged exceeding that sum if defendant is not restrained from invading same.

Proportionate area or acreage system for division of alluvion between adjoining riparian proprietors excluded.

Each proprietor of original tracts takes between the lines of his new frontage on the water-course measured back to the old frontage.

Course or direction of side lines of no consequence. Extent of old frontage on the water-course determines extent of the new frontage on the water-course.

Newell vs. Leathers et als., *p.* 162.

LAST WILL.

The statement in the certificate to nuncupative will by public act, "Before me, C. R., a notary public for the parish of Orleans and

LAST WILL—*Continued.*

city of New Orleans," without "duly commissioned or sworn," or other addition, is sufficient to express the official character of the notary.

The law does not exact the use of the very words of the Code by the notary in the express mention required of him that the requisites of the will in nuncupative form by public act have been fulfilled. Hence, to describe the witnesses as all of this "city," following "C. R., a notary public for the city of New Orleans," is equivalent to stating the witnesses to be residents of New Orleans, and meets the requirements of the statement in the certificate of their residence. Civil Code, Art. 1578; C. N., Art. 978; 16 La. 81; 40 An. 597; 2 Mourlon, p. 400; 2 Baudry-Lacantinerie, p. 378; 16 Dalloz Repertoire, p. 818, par. 2835, p. 916, par. 3144; 3 Troplong, p. 118.

The law does not require the mention in the will that the witnesses are not disqualified. C. C., Art. 1691.

Succession of Marqueze, p. 66.

LAST WILL AND TESTAMENT.

A judgment or order probating a will can be attacked on the final homologation of an account, all parties in interest and the issues involved being before the court.

The writings on two sides or a broken envelope did not form a continuous connected will. On one side is a written list of claims, which list is not signed or dated; on the other the words: "These notes go to my wife," without designating the notes intended. Not sufficiently certain to give it effect.

The legacy of notes does not lapse when the only purpose, in accepting new notes instead of the old, was to make them more secure as to their payment, and they were substantially the same as the canceled notes.

A legacy from a designated fund is not extinguished if the fund is replenished and is a continuous existing fund.

Particular legacies may speak with reference to the future, if it be evident that the testator expected amounts given to be deducted from sums to be realized in the future.

A legacy in one will is not revoked by a subsequent will in which the testator substantially disclaims any intention to revoke.

A clause in a will giving the usufruct to one person and the owner-

LAST WILL AND TESTAMENT—*Continued.*

ship to another, at the death of the usufructuary, is not a prohibited substitution. There was no trust created and no property taken out of commerce.

Words of recommendation to a legatee is not a bequest, and is not an illegal condition.

Succession of Shaffer, p. 601.

LEASE.

One of the buildings leased (not both) was rendered temporarily uninhabitable by the fire. To restore the building temporarily uninhabitable, repairs were necessary, and not reconstruction.

The building could have been put in condition for use in seventeen days. The defendants after the fire remained in possession more than that number of dags. Those who held the premises under the defendants and for their benefit objected to the work of repairing, and prevented the possibility of repairing the building within the time stated.

While the lessor ought to make, during the continuance of the lease, all the repairs which may accidentally become necessary, the tenant should not interpose obstacles to the work of repairing.

Partial destruction remedial by repairs, and which do not require reconstruction, will not give good grounds to dissolve the lease.

The judgment of those who are skilled in matter of building and the repair of building as to what constitutes reconstruction, and what constitutes repairs of a building, is entitled to weight.

Where the lessee has property to store immediately after a fire, the offer to him by the lessor of a store-room as an accommodation is not ground to rescind; nor does it necessarily manifest a desire to put an end to the lease. The annulment of leases is not favored where the lessor is not at fault. 21 An. 23; 6 An. 379.

Where lessees abandon the premises, the lessor may, for the purpose of minimizing the loss, offer "to let" the property. Such acts will not cancel the lease. 6 An. 74.

The petition and the document annexed are construed together, and error in the petition as to interest was amended by reference to the contract of lease annexed. 15 L. 116; 5 An. 575.

Vincent vs. Frelich, p. 378.

LEASE—*Continued.*

While the taking of part of the property leased for a purpose of public utility gives the lessee no action in damages against the lessor, he not being in fault, the lessee is entitled to a diminution of rent. Civil Code, Art. 2697.

When the city of New Orleans becomes a lessor, it is subjected to the same obligations imposed by law on those who enter into contracts of lease, hence the lessee from the city of the revenues of the public markets deprived of part of the revenues, because a portion of the space on which the stalls in the market are erected is taken for a public necessity—*i. e.*, the widening of a street, the city must allow the lessee a diminution of rent.

The lessee entitled to a diminution of rent does not lose his right, because under the menace of dispossession under the extra-judicial power claimed by the lessor under the contract, the lessee pays under protest rent becoming due after the right to the diminution accrues.

The lessee can urge his demand for diminution of rent in a separate suit, or by reconvention, if sued on the rent notes. C. P., Arts. 374, 377. *Hinrichs vs. City, p.* 1214.

LIFE INSURANCE.

A policy of life inserance, taken out by a husband in favor of his wife, can not subsequently be assigned by him to her prejudice. The doctrine announced in the Pilcher case, 33 An., and the Putnam case, 42 An., sustained as the juriprudence of the State.

And it makes no difference that he secured from her what purports to be an assignment, without consideration, of the policy to him before he assigned it to his creditor.

A donation made in the form of an onerous contract (without consideration and really intended as a donation in disguise) to have effect as such must be passed before a notary public and two witnesses.

An innocent stakeholder, without interest in a pending litigation, depositing in court, by consent of the judge thereof, the full amount he owes, or in his hands, and which is the object of dispute between contesting claimants, the rightfulness of whose claims is the subject of the litigation, should be relieved from further liability, and not held for interest and costs subsequently accruing. *Lambert, Widow, et al. vs. Ins Co., p.* 1027.

LICENSES.

A commercial drummer, or canvasser, who goes out on the road soliciting orders for his house, whether it be located in or out of the State, and who takes with him samples of the goods or wares his house deals in, is not a "traveling vendor" within the meaning of Sec. 13 of Act No. 150 of 1890.

A business house, located in one of the towns or cities of the State, taking out the necessary licenses there, may send its drummers or canvassers out, with samples, to take orders in other towns and parishes without becoming subject to the payment of a State, parish or municipal license in such other towns and parishes.

The negotiation here of sales of goods which are in another State for the purpose of their introduction in this State is interstate commerce.

Tax Collector vs. Ray, p. 574.

Suits relating to taxes or licenses are preference suits, triable without a jury and at Chambers if court be not in session. Sec. 56 of Act 106 of 1890.

Railroad & Steamship Co. vs. Sheriff, p. 737.

LIS PENDENS.

The pendency of another suit between the same parties, for the same object arising out of the same cause of action, will not abate the suit unless specially pleaded *in limine*.

The court will not supply the plea, although evidence was anmitted without objection.

Where the matter relates to property rights of religious socicties, the controversy is generally to be decided as other controversies between persons.

Ex rel. Church vs. Riedy, p. 258.

MANDAMUS.

Mandamus will lie to compel an officer of a religious corporation to deliver records to his successors, who are properly entitled to them. The books and records being subject to inspection by those having an interest, the corporation is entitled to a prompt remedy to have them restored. C. P., Arts. 831 and 832.

State ex rel. Church vs. Riedy, p. 258.

Mandamus will not lie for the purpose of compelling a bank to pay

MEDICAL BOARD OF EXAMINERS—*Continued.*

The General Assembly, having the authority to require as a condition precedent to the right or privilege of any one to practise medicine in Louisiana, that he should be subjected before doing so to a prior examination as to his qualifications, and found and declared worthy and qualified, it has the right to select the particular agency to whom should be delegated that duty. Courts can not control that selection. A statute creating a Board of Medical Examiners, to be composed of physicians recommended for appointment from lists to be furnished by the Louisiana Medical Society and the Hahneman State Medical Society, to be appointed by the Governor on such recommendation, is not open to attack as discriminating in favor of the allopathic and homeopathic schools against the eclectic school of medicine. No constitutional right is given to particular individuals entertaining peculiar theories of medicine to group themselves together, and, calling themselves a special school of medicine, under a selected name, to insist that they be recognized and dealt with as such.

The action of the Medical Board of Examiners is not conclusive, but is subject to correction in case of abuse.

The recognition by the constituted authorities of another State that a person was properly qualified to practise medicine, and that the medical college whose diploma he presented as evidence of that fact was a medical college in good standing, does not carry with it a vested right in the party to practise medicine in Louisiana. Each State acts independently of the other in this matter.

A person who has been practising medicine as a physician for a number of years without objection is not exempt from complying with legislation of a later date, making it a condition precedent to any one's practising medicine that he should have been examined by a medical examining board, found to have the qualifications required by law for so doing.

Board of Medical Examiners vs. Fowler, p. 1358.

MORTGAGE.

The mortgage enjoins on the ground of outstanding title to part of the property in a third person. The third person appears and by authentic act disclaims title, and the act is duly recorded.

This act is held not to be a donation and not subject to the provisions of law relating to such dispositions, nor to the implied condtions the law attaches to the same.

It is what it purports to be, a disclaimer of apparent title, and estops the maker and those claiming under and through him.

The cause of complaint being removed the injunction falls.

Beltran vs. Leche, p. 385.

A syndic's sale of real estate discharges only those incumbrances which the insolvent placed upon it, and not those by which it was burdened at the time he purchased it.

The vendee of mortgaged property is at liberty to make a sale thereof to a stranger who consents to assume the payment of the mortgaged indebtedness as part of the purchase price, notwithstanding the original act contains the pact *de non alienando;* but to constitute such an assumption an abandonment of the right of the mortgagee thereunder he must either have intervened in the act and made a formal renunciation thereof, or performed some other act of equivalent import.

Daniel vs. His Creditors, p. 391.

When there is no written contract for the wages of laborers or with thsse who repair or furnish materials, claiming privileges on immovables for such wages, repairs or materials, the registry of such privileges must be made within the period fixed for registry computed from the dates when the wages became due, the repairs completed, or when the materials are furnished. Constitution, Art. 176: Civil Code, Arts. 3186, 3249, 3272; R. S. Sec. 3093; 27 An. 243.

Mortgages, in the usual course for cash advanced the debtor, are not within the scope of our law, presuming the fraudulent preference from the mortgage granted within three months preceding the debtor's insolvency. C. C. 1981; Revised Statutes, 1808; 37 An. 595.

The director claiming under a mortgage in his favor by the corporation can not compete in the distribution of the proceeds of the mortgaged property with the corporate creditor to whom on the same date the mortgage note is delivered to the director, the directors authorize the mortgage on which the corporate cred-

itor advances his money to the corporation. 47 An. 1487; Taylor on Corporations, Sec. 759.

If the director can not enforce to the prejudice of the corporate creditors the mortgage in his favor by corporation, neither can the transferee.

Brashear vs. Cooperage Co., Ltd., p. 587.

Plaintiff claimed a special mortgage prior in date on property adjudicated to defendant.

He claimed also that by the adjudication and the fact that by operation of law he, defendant and adjudicatee, was authorized to retain the price, he thereby became personally indebted for the amount of the special mortgage.

Held: That the special mortgagee holding the first mortgage on property has no cause of action to hold the purchaser personally responsible for the amount of the first mortgage.

The purchaser not having assumed the first mortgage is responsible as a third possessor and the property was transferred to him *cum onere.*

The question was passed upon in Bacas vs. Hernandez, 31 An. 86; Trondle vs. De Bouchel, 33 An. 759. It was decided in these cases that the special mortgagee had no personal claims. The fact that a purchaser, who, for purposes of his own, delays payment, may be held personally for interest accruing from date of the sale, as in 29 An. 384, on the special mortgage, first in rank, is not ground upon which it can be held that he is liable personally on the mortgage, with interest to the day of sale.

Thompson vs. Levy, Jr., p. 751.

The asserted error in an act of mortgage in describing the property may be inquired into and corrected on the intervention of the mortgage creditor in the suit of an alleged owner enjoining the execution of the mortgage creditor, the petition of intervention containing the requisite allegations to show and admit proof of the error.

Lake Bisteneau Lumber Company vs. Sheriff et al., p. 619.

Mortgages are not (as cutting off equities) negotiable in the sense of the law merchant.

A father who being tutor of his minor children receives into his pos-

MORTGAGE—*Continued.*

session as such as part of their inheritance from their grandmother, negotiable notes made by him to his own order and by himself indorsed, which notes represented the purchase price of property purchused by him, and were secured by special mortgage and vendor's privilege on the property purchased, became *ipso facto* the debtor of his children for the amount of the notes, the said debt being secured in their favor by special mortgage and vendor's privilege. The notes in the tutor's hands were the mere evidences of his debt to them.

The tutor being so indebted to his children, could not alter the sitaation to their prejudice by illegally transferring these notes before maturity to a third person. The rights of the transferee *quoad* the mortgage and privilege are subordinated to those of the minors.

Pertuit vs. Damare, *p.* 893.

In case the form of a sale is resorted to for the purpose of obtaining the apparent security of a special mortgage and vendor's lien, it will be treated as a mortgage pure and simple in an action by the wife who enjoins its execution in executory proceedings on the charge of simulation and illegality as an effort to bind her paraphernal property for the individual indebtedness for her husband. And, that, being so considered, same draws to it all the legal consequences which attend a mortgage in fact which has been executed for like purposes.

Terry and Husband vs. Gilkerson, Ex., et als., p. 1040.

On appeal from an order of seizure and sale the legality of the order alone can be inquired into. If the notice, or three days' demand of payment, be defective, either in substance or in the manner of its service, it may afford ground for injunction, or other relief in the court below, but can not be the subject of appeal.

Where an act of mortgage authorizes the mortgagee to take out insurance in case the mortgagor fails to do so, and stipulates that the premiums paid up to a certain sum shall be considered covered by the mortgage, such premiums, within the limit, may properly be included in the order for executory process as an incidental expense, upon production of the receipt, or an affidavit showing payment thereof by the mortgagee.

Savings Bank vs. Lemle, *p.* 1289.

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Savings Bank vs. Lemle, *p.* 1289.

NEGLIGENCE—*Continued:*

risks which he neither knows nor suspects, nor has reason to look for; and it would be more reasonable to imply a contract on the part of the master not to invite the servant into unknown dangers than one on the part of the servant to run the risk of them.

Whether invited upon the premises by the contract of service or by the calls of business, or by direct request, is immaterial; the party extending the invitation owes a duty to the party accepting it to see that at least ordinary care and prudence are exercised to protect him against dangers not within his knowledge and not open to observation.

The servant assumes the risk of such hazards as are apparently incidental to an employment intelligently undertaken, and those only.

A superior is presumed to know whatever may endanger the person or life of an employee, in the discharge of the duties of his employment, and is bound to specially warn him of the nature of the danger, unless said employee well knew of the existence and extent of the hazard or risk, or willingly exposed himself to it.

If the negligence of the master caused or contributed to the injury of his servant, the former is liable to the latter, notwithstanding the negligence of a fellow-servant likewise contributed thereto.

When an injury is caused partly by the negligence of a fellow-servant and partly by the failure of the master to provide the servant a reasonable safe place at which to work, the negligence of the fellow-servant will not exonerate the master.

When the service to be rendered requires for its performance the employment of several persons, there is necessarily incident to the service of each the risk that the others may fail in the exercise of the caution that is essential to their mutual safety.

Consequently, there is implied in the contract of service in such case that each servant takes upon himself the risk arising from the negligence of the other, while in the common employment; always *provided* that the master is not negligent in the selection or retention of the fellow-servant of either, or in providing him a reasonably safe and suitable place at which to work, and reasonably suitable tools and materials with which to work.

It is necessary in order to constitute a fellow-servant within this rule of jurisprudence that the servants should be fellow-laborers in

the same work or in the same department of a common employment.

Stucke vs. Railroad Company, *p.* 172.

It is negligence to throw from the interior of a building the debris of carpenters' work done therein upon a constantly traveled public sidewalk and to leave it there throughout the night of Saturday, all Sunday and all Sunday night, and the lessees of the building are responsible for personal injuries received by a passer upon the sidewalk falling over the same at night, there being no light nor other warning, or notice given of the presence of such obstrcutions, and the night being dark.

Such an accident was one which might reasonably have been, and should have been, anticipated and guarded against. The lessee had no right to take the chances of the sidewalk being lighted up, either by the moon or by the electric lights of the city. Plaintiff had the right to be walking precisely where she was; she was not bound to walk on the gutter's edge, or on the middle of the sidwalk, but had the right to assume and presume that the whole way was clear. Heckman vs. Evenson, 73 N. W. 430.

Shidet vs. Dreyfous Co., Ltd., et al., *p.* 281.

The switching of cars in the night-time on the main tracks of a railroad, with no lights displayed, or other precautions used to warn approaching trains of the obstructed track, resulting in the collision with the obstructing cars of a freight train dispatched with no notice or warning of the obstruction, will be deemed negligence in the railroad company, subjecting it to damages caused by the collision.

Nor is the liability of the company at all lessened because the main track obstructed is within what are termed yard limits, extending eight hundred feet and over which all trains must pass, and such obstructions menacing such trains unless proper precautions are employed.

McGraw vs. Railroad Company, *p.* 466.

In an action for damages received from a collision between a cart and a street car, moving side by side in the same course, with a short space between them (one can not strike the other if each remains in its direction), it being evident that the car did not

NEGLIGENCE—*Continued.*

turn, but that the cart was turned so that it struck the side of the car, the presumption of negligence was not against the street car.

To recover, it was incumbent upon the plaintiff to prove that the collision was caused by the negligent acts of the defendant. On the contrary, it appears that it proceeded from the incautious acts of the driver in pulling his horse to the left.

Held: That the injury was not caused by defendant's negligence, and that there is no ground for deciding that the unanimous verdict of the jury and the judgment of the court pronounced thereon were erroneous.

Rombach, Tutrix, vs. Railroad Company, p. 473.

Persons manning and operating street cars are expected to be careful at the crossings. The company must exercise reasonable care to provide men enough to properly control a train consisting of a motor car and a trailer. At deep grades leading to railroad crossings there should be a motorman and conductor aboard the train and in charge. There was only a motorman. The injuries, occasioned by the collision between the street cars and the passing train at the crossing, were injuries for which the defendant company must be held responsible in damages.

Flourney and Wife vs. Railroad Company et al., p. 635.

It is usual to have a motorman and conductor on a train consisting of a car and trailer carrying passengers.

Approaching a railroad crossing on a steep grade the train of defendant company was not stopped, owing to the fact that it was not controlled by the motorman.

The result was that it ran into the passing train of the Texas & Pacific Railway. At the moment of the collision plaintiff, a passenger on defendant's train, leaped off and was injured.

The duty was, by the ordinances of the municipality and rules of safety, imposed upon the defendant train to stop at the crossing. It was not stopped.

The ordinary care due passengers was wanting. There was only a motorman and no conductor on the train to properly apply back brakes. There was actionable negligence.

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NEW ORLEANS—*Continued.*

an ordinance of the City Council declaring a penalty for non-compliance with an order given by an officer of the Board of Health to repair any vault found leaky, which fails to cast upon any particular person or persons the duty of making the repairs, is too vague and uncertain to be made the basis of a penal or criminal action. *State vs. Forman*, p. 1022.

An ordinary action of a judgment creditor of the city of New Orleans attacking the 1897 annual city budget subsequent to its approval by special ordinance, and also the 1898 budget six months prior to its preparation and presentation, discloses no cause of action. *Foy et als. vs. Mayor and Council*, p. 1074.

An ordinance of the City Council of the city of New Orleans which requires corporations operating street electric cars within the limits of the city, upon tracks laid down in the public streets thereof, to water their tracks so as to effctually lay the dust within its tracks, is a legal exercise of the police power of the city. Such an ordinance tends to promote the comfort and convenience of passengers and the health and comfort of the inhabitants of the city.

It is neither indefinite nor unreasonable.

State vs. Railroad Company, p. 1189.

The power to fix places for the sale of food commodities for the daily wants of the community exerted by ordinances establishing the markets and prohibiting sales of such commodities elsewhere, is a municipal function vested by the charter in the city of New Orleans. Act No. 45, of 1896, Sec. 14; 49 An. 618.

Hence, it is competent for the council to prohibit the sale of perishable food commodities in the railroad depots or landings of the city, except such sales of the articles in the unbroken packages in which the articles are imported into the State.

The ordinance as one intended to prevent the conversion of the railroad depots and landings into places for the offering and sale of perishable food commodities is not to be annulled for alleged oppressiveness or unreasonableness, and the exception removes any incompatibility between the ordinance and the commerce provision of the Constitution of the United States. Const., Art 1, Sec. 8; Brown vs. Maryland, 12 Wheaton, p. 436.

State vs. Davidson, p. 1297.

NEW ORLEANS.

Plaintiff, holder of certain judgments against the city of New Orleans, attacks certain items of expenditure found on the city budget for 1898 as being illegal, demands that same be stricken therefrom and that his own judgment be placed thereon in their stead, to be paid by preference in full. Exception of no cause of action disclosed, filed to his petition, sustained.

Fernandez vs. Mayor and Council, p. 485.

Holders of claims against the city of New Orleans, by the laws and ordinances under which the claims were created, entitled to payment only from and out of the funds appropriated to payment of such claims, are not entitled to an absolute judgment against the city. Johnson vs. The City of New Orleans, 46 An. 714.

Assuming that the funds applicable to the payment of claims of particular years out of the taxes of those years should have been illegally diverted and misapplied to the payment of the claims of later years, the effect thereof would not be to transform the mass of these qualified creditors into general creditors with the right to obtain absolute, general judgments against the city—nor authorize any particular one of these creditors to obtain such a judgment giving him superior rights to which he would not be entitled.

Johnson vs. City, p. 920.

SEE Constitution.

If there be other points or defences in a case upon which its decision may well turn, the court will pretermit an expression of opinion upon a constitutional question that may have been set up as a matter of defence.

The civil service law adopted for the city of New Orleans includes within the scope of the civil service all positions (except that of chief engineer) in the *fire force* only.

It leaves untouched by the civil service other positions not clearly within the meaning of the words "fire force."

As to such other positions the fire board may appoint and promote independently of the civil service.

The position of secretary-treasurer of the fire board held not to be included within the meaning of the term "fire force" as used in the statute.

City vs. Board of Fire Commissioners, p. 1000.

NEW ORLEANS—*Continued.*

An ordinance of the City Council declaring a penalty for non-compliance with an order given by an officer of the Board of Health to repair any vault found leaky, which fails to cast upon any particular person or persons the duty of making the repairs, is too vague and uncertain to be made the basis of a penal or criminal action. *State vs. Forman*, p. 1022.

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State vs. Davidson, p. 1297.

NUISANCE.

The validity *vel non* of the ordinance under which the defendant was fined, gave rise to the issues involved.

The ordinary use of property can not be interfered with by assuming that it is a nuisance *per se*.

State vs. Marshall, *p.* 1176.

There are few uses of property that are nuisances *per se*.

A use which is not necessarily a nuisance is not to be treated as a nuisance.

A municipality is without power to suppress that which it may regulate.

State vs. Owen, *p.* 1181.

ON REHEARING.

When the testamentary disposition in favor of two or more legatees to be paid from the fund specified deemed by the testator to pay all legatees, but which, when he dies, proves insufficient, the rule of proportional distribution between the legatees will not apply when the terms of the disposition plainly manifest the testator's intention that his wife, named first, shall be paid by preference from the fund. Civil Code, Arts. 1712, 1635.

Succession of Shaffer, *p.* 601.

OWNERSHIP.

The owner whore covers his property owes to the party evicted the taxes paid and the value of useful improvements made by him which have augmented the value of the property. C. C., Arts. 508, 3453; 16 La. 314; 33 An. 744.

The evicted party in bad faith owes rents from the beginning of his possession. 7 N. S. 112; 12 Rob. 256; 3 An. 258; C. C., Art. 3453.

The possessor under a title void on its face, because violative of a prohibitory law, can not claim the protection accorded by law to purchasers and mortgagees who acquire on the faith of the title conveying ownership placed on record by the owner. 8 N. S. 227; 19 La. 362; 1 An. 286; 47 An. 49.

Beaulieu vs. Monin, *p.* 732.

PAROL EVIDENCE.

While parol evidence is admissible to correct an error in the description of property mortgaged; yet a special demand to correct should be made, and correct description of the property should be set forth as part of the demand to correct.

The prayer for general relief does not supply failure to ask for an amendment of the mortgage of property incorrectly described.

Murphy vs. Robinson, p. 213.

PARTITION.

When parties to a litigation have agreed among themselves as well as by order of court that the credit portions of the purchase price should be represented by notes of the purchaser secured by special mortgage and vendor's privilege on the property sold, the purchaser although one of the heirs in a partition suit can not refuse to comply with that portion of the bid.

Granting that an heir in a partition suit who becomes a purchaser at the partition sale could not be called upon to pay the cash price of the bid, that fact would not justify such purchaser in asking a title to the property purchased unless such purchaser executed simultaneously the notes called for by the conditions of the sale.

Young et als. vs. Sheriff et als., p. 12.

Plaintiff in a partition suit, who has cited a number of co-defendants as owning certain designated interests in the property sought to be divided, has no legal reason to complain that one of the defendants, after denying that the interest of one of her defendants was as large as had been stated in the partition should, under an agreement with that co-defendant, have discontinued (under reservation of her rights) her opposition on that point, and permitted the partition to proceed on the basis alleged. Contestant could not, thereafter, attack generally the partition, on the ground that that particular party had been assigned too large an interest. The partition as made would stand, though the two parties might have to adjust rights *dehors* the partition between themselves. If plaintiffs obtain all they are entitled to, they have no legal concern as to how the other parties to the litigation may settle their relative differences.

Benton vs. Sentell, p. 869.

PARTNERSHIP.

Our code declares that a partnership may be dissolved for the breach of one of its obligations.

It declares that it may be dissolved for just cause without furnishing any interpretation of that term. Hence it is a question for the courts to determine.

Partnership is essentially a relation of mutual trust and confidence, and when they cease the engagement is virtually at an end.

One of the members of an ordinary planting partnership having failed or refused to comply with the terms of his engagement to furnish his proportionate share of the funds necessary to carry the planting operations to completion, violates one of the essential obligations of the contract and gives to the other partner just ground for annulling it.

Breaux vs. Le Blanc, p. 228.

Where a copartnership agreement provides that in event of disagreement between the copartners, a third person (named), who furnishes the capital upon which the business is conducted, should take possession of the affairs of the firm, one of the parties sued by the other for liquidation is without cause of complaint that the court should, on rule to show cause taken in the pending suit, appoint such third person liquidator.

Newman vs. Schminke, p. 516.

PARTY WALL.

The wall built by plaintiff was made a common wall by the owners of the lot adjacent, who used it as one of the sides of their building.

The trespass and encroachment charged, in that plaintiff had exceeded by about two inches, the nine inches allowed to one who builds a wall on a dividing line, was not sustained.

The defendants having made use of the wall as a support for their own building are indebted for one-half of the cost of construction.

The intervenors, an insurance company, were subrogated to the right of plaintiff, when it paid plaintiff the value of one-half of the old party wall, which had not been insured.

An amount equal to the value of the old wall was allowed to the intervenor in accordance with decree in Monteleone vs. Insurance

PARTY WALL—*Continued.*

Company, 47 An. 156. The remainder due by the defendants to plaintiff is an amount to which plaintiff has a right, it being for costs of construction to which intervenors had not been subrogated, as it was additional cost of the new wall.

Monteleone vs. Harding et al., p. 1147.

PAYMENT.

An imputation of payment, made at the time that the insolvent debtor paid, in part, his indebtedness to a senior mortgage creditor, can not subsequently be recalled and changed to the prejudice of the junior mortgage.

To the extent that payment is made a mortgage is annulled.

It is not possible to give new life to the part annulled and thereby lessen the chances of recovery on the junior mortgage.

Boagni vs. Wartelle, p. 128.

PETITORY ACTION.

When by the consent of the owner of property the legal title thereto has been placed in the name of one of his creditors, under an agreement that he should hold the same until the amount due him should be paid, the owner has no right to ignore the latter's right of detention until a balancing of accounts had been had, and by and through a petitory action recover both the property and the rents, leaving her own debts unpaid.

Talle et als. vs. de Monasterio et als., p. 940.

PHYSICIANS.

In fixing the value of fees due by a succession for professional services of physicians, the court is justified in taking into consideration the value of the succession.

The claim that from the moment more than one physician is called in and attends regularly upon a case, every visit made by every physician employed takes rank as a "consultation," can not be listened to. Succession of Duclos, 11 An. 407.

Succession of Haley, p, 840.

PLEADING.

When an action is met by an exception of no cause of action leveled at the suit in its entirety, it will not be sustained if the plaintiff have a right of action on any branch of its case.

A bank to whom its own certificate of deposit has been presented for payment by another bank, to whom it had been forwarded for collection by a third holder thereof, can not, when it has refused payment and declined to return the certificate to the agency bank from whom it had obtained possession through presentation for payment, have dismissed an action brought by the latter to obtain either payment of the certificate or its return to the agent on an exception that the plaintiff has no right of action.

Bank vs. Bank, p. 528.

PLEADING AND PRACTICE.

The plaintiff suing on the commutative contract can recover for partial performance, but the measure of recovery is necessarily not the contract price, but the benefit the proof shows the defendant derived from the partial performance. 3 La. 1; 4 La. 465; 7 La. 134.

An attachment will not lie of funds brought within the jurisdiction of this court to pay the debt binding on the attaching creditor and which payment he seeks to defeat by his attachment.

Taylor vs. Almanda & Bro., p. 351.

The truth of plaintiff's averments being admitted by the exception of no cause of action, to warrant a dismissal of the action it must appear that the allegations admitted true are all disposed of by the effect of the plea.

He, defendant, for the hearing having admitted certain alleged rights (without passing upon the question of their validity at this time) the court holds that the trial of the asserted rights of plaintiff, as against defendant's title, may be had under the pleadings.

The deed annexed by plaintiff to its petition setting forth defendant's rights of servitude (disputed by plaintiff) gives rise to questions which may be determined in this litigation. If defendants have a servitude, it is to the interest of all concerned that it be localized; its character determined and limit fixed. This can be as well done now under the pleading as at another time under other pleading.

LEADING AND PRACTICE—*Continued.*

ae multiplicity of actions are not forced. It is even a maxim that *interest reipublicæ ut sit finis litium.*

Middlesex Banking Co. vs. Niemeyer & Darragh, p. 755.

PLEDGE.

In case a promissory note is executed without any consideration actually passing from maker to the payee, and as an accommodation to the payee, for the express purpose of enabling the latter to pledge same as collateral security for an anticipated indebtedness to a third person in pursuance of an agreement to that effect, same in the hands of the latter can be realized upon, against the maker to the extent of the secured indebtedness of the payee and pledgor and no further.

The forbearance of the creditor to institute suit against his principal debtor for the recovery of the amount due him is not such a prolongation of the terms granted to the principal debtor as will operate the discharge of a surety, in case he has not given his consent thereto, as the Code contemplates.

Forstall vs. Fussell et als., p. 249.
Forstall vs. Fussell et als., p. 256.

The contract of pledge was made to cover the fee of attorney for professional services rendered by pledgee's attorney in court, and for his services rendered out of court, in all matters appertaining to the securities pledged.

The debtor after it had failed to meet and pay its indebtedness at maturity of its obligation, was indebted for the fee of the creditor's attorney, on the amount realized and credited on the pledgee's claim from the sales of the pledged property.

The effect of plaintiff's default in its payment was suspended during the delays granted to plaintiff after default. No fee is due on collections made during that time. Sale being a condition precedent to the fee, no amount is due as a fee on the collections made on the securities (without sales).

The rule as above indicated applies to the commission claimed to pay the creditor's special agent.

The bank, by the fact that it closed its doors and suspended payment, did not cause to mature all its unmatured obligations. It was not a case of judicially fixed insolvency. In consequence no fee and commission are due on the assumption that the debt had become matured by the debtor's insolvency.

PLEDGE—*Continued.*

The special agent of defendants under the contract was not the special agent of the plaintiff as well. He owed a duty to his principal, the defendants. If there was any obligation to report and give notice of sales to the plaintiff debtor, it was due by the pledgees and not by the agent. The pledgees' obligations are in some respects those of agents, but the pledgees, in view of the facts, did not lose the right to fee and commission, because no notice was given by them to the pledgors of sales *intended*, or of sales made. They are protected by the terms of the contract of pledge. The bank did not give them such evidence of preparation to resume business as required them to suspend sales of bonds.

The sale of the bonds on a depreciated market was permissible under the terms of the contract plaintiff chose to sign, and offers no ground for a set-off against defendants' claims.

Plaintiff having in part succeeded in sustaining its injunction is not bound for any fee of defendants' attorneys for services in dissolving the injunction. *Bank vs. Forsyth*, *p.* 770.

POLICE JURY.

The police jury in the exercise of the power of taxation with *which* it is clothed under the Constitution and laws, met by the claim of a municipal corporation, that part of the parish has *been* detached and added to the municipal corporation, is not suspended in the exercise of the power of taxation by such *claim of* the city, but may levy the parochial taxation and thus present for judicial determination the conflicting pretensions of the *city*. Constitution, Arts. 249, 250 *et seq.*; Act 1892, No. 105; 47 An. 589.

The prescription of personal actions can not be applied to deprive a political corporation of the function of taxation vested in it by the Constitution, and which the corporation can not surrender. *City et als. vs. Police Jury*, *p.* 346.

POSSESSION.

Where the purchaser has actual and open possession, this fact puts original owner under notice of necessity of bringing his action within the time fixed, in default of which the bar of the statute applies.

PLEADING AND PRACTICE—*Continued.*

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POSSESSION.

Where the purchaser has actual and open possession, this fact puts original owner under notice of necessity of bringing his action within the time fixed, in default of which the bar of the statute applies.

POSSESSION—*Continued.*

Defendant has the right to stand on his possession. Plaintiffs can not force him, in defence, to assume the attitude of plaintiff in a petitory action.

Instant case distinguished from Remick vs. Lang, 47 An. 922; Blood vs. Negrotto, 47 An. 1132; Johnson vs. Martinez, 48 An. 52; Hoyle vs. Athletic Club, 48 An. 879; Breaux vs. Negrotto, 43 An. 428. *Russell vs. Lang, p.* 37.

PRACTICE.

Where the record is not in condition to close the controversy, unless there is manifest reason for a different course, the court in the interest of all parties will remand the cause.

Landry vs. Sugar Factory, p. 542.

This court will not remand a case in which the party seeking the remanding has had full opportunity to produce his testimony and has been fully heard, least of all, can this remanding be directed on the strength of *ex parte* affidavits filed in this court charging in effect, that plaintiff and his witnesses swore falsely and that defendants were subjected to a conspiracy to defraud them by the judgment sought and obtained.

If these affidavits can be sustained, the defendant's remedy is the action to annul the judgment, the result of fraudulent practices. C. P., Art. 607 *et seq.*

When the contract for the purchase of logs by the mill owner stipulates for delivery by the vendor in the defendant's boom; that the mill owner will saw the logs in a reasonable time, and pay for them according to the mill scale, the rights of the "logger" or vendor will be adjusted by the number of logs delivered in the boom; and not by the logs claimed to have been sawed when that sawing is delayed by the mill owner, and the logs are not sawed for months.

Rowe vs. Lumber and Coal Co., p. 1258.

PRESCRIPTION.

An action by heirs for the recovery from the succession of their father the amount of their interest in the succession of their predeceased mother is not a personal action prescriptible by ten years, but one for an entire succession, which is prescriptible by thirty years. *White et al. vs. White, p.* 104.

PRESCRIPTION—*Continued.*

Prescription pleaded against a privilege or mortgage should not be permitted to be urged against the debt which the privilege or mortgage secures. The courts should not extend the plea beyond its terms.

Succession of Haley, p. 840.

See Injunction.

PROFESSIONAL SERVICES.

A physician, a relative of an aged and infirm lady, rendered her professional services extending through several years. He made no charge against her while living, but was told by her she would compensate him. Shortly before her death she gave into his hands five thousand dollars in cash. He says this was a donation to his wife; but it appears to have been received by him and to have passed under his administration and control. Under the circumstances developed by the evidence, *Held:* This was the compensation she referred to and the remuneration he depended on, and he can not recover on a large claim for professional services presented or asserted for the first time after her death.

Estate of Littell, p. 299.

PROHIBITION.

The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which by the suggestion of the relator the court is informed he is about to do. If the thing is already done it is manifest that the writ can not undo it, for that would require the performance of an affirmative act; whereas the only effect of the writ of prohibition is to suspend all action and prevent further proceeding in the prohibited direction.

State ex rel. McLeod & Co. vs. Judge, p. 109.

PROMISSORY NOTES.

When the promissory note to the maker's order is transferred by him to his creditor with the names of parties placed on the back of the note while in the maker's hands, the holder acquiring with full knowledge that the names of such parties were thus

PROMISSORY NOTES—*Continued.*

placed on the note for the accommodation of the maker, they will be regrrded as sureties for the maker, and not as endorsers in the sense of the law merchant. Story on Promissory Notes, Secs. 133, 134, 188; 1 Randolph Negotiable Paper, 829, 831, 832 and 834; 4 Rob.. 161; 10 La. 374; 4 An. 273; 95 U. S. 90, and line of decisions in the Digest; 1 Hennen, p. 172, No. 1.

As sureties of several for the same debt, defendants primarily liable *in solido* are entitled to a division of the debt so as each shall respond for his share or part of the debt, unless they have renounced the benefit of division, and on being sued demand such division. C. C., Arts. 3049, 3050; 4 An. 273; 9 An. 423; 12 An. 630.

Bank vs. Muller et als., *p.* 1278.

PUBLIC USE.

Property once dedicated to public use is *extra commercia* and inalienable by seizure and sale under execution against a municipal corporation, unless it is made affirmatively and clearly to appear that its use had been abandoned or lost by *non-user*.

City vs. Werlein, *p.* 1251.

RECEIVER.

Where an *ex parte* order is granted appointing a receiver, it is not the proper practice for a complaining creditor to appeal directly from such order.

The correct course to pursue is for such creditor to appear in the cause and move that the order be vacated and set aside, or take a rule to set aside and vacate, and if the motion be refused, or the rule denied, to appeal from the decision, and such appeal, if suspensive, would stay further proceedings in the receivership and hold matters in *statu quo* pending the appeal.

Appeal by creditor, whose claim exceeds two thousand dollars, from order appointing receiver and staying proceedings against insolvent corporation. Motion to dismiss appeal on ground that assets of corporation do not equal two thousand dollars in value —*Held:* That the question of jurisdiction is determined by amount of creditor's claim on which the right of action is suspended rather than by the sum of the assets as shown by the schedule.

RECEIVER—*Continued.*

Further motion to dismiss, on ground that the appeal will not lie from order appointing receiver as herein made—*Held:* The appeal does lie, differentiating the case from Brewing Company vs. Judge, 46 An. 100, and Harrod vs. Sewerage Company, 49 An. 1595.

There is no direct authority of law for appoietment of receiver as herein made and for the order staying proceedings against the corporation, and the facts and exigencies of the case do not bring it within the category of cases where, under their inherent powers, such appointments have been made by the courts in aid of their jurisdiction as a conservatory process incidental to a main demand.

In re Moss, Limited, p. 789.

RECORDERS.

The office of Recorder, under the Constitution of 1879, was not a constitutional office. 46 An. 830.

The existing Constitution as to those Recorders now in office is not retrospective.

The statutory office of Recorder, under the Constitution of 1879, as to those previously elected to that office, continue to be a statutory office under the existing Constitution.

The authority of the municipal council to organize a tribunal to try the issues raised continues as it was prior to the existing Constitution.

Ex rel. Recorder vs. Judge, p. 655.

RECONVENTIONAL DEMAND.

The only judgment that can be rendered against the plaintiff absent when the case is called for trial, unless there is a reconventional demand, is one of non-suit. C. P., Arts. 536, 491; 3 An. 660; 4 An. 165; 36 An. 288.

If the reconventional demand is filed after the term begins, and on the day fixed for trial the plaintiff being absent, he should be notified, especially as under the rules of the court when issue is joined after the term begins the adverse party is entitled to notice; the spirit of the rule, at least, and obvious justice requires notice to an absent plaintiff of the issue made on the very day of trial in plaintiff's absence changing the character of the action.

RECONVENTIONAL DEMAND—*Continued.*

No such notice being given, and the cause tried and judgment given against the absent plaintiff on such charged issue, there is the basis to annul the judgment and reinstate the case for trial. C. P. 607; 5 R. 123; 3 An. 646.

City vs. Le Bourgeois, *p.* 591.

RIGHT OF WAY.

A telephone company, through its employees, had been placed in possession of a line of way, and of telephone posts upon the property of another, which it would have had really the legal right to possess under expropriation proceedings properly conducted. It had obtained the same, however, without the consent of the owner or any order of court. A prayer by the owner for the removal of the posts will not be granted when the evidence establishes the fact that the company would be entitled to have the same line re-established as its right of way, and the posts immediately replaced in the same position. The company, however, will be compelled to pay the value of the right of way and damages for the illegal invasion of the owner's right of property.

Fuselier vs. Telephone and Telegraph Company, *p.* 799.

A vendor having, by warranty doubtfully recorded, undertaken to sell an undivided fifth interest in a plantation when his real interest was less, any interest therein which the vendor should thereafter acquire, up to the extent of the interest conveyed, would at once, without any act between the parties, enure to the benefit of the vendee. A declaration in the act of sale as to how he had acquired the thing sold would be merely descriptive, and not limit the extent of the thing sold or the warranty.

A quit-claim deed reaches only to interests actually owned at that time by the party executing it; it is of no effect whatever as to interests already gone.

A husband uniting with his wife in executing a quit-claim deed is estopped from attempting thereafter to acquire by seizure (as a creditor of his wife's succession) rights which she had, with his consent, voluntarily surrendered.

Benton & Milliken vs. Sentell, *p.* 869.

RESPITE.

It is proper practice to test by rule to show cause whether or not the preliminary orders in proceedings for respite were providently issued, and if found not to be so, for the judge to seasonably revoke the same.

An agreement under which one party advances all the capital needed by another to conduct a certain business, and which stipulates that in event he disapproves of the management of the business he may take possession of the same, assuming all liabilities, is not a *nudum pactum*.

Agreements and covenants which parties make between themselves must control in all things not contrary to law and good morals.

Schminke & Newman vs. Creditors, p. 511.

RES ADJUDICATA.

The court in the first suit decided, as to plaintiff's demand, that he (plaintiff) had no cause of action to compel the defendant to sign a contract of lease and rent notes.

This ruling did not conclude the plaintiff from prosecuting suit for any right not necessarily covered by the ruling.

Where the judgment does not decide certain issues, and this is made manifest by the decree itself, the decision will not support the plea of *res adjudicata*.

Laroussini vs. Werlein, p. 637.

A judgment of non-suit does not support a plea of *res adjudicata*.

Johnson vs. City, p. 920.

SALE.

Where the probate court has granted an order for the sale of "all the property of a succession," a commission to sell, directed to the sheriff, which follows the wording of the order, is not null because it fails to give specific descriptions of the properties to be sold under the order in the body of the commission. The sheriff is authorized to have recourse for descriptions to certified extracts from the inventory of the succession on file in the court.

A sale is not attackable because the sheriff, in his *proces verbal* of a particular sale, annexes thereto a certified extract of the inventory containing the description of a particular piece of property

SALE—*Continued.*

and a printed copy of the advertisement under which the sale was made, and after detailing the various steps in the execution of the commission of sale in his hands, refers to the annexed extracts from the inventory and the printed advertisement as being descriptive of the property sold and adjudicated.

Ingram et als. vs. Laroussini, p. 69.

Where the true object of a sale with the right of redemption was to secure an existing indebtedness, the court called upon to interpret and give effect to the agreement, properly held the parties to their intention by decreeing the title asserted not one from which ownership resulted, but as a kind of security for the debt due.

But to effectuate this security the sale was, for this purpose, a ceding away—a transfer, a conveyance—of the fee of the estate by the vendor to the vendee to that extent that, after the appropriate registry thereof, the vendor could neither sell nor mortgage to another the same property, to the prejudice of his vendee. And, if this be so, it follows that neither could rights attach thereon by operation of law, like a legal or judicial mortgage, to his prejudice. *Davis vs. Kendall*, p. 1121.

SALE, SHERIFF'S.

The adjudication carries to the purchaser at the sheriff's sale the immovable and all its appurtenances, including its fruits pending the seizure in the control or possession of the sheriff at the date of the adjudication.

But the adjudication does not pass to the purchaser an action of damages to the land for trespasses committed or for value of trees converted by the trespasser prior to the acquisition of title by the purchaser, and in this connection the analogies of the law in reference to the rights of the execution creditor have pertinence. C. P., Art. 656; 30 An. 524, 984; 32 An. 1045.

The contract by which the owner confers on another the privilege of cutting wood on the owner's land does not permit creditors of the owner from seizing the land—least of all, when the creditor seizes under the equivalent of a mortgage with the "pact *de non alienando*" duly recorded and the seizure terminates the right to cut wood under such contracts. R. S. S. 351, 354; 31 An. 278.

Frank vs. Magee, p. 1066.

SEPARATION FROM BED AND BOARD.

A wife having sued her husband for a separation of bed and board grounded upon abandonment, the husband was summoned according to law to return to the matrimonial domicile, and immediately complied with the order, whereupon the wife left the house and went to reside with her father. The return of the husband was evidently *bona fide*, and not colorable to put an end to the suit. The wife then filed a supplemental petition, averring cruel treatment and want of support by her husband. The court found these allegations to be not well founded, and the real source of complaint to be differences between her parents, who had gone to reside with their daughter and her husband. There was no reason to suppose that the husband through his conduct intended to wound the feelings and sensibilities of his wife. Her first duty was to her husband. Differences between the husband and the wife's parents, in which the wife sides with the latter, furnish no ground for separation.

Lane, Wife, vs. Bursha, Husband, p. 275.

The wife obtained a judgment of separation from bed and board, but did not apply for alimony prior to the judgment.

After judgment of separation from bed and board, proceeding by rule for alimony, being an accessory to the principal demand, is permissible. Pension is due during the marriage. The marriage ties are not dissolved by the decree of separation from bed and board.

State ex rel. Stuart vs. Judge and Burkhardt, p. 559.

SEQUESTRATION.

The writ of sequestration is intended as a protective and preventive, not a compulsory, remedy. Parties using it for coercive purposes to effect payment of claims due them, by threats of injury and annoyance, must be prepared, if they do so, to be in the exact position necessary to enable them to claim the benefit of the legal proposition, that a person is not liable for damages if he merely exercises a legal right, even though his motives may be bad.

Where the question before the court is, whether on the face of the papers the District Court was justified on the pleadings and affidavit in directing a writ of sequestration to issue—the appellate

court will give full weight to the affidavit and take its averments to be true; but, where the question comes up on a motion to dissolve the sequestration on a direct charge that the allegations of the petition and affidavit were false, plaintiff will be required to do more than rest upon the pleadings and affidavit. On the trial of the sequestration as to issues of fact, plaintiff must show and sustain the grounds and facts upon which his alleged fear was made to rest.

Where a person engaged in selling goods, wares and merchandise, to parties in a retail business, sells them on credit, there is an implied consent on his part that the latter should dispose of the goods purchased in the usual and regular course of business. If the price be not paid at maturity, the vendor may withdraw this consent and resort to legal proceedings (if called for) to enforce this withdrawal. Should he resort to writs of sequestration for that purpose he must be careful not to convey to the general public in his pleadings and affidavit (unless warranted by the facts) that he had reason to believe that defendants had concealed or were about to conceal the goods. That allegation carries with it the idea of dishonesty or want of fairness, and is calculated to alarm all parties dealing with the vendees.

Furniture Company vs. Furniture Company, p. 931.

SIDEWALKS—BANQUETTES, RIGHT OF WAY ON.

Pedestrians are entitled to the right of way on the sidewalks of the city, and to the assurance that they may traverse the same in the confidence of safety.

Ordinary care is to be observed by those using the banquette to avoid danger, but not the same alertness is required of them as is the case when they cross streets where vehicles, cars, etc., have equal rights of way.

While it is permitted to load and unload drays, floats and other vehicles over the banquettes, the same must be done with due care and precaution for the safety and protection of passers-by, those engaged in the work remembering always that they are temporarily obstructing a thoroughfare over which the general public afoot has the prior servitude or right of passage.

Mahan vs. Everett and Molasses Co., p. 1162.

SUCCESSION.

A creditor of a succession, or an heir, or the creditor of an heir, who has obtained a judgment against the heir, his debtor, and who has had his interest as an heir seized, may compel an administrator of the succession to file an account showing what funds he has on hand.

While the interest of the heir is under seizure, the creditor, who by rule compels the administrator to account, does not thereby injuriously affect any of the rights of his debtor or of the succession of which the debtor is an heir.

An action to compel an accounting by an administrator of the succession, who has never filed an account, although property has been sold, cash realized, and a number of years have elapsed since the succession was opened, offers no good ground for complaint. *Voinche vs. Brouilette*, p. 370.

The sale by heirs of their right in a succession is free from the action in rescission for lesion; if such a sale is in character aleatory, in that the value of the right sold depends upon the duration or continuance of the usufruct.

Schmidt et als. vs. Herberth, p. 375.

The provisions of our Code and decisions of fixing the domicile of the deceased for the opening of his succession clothe the court of the domicile with the jurisdiction to probate his will, qualify the executors and of other incidents to the opening of the succession, do not confer on that court jurisdiction to determine the validity of an alleged will disposing of immovable property in another State. Civil Code, Arts. 934 *et seq.*; Code of Practice, Arts. 928 *et seq.*; Story Conflict of Laws, Secs. 431, 474; 14 An. 85.

The effect of such a will is for the determination of the courts of the sister State where the immovable property is situated. Story *Ibid.*; 14 An. 85.

Where in a controversy between heirs in our courts it appears that the deceased made an alleged will disposing of lands in another State, and that the alleged will has been transmitted to that State for the requisite judicial proceedings, it is proper for the court here to refuse the decree that the deceased died intestate wholly ineffective to determine the validity of the alleged will affecting lands in the sister State. Story *Ibid.*

Succession of Earhart, p. 524.

SUCCESSION—*Continued.*

A claim long pending against an alleged debtor, not presented nor prosecuted during her lifetime and only sought to be enforced after her death, is looked upon as stale, not regarded with favor, and the evidence in support thereof must be entirely conclusive and satisfactory.

The presumption that property purchased during marriage in the name of the wife pertains to the community may be rebutted by proof of the origin, existence and investment of paraphernal funds administered by her.

The spouse dying rich, possessed of wealth which had been the common enjoyment of the conjugal pair, must leave the other in necessitous circumstances to entitle the latter to the marital portion. Long separation of the husband from the wife, under the facts of this case, precludes his recovery.

Succession of Rogge, p. 1220.

SUCCESSION TAX.

An act of the Legislature which imposes a succession tax upon the amount going to foreign heirs, legatees or donees, is a bill for the purpose of raising revenue, within the contemplation of Art. 130 of the Constitution, which should originate in the House of Representatives.

Succession of Givanovich, p. 625.

SUPREME COURT.

The court again affirms that the amount claimed by plaintiff is the test of jurisdiction of this court of the incidental demands. 11 La. R. 463; 8 La. 167.

Taylor vs. Almanda, p. 351.

The suit brought against a number of creditors claiming liens on the building of plaintiff is not within the jurisdiction of this court, when each creditor claims less than two thousand dollars. Constitution, Art. 81 as amended.

The appellate jurisdiction of this court based on "the fund to be distributed" can be exerted only when the fund deposited subject to the order of the court exceeds two thousand dollars. *Ibid.*

Fredericks vs. Donaldson et al., p. 471.

SUPREME COURT——*Continued.*

The appellate jurisdiction of the Supreme Court in cases in which the constitutionality or legality of the fine, forfeiture or penalty imposed by a municipality was in contestation, is limited to a determination of the constitutionality of the fine, forfeiture or penalty, and to an examination of the particular facts necessary to be considered, in order to reach a conclusion on that subject.

Proceedings directed against parties for violations of city ordinances should be in the name of the city, not that of the State.

State vs. Faber, p. 952.

The rules of the Supreme Court direct to omit (in the absence of special instructions from appellant) copying in the transcript of appeal all ordinary process and return thereon, such as citation and writs.

Statute 104 of 1894, relating to shorthand reporters, their fee and the transcript of testimony, is not repealed by Statute 203 of 1898 relating to clerk's costs.

State ex rel. Barrow, Tutor, vs. Ogden, Clerk, p. 982.

SURETY.

Question presented: Can an individual member of a copartnership become surety on an attachment bond executed by his firm as principal? Is he such a surety as the law contemplates on a bond of that character?

He is not competent as surety.

Bayne & Onorato vs. Cusimano, p. 361.

TAXATION.

The Supreme Court is not vested with appellate jurisdiction (independently of the amount in dispute) in every case in which the constitutionality of an act of the General Assembly is placed at issue. That issue of itself determines its jurisdiction only in cases in which the constitutionality or legality of any tax, toll or impost whatever, or of any fine, forfeiture or penalty imposed by a municipal corporation, should be in contestation.

Act No. 128 of 1896, ordering the city of Monroe to pay to the parish of Ouachita expenses incurred for the arrest, prosecution, trial and conviction of persons accused of crime in certain cases, and those incurred for other specially designated purposes, may,

by way of consequence and result, cause an increase in the amount of taxes imposed by the city on its inhabitants, but the city in its corporate capacity is chargeable with and is charged with no taxes, and the statute does not order the city to impose taxes upon its citizens. The amounts it is directed to pay may well be paid from sources of revenue other than taxation.

The statute is too contingently, remotely and indirectly connected with the subject of taxation to cause the attack upon its constitutionality made by the city vest jurisdiction in the Supreme Court under Art. 81 of the Constitution.

Should illegal taxation result from the law, the individual citizens who will be sought to be charged under the same will themselves test the validity of the law.

Parish of Ouachita vs. City of Monroe, p. 301.

See MUNICIPAL CORPORATIONS—Police Jury.

In an action claiming immunity from taxation under the article of the Constitution exempting property and capital employed in manufacturing industries, it is essential the petition should allege that the factory employs not less five hands. Otherwise the suit is subject to dismissal on exception of no cause of action.

Stave Co. vs. Sheriff, p. 1343.

TAX SALES.

The law of 1874 decreeing the prescription of three years against actions to invalidate tax titles held to be in force and applicable to facts of this case.

Purpose of this statute is to obviate necessity on part of purchasers at tax sales, after lapse of three years, of substantiating validity of the tax titles under which they hold.

Russell vs. Lang, p. 36.

See POSSESSION.

A tax sale based on assessments against the recorded owner holding under titles conveying ownership binds all previous owners by whose acts or acquiescence such titles are placed on the public records, thus becoming guides for the assessors.

One who witnesses an act of sale is precluded from afterward asserting title to the property against the purchaser who accepts the conveyance in part on the faith implied by the witness' signature. Bigelow on Estoppel, p. 451.

TAX SALES—*Continued.*

An act of sale absolute in form, though the real consideration be the indebtedness of the vendor to the purchaser, binds the vendor as effectively as if the price was paid in cash.

Reinach & Oteri vs. Improvement Co., p. 495.

TUTORSHIP.

A parish judge, in writing at the foot of the petition of a mother praying appointment as tutrix of her minor children the words: "Let the prayer of the petitioner be granted and let her be qualified as natural tutrix of the minors," follows the form usually employed by the probate court in granting orders for the appointment of tutors of minors.

Article 321 of the Civil Code, which declares: "In the several cases in which the tutor is not required by law to give bond, it shall be the duty of the clerk of the District Court of the parish in in which the appointment (of tutor) is made, to furnish a certificate of the amount of the minor's property, according to the inventory on file in his office. This certificate must be recorded in the mortgage book of the parish in which the tutor resides and a certificate to that effect, signed by the recorder of mortgages, must be presented to the judge before he can make the appointment or authorize letters of tutorship to be issued," is intended as a protection to the interest of minors, and not an instrumentality by means of which they can enrich themselves at the expense of the creditors of their father, under whom they claim as heirs.

Where the succession of the father has been settled throughout, with the mother of the minor children of the deceased acting as its legal representative in her capacity as natural tutrix, and where, in the course of its administration, property has been sold on the application of such representative, and upon her truthful allegation that the succession was insolvent and that the property was specially mortgaged for an amount many times more than its value, and where such property has been adjudicated to parties holding promissory notes evidencing the entire purchase price of the property sold, who credit the succession with the amount of the bid, such sale will successfully resist an attack made upon it by the children of the deceased claiming under him as his heirs based simply on the ground that their mother was appoin-

TUTORSHIP—*Continued.*

ted tutrix and had received letters as such in violation of Art. 321 of the Civil Code.

Ingram et al. vs. Laroussini, p. 69.

The law requires under penalty of nullity that any agreement made between a tutor and his ward on reaching the age of majority shall have been preceded ten days before the making of the same not only by the delivery by the tutor to his ward of a full account of his gestion, with the vouchers in support of the same, but also by the giving at such prior date by the ward to his tutor of a receipt by which said facts are made to appear. C. C. 361, corresponding to Art. 472, C. N.

A settlement of accounts between tutor and ward made without a compliance with these requirements is subject to be reopened by a direct action of nullity, though the same may have been evidenced by a notarial act and confirmed by order of court.

There is no obligation on the part of the ward as a condition precedent to the institution of such a direct action of nullity for the purpose of reopening of accounts to tender back to the tutor bonds and property admittedly belonging to him which he had received from his tutor at the time of such settlement. Rist vs. Hartner, 44 An. 373; Rist vs. Hartner, 44 An. 480.

The rule which exempts a married woman from the general operation of the doctrine of estoppel is applicable to a minor seeking the protection of a provision of the Code made especially in his interest to guard him from the presumed influence of his tutor over him. Recitals made in a notarial act between tutor and his ward on reaching majority which would cut off the right of the latter to avail himself of a declared nullity can not stand.

Mere acknowledgment made by a ward on reaching his majority that he had received payment in full from his tutor of all moneys due him and all property belonging to him, and releasing the tutor from all responsibility, does not conclude the minor, though made in a notarial act. The ward can disprove the truthfulness of the acknowledgment by parol evidence. 49 An. 1402.

A minor seeking to reopen by suit a settlement of accounts made between himself and his tutor whom he had released under the provisions of Art. 361 of the Civil Code is not called on to allege error and misrepresentation to authorize his action. It is suffi-

cient to open the door to examination into the state of accounts if he alleges the non-existence of the fact whose existence the law has made a necessary condition precedent to the release of the tutor.

Vennard vs. Vennard, Succession of Vennard, p. 808.

Upon an application by a natural mother residing in New York to be appointed tutrix of her minor child living here, it is the duty of the court to look after the good of the child rather than considering the feelings of the mother. Where it is convinced that it is for the interest and good of the latter that the child and its property should not be taken from the jurisdiction of the Louisiana courts and beyond their supervision, the application should not be granted. *Succession of Haley*, p. 840.

A tutor is entitled to ten per cent. commissions on the amount of the revenues of the minor, not upon the amount of the property, or the property and the revenues.

The expenses of the minor for board, clothing, tuition, etc., should not exceed her net revenues, unless under special authority given by a family meeting, that an additional amount should be taken from his capital. C. C. 350. Services rendered to the tutor and to his family by the minor should be taken into consideration in fixing a claim for board against her.

A tutor has the right to bring into his account and charge the minor with amount paid by him as the minor's proportion of the debts and charges of a succession in which the minor was an heir where the property of that succession has been partitioned between the tutor and the minor's co-heirs, and the tutor has received and charged himself with the minor's part of that property (which largely exceeded the amount paid out by the tutor) and the revenues thereof. The fact that the debts of the succession were not paid at the time of the partition is an immaterial circumstance, as in a partition no partition is usually made of the debts, each heir remaining bound for his proportion thereof. C. C. 1371.

Community funds received by the widow after her husband's death, and prior to her appointment as tutrix of her minor child, must be accounted for in her account of tutorship. She is entitled to show that they were paid out for the benefit of the community.

TUTORSHIP—*Continued.*

The court cannot compel the minor, without her consent, to receive in payment of claims due her by her tutrix, and by her step-father as her co-tutor, a store building placed by the latter on her separate property.

A tutor can properly claim credit for premiums of insurance paid on the residence building upon the separate property of the minor.

A tutor is properly charged in favor of the minor for all movables converted by him, with legal interest from date of conversion.

Sims, Wife, vs. Billington, Wife, p. 968.

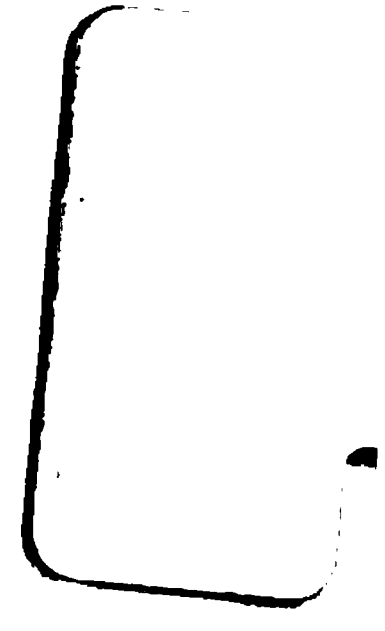
WARRANTY.

Plaintiff, claiming eviction in part, sues on the obligation of warranty in act of sale.

He is entitled, under the facts disclosed, to be reimbursed only the value of the part evicted from, estimated proportionately to the price paid for the whole.

Manufacturing & Creosoting Company vs. Davenport, p. 505.

WITNESS.

If a witness resides in the State of Mississippi, and personal service of a summons can not, after due diligence has been exercised, be made upon him, the depositions taken before the committing magistrate may be introduced in evidence on the part of the State.

State vs. Madison, p. 679.